IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 83,301

RE: ADVISORY OPINION TO THE ATTORNEY GENERAL - SAVE OUR EVERGLADES TRUST FUND

INITIAL BRIEF OF THE FLORIDA SUGAR CANE LEAGUE, INC. ("FSCL") SUGGESTING THAT THE TEXT OF THE AMENDMENT DOES NOT COMPLY WITH FLORIDA CONSTITUTION, ARTICLE XI, SECTION 3, AND THAT THE TITLE AND BALLOT SUMMARY VIOLATE FLORIDA STATUTES SECTION 101.161

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INTERESTS OF THE FLORIDA SUGAR CANE LEAGUE, INC.

The Florida Constitution, art. IV, § 10, specifies a rule of standing in these proceedings. That measure prescribes: "the justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously."

The Florida Sugar Cane League, Inc. ("FSCL" or "the League") is an "interested person" and more than that. As a not-for-profit agricultural interest group, the League represents its members who are taxpayers and citizens of Florida. The FSCL's members include sugar farmers and producers of sugar who are expressly targeted by, and who will be directly, substantially and adversely affected by operation of the proposed amendment that is the subject of these proceedings if it should become law.

SUMMARY OF ARGUMENT

These proceedings have been instituted by the Attorney General to seek an advisory opinion as to the compliance of the text, ballot title and ballot summary of the proposed "Save Our Everglades" (hereinafter referred to as "S.O.E.") amendment with the requirements of Fla. Const., art. XI, § 3, and Fla. Stat. § 101.161(1). The League respectfully submits that the advisory opinion should find that the proposed amendment, its ballot summary and title are "not in compliance" with the applicable constitutional and statutory requirements for numerous and independently sufficient reasons.

The sponsors have written the S.O.E. measure from the point of view of accomplishing their desired political agenda rather than from the point of view of amending the Constitution to modify the legal powers of the various branches and departments of government. As a result, the amendment has the following impermissible defects:

1. S.O.E. violates the single-subject requirement by imposing limits on the powers of the Legislature, the Executive and the Judiciary, and, in addition, would create a new appointed governmental entity (the "Trust") with both legislative and executive powers.

2. The ambiguous language in the S.O.E. and ballot summary proposal embodies multitudinous functions and purposes which prevent comprehension of a "chief purpose" in terms of its legal effect upon the Constitution, as required by Fla. Stat. § 101.161(1).

3. The ballot title fails to provide a popular name that reflects the legal effect of the proposal, using instead a catchy, political slogan, i.e., "Save Our Everglades," as a title, which fails to comply with the informing requirements of Fla. Stat. § 101.161.

4. The proposal violates the implicit requirements of article XI, section 3 of the Florida Constitution, as acknowledged in numerous decisions of this Court, that sponsors of ballot measures may not employ catch phrases and partisan language in ballot language to mislead, deceive or unfairly persuade the voters.

5. An advisory opinion from this Court that the S.O.E. text, ballot title and ballot summary comply with the Constitution and laws, would constitute an unfair and improper official "vouching" for the legal sufficiency of the partisan statements and the accuracy of the partisan "facts" contained within them.

The League thus respectfully submits that this Court's advisory opinion should find that the S.O.E. proposal does not comply with the Constitution and laws governing the initiative process.

I.

ARGUMENT

A. TESTS TO BE APPLIED AND STANDARD OF REVIEW.

1. Single-Subject Requirement of Florida Constitution, art. XI, § 3.

This Court is thoroughly familiar with the extensive development and application of the single-subject requirement imposed by the people of Florida upon proponents of initiative proposals to amend the Florida Constitution pursuant to Fla. Const., art. XI, § 3. In relevant part, that provision states:

> . . . [t]he power to propose the revision or amendment of any portion of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith . . .

Fla. Const., art. XI, § 3.

This Court has explained this provision as follows:

> The single-subject requirement in the proviso language of this section is a rule of restraint. It was placed in the constitution by the people to allow citizens, by initiative petition, to propose and vote on singular changes in the functions of our governmental structure.

Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984) (emphasis added).

This statement of this Court makes plain the operational effect of the single-subject proviso: it constitutes a restraint imposed by all the people of the state, upon those particular citizens in the state who might wish to propose an amendment to the people's Constitution. In short, the article XI, § 3, single-

subject limitation constitutes a restraint imposed upon petitioner citizens by the people themselves as distinguished from a restraint imposed by the Legislature or the Executive. In the context of these proceedings, this Court has the constitutional obligation to assure that the constitutional restraints imposed by the people are faithfully observed. See, e.g., Dade County Classroom Teachers' Ass'n. v. Legislature, 269 So. 2d 684 (Fla. 1986); Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). In this regard, this Court has noted that citizen proposals differ in context from amendments proposed by the Legislature because citizen proposals do not "proceed through legislative debate and public hearing" and do not allow for "change in the content of any [proposal] before its adoption." Fine, at 988.

To the extent that S.O.E. or any other initiative petition embodies statements of fact as a predicate to or the substance of the proposed constitutional amendment, those assertions of fact are not the final product of any legislative, executive or judicial fact finding process affording FSCL, or other interested persons or the people at large, due process of law. Hence, those factual assertions come to this Court as mere opinions of the particular citizen proponents and not as legislative findings such as those that might accompany an amendment proposed by the Legislature pursuant to Fla. Const., art. XI, § 1.

Accordingly, to honor the peoples' method of proposing citizens' initiatives under article XI, § 3, this Court must give any such factual assertions very close scrutiny to assure that

unproven, false, misleading or irrelevant assertions of fact are not impliedly vouched for by the state by printing them in ballot titles and ballot summaries that are presented by the state to the voters in the voting booth, or implying their truth by allowing their inappropriate incorporation into the text of a proposed amendment.

a. Fine v. Firestone described the factors defining the single-subject standard.

Fine v. Firestone, supra, clarified the essential legal tests with which citizens' initiatives must comply to satisfy the article XI, § 3, "single-subject requirement":

First, the primary purpose is to prevent "log-rolling," i.e., "to prohibit the aggregation of dissimilar provisions in one law in order to attract the support of diverse groups to assure its passage," id. at 988, and to "protect against multiple precipitous changes in our constitution." Id.

Second, to satisfy the single-subject requirement the proposed measure must have "a logical and natural oneness of purpose." Id. at 990. This, in turn, requires that the proposed measure "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Id.

Third, "an initiative proposal 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." Id. at 989.

Fourth, the single-subject limitation imposes "a functional as opposed to a locational restraint on the range of authorized amendments." Id. at 990. Thus, an initiative proposal may affect more than one article or section of the Constitution, but it may not apply to more than one function of governmental power; i.e., the measure may not "affect [more than one] separate, distinct functions of the existing governmental structure of Florida." Id. at 990. This point was elaborated by this Court in Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984), in which this Court disapproved a measure that affected both the legislative and judicial branches of government, stating, "where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation the people have incorporated into article XI, section 3, Florida Constitution." Id. at 1354 (emphasis added). The facts and holdings in Fine v. Firestone demonstrate that a measure may violate the functional, oneness-of-purpose test if it affects more than one distinct function of a single branch of government; i.e., the power to tax, the power to impose fees, and the power to issue bonds to borrow money for capital projects, are distinctively different functions of the legislative branch.

Fifth, "how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject

included in an initiative proposal." Fine, 448 So. 2d at 990. This Court is required to scrutinize the impact of an initiative proposal upon the entirety of the Constitution to evaluate whether the functions of more than one branch of government are affected, as in Evans v. Firestone, or whether multiple functions of a single branch are affected, as in Fine v. Firestone. The single-subject limitation imposed by the people themselves is met only when the effects of an initiative proposal are limited to one function of one branch of government.

A careless or uninformed interpretation of the "oneness-of-purpose" and "single function" aspects of the single-subject limitation on constitutional amendments could result in misunderstandings as to what it is that the "single-subject" refers. Such a careless reading of this Court's test would yield two simplistic questions: Is it a single program of legislative character, such as to "save" the Everglades, or is it a single functional change to the meaning of the Constitution itself? Although this Court has never expressly addressed this question in these exact terms, the many cases decided by this Court, including especially those referred to above, make it plain that the "single-subject" refers to the operation of the Constitution itself. In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, ___ (19 Fla.L. Weekly S109, 110 (Fla. March 3, 1994), this Court made plain that, "[r]equiring voters . . . to cast an all or nothing vote on [disparate classifications] listed in [an] amendment defies the purpose of the

single-subject limitation." Hence, requiring a voter to accept unwanted aspects of a multifaceted proposal such as S.O.E. [i.e., pertaining to taxes, trusts, expenditure plans, geographic designations, restrictions on governmental powers] in order to vote favorably for wanted aspects, violates the single-subject requirement.

b. The people have limited their initiative power to amend the Constitution.

As this Court well knows, the Florida Constitution is not a mere accumulation of legislative enactments, nor is it a proper document for achieving mere legislative objectives. Instead, this Court has said,

> . . . the Constitution of Florida is a document of limitation by which the people of the state have restricted the forces of government in the exercise of dominion and power over their property, their rights and their lives.

Smathers v. Smith, 338 So. 2d 825, 827 (Fla. 1976). And, again, "the Constitution is a limitation on power as distinguished from a grant of power, particularly with regard to legislative power." State ex. rel. Collier Land Investment Corp. v. Dickinson, 188 So. 2d 781, 783 (Fla. 1966). Although the people have rightly commemorated that "[a]ll political power is inherent in the people," Fla. Const., art. I, § 1, the people in the same Constitution have vested "the legislative power of the state" in the Florida Legislature, Fla. Const., art. III, § 1; have vested "the supreme executive power" in the Governor, Fla. Const., art. IV, § 1; and have vested "the judicial power" in this Court, the

district courts of appeal, circuit courts and county courts, Fla. Const., art. V, § 1. In sum, the people have deliberately vested all legislative powers, all executive powers and all judicial powers in the three named branches of government--always subject to the limits of the Constitution itself. However, the people have not reserved to themselves, outside of their prescribed branches of government, the power collectively to legislate, to execute or to adjudicate.

What the people have reserved to themselves are the powers expressed in Fla. Const., art. XI, §§ 3, 4. Section 3 involved herein reserved only:

> The power to propose the revision or amendment of any portion or portions of this Constitution by initiative . . . provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith.

Fla. Const., art. XI, § 3 (emphasis added).

In the context of the proper meaning of the Florida Constitution, as expressed by this Court in the three cases quoted above and many others, the single-subject in the provision refers to "portions of this constitution" and not to some legislative program that the proponents of the initiative proposal may have in mind.

This is not to say that the people are not free, so far as the Florida Constitution is concerned, to abandon governance under the republican theory so valued by our founders, and introduce some form of governance outside the prescribed branches of government. Perhaps the people could, if they were to choose to do so, achieve

this by an article XI, § 3, amendment to Fla. Const., art. III, 21 1, e.g., striking the words "the legislative power of the state shall be vested in a legislature . . ." and supplanting them with "the legislative power of the state is vested in the people by plebiscite."\[1] Certainly, the people could achieve this result if they were to choose to do so, by exercising their reserved power of amendment by constitutional convention pursuant to Fla. Const., art. XI, § 4.

Nevertheless, unless and until the whole people exercise their sovereign authority to revise the structure they themselves have adopted for vesting all legislative, executive and judicial power in the named departments of government, then citizens proposing to exercise the rights reserved in article XI, § 3, must limit their propositions so that each one affects the constitutional status of only one function of government.

c. The proponents must demonstrate compliance with the single-subject limitation.

As to the showing necessary to sustain a proposed amendment, this Court apparently has never had an occasion to elaborate the question of burden of proof in regard to a single-subject challenge. Testing whether an initiative proposal violates article XI, § 3, is a question of law requiring plenary scrutiny by this Court in the first instance in these proceedings. To the extent

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[1] The League notes that at least one (1) member of this Court has expressed reservations about this possibility. See In Re Advisory Opinion Restricts Laws Related to Discrimination, ___ So. 2d ___ , 19 Fla. L. Weekly S109, 110-11 (Fla. March 3, 1994) (Kogan, J., concurring).

that the idea of "burden of proof" has relevance to these proceedings, the burden plainly rests upon the proponents. This proceeding is thus distinctly different in legal context from those in Fine v. Firestone, supra, and many other cases referred to herein. In Fine, the Secretary of State had made an administrative determination that the proposed initiative measure therein was valid and had certified it for ballot position. That administrative determination came to this Court with a presumption of correctness. No such administrative determination has been made in this case prior to these proceedings.\[2] At this point, the assertion that S.O.E. does not violate article XI, § 3, is the mere ipse dixit of those citizens who propose it; it is their burden to persuade this Court of the validity of their opinion.

2. Title and Ballot Summary Requirements of Fla. Stat. § 101.161.

a. The statute and rules establish the criteria for ballot title and summary sufficiency.

This proceeding was commenced pursuant to Fla. Const., art. IV, § 10, as implemented by Fla. Stat. § 15.061, under which this Court is requested to render an "advisory opinion regarding the text of the proposed amendment or revision with article XI, § 3, of

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[2] The letter of the Attorney General transmitting the S.O.E. proposal to this Court for an advisory opinion, insofar as it concludes from the face of the proposal its compliance with the constitutional and statutory requirements, also carries no presumption of correctness. This Court, unlike the Attorney General, is required to look "beyond the surface" of the proposal in determining whether it "touches on more than one subject." See In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109, 110 (Fla. March 3, 1994).

the State Constitution and compliance of the proposed ballot title and substance with s. 101.161." Fla. Stat. § 16.061(1) (emphasis added). Section 101.161 states in relevant part:

> 101.161. Referenda; ballots
>
> (1) Whenever 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 after the list of candidates, ... 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.
>
> (2) The substance and ballot title of a constitutional amendment proposed by initiative shall be prepared by the sponsor and approved by the Secretary of State in accordance with rules adopted pursuant to s. 120.54. . . . The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on.

Fla. Stat. § 101.161 (emphasis added).

The Secretary of State has implemented Fla. Stat. § 101.161 by adopting the following rule:

> Rule 1S-2.009 Initiative Constitutional Amendment Petition.
>
> (1) Any proposed amendment to the state constitution to be placed on the ballot by initiative shall be submitted to the Division of Elections for approval as to format prior to the proposed amendment being circulated for signatures. Such submission shall be in writing and shall include a copy or a facsimile of the form proposed to be circulated. The Division shall review as to the sufficiency of the format only and render

> a decision within seven (7) days following receipt. No review of the legal sufficiency of the text of the proposed amendment is to be undertaken by the Division.
>
> (2) Proposed initiative amendments shall be circulated for signatures only if the format of the petitions is deemed sufficient by the Division. . . .
>
> (3) The petition form shall conspicuously contain the full text of the amendment being proposed, preceded by a title and substance. . . .

R. 1S-2.009, Fla. Admin. Code Ann. (emphasis added).

The provisions of Fla. Stat. § 101.161 and Rule 1S-2.009 are tinctured with several important legal consequences as they pertain to these proceedings.

First, the Secretary of State will furnish the ballot title and the substance of each amendment approved by this process to the Supervisor of Elections of the counties for printing on the ballots. Fla. Stat. § 101.161(2). Hence, if this Court gives advisory approval of the ballot title and summary, and the matter is finally certified for the ballot, then the state itself will become directly involved in communicating the ballot title and summary to the electorate in the crucial voting stage of the amending election process.

Second, the ballot title and summary are proposed by the "sponsor" and not by any agency of the state. This means that no state authority nor the general public have had any legal entitlement to participate in the formulation of these measures as they reach this Court in these proceedings.

Third, in ruling upon the sufficiency of any initiative

pursuant to Rule 1S-2.009, the Secretary of State approves format only and is legally forbidden to review the "legal sufficiency of the text of the proposed amendment." Rule 1S-2.009, Fla. Admin. Code Ann.

The upshot of these points is that like the "single-subject" limitation on the text of the amendment, the legal sufficiency of the ballot title and summary come to this Court as a matter of first instance, and do not come with any presumptions of correctness that might pertain had a lower court, an administrative agency or the Legislature made initial determinations of sufficiency. At this stage of these proceedings, the proponents' assertion of legal sufficiency is merely their opinion and nothing more, and carries no more nor less weight in this Court's consideration of their legal sufficiency.

Fla. Stat. § 101.161(1) prescribes several legal requirements with which ballot titles and summaries must comply as a condition of being approved for ballot position:

(1) The "substance" of the measure must be expressed;

(2) The language must be "clear" and "unambiguous";

(3) The expression must be an "explanatory statement";

(4) The explanatory statement must explain the "chief purpose";

(5) The ballot summary shall not exceed 75 words;

(6) The ballot title may not exceed 15 words; and

(7) The ballot title must be captioned for identification of the measure.

b. This Court has established principles for application of the statutory criteria.

This Court has decided numerous cases elaborating upon these statutory criteria. Two of the earlier cases laid down general principles pertaining to ballot language that permeate the substance of Fla. Stat. § 101.161 and all subsequent cases. In Webster v. Powell, 18 So. 441 (Fla. 1895), this Court was construing the constitutional predecessor of current Fla. Const., art. III, § 6, requiring that each law have a title briefly explaining the subject. Webster canvassed the authorities and identified several public purposes to be served by the title requirement. These included preventing "surprise and fraud upon the Legislature," avoiding careless and unintentional adoption of measures, and avoiding the misleading of the members "as to the true purpose of the act." Id. at 18 So. 442, 444. These same purposes are inherent in the requirements of Fla. Stat. § 101.161.

In Hill v. Milander, 72 So. 2d 796 (Fla. 1954), this Court applied those principles to an initiative election pertaining to a city charter. There, this Court asserted "the only requirements are that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote." Id. 72 So. 2d at 798 (emphasis added).

Several later decisions have applied Fla. Stat. § 101.161 in article XI, § 3, initiative proceedings. Askew v. Firestone, 421 So. 2d 151 (Fla. 1982) expressly adhered to the foregoing standards and further particularized them as follows:

1. "The ballot must be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." 421 So. 2d at 154.

2. The measure "must stand on its own merits and not be disguised as something else." 421 So. 2d at 156.

3. "A proposed amendment cannot fly under false colors." 421 So. 2d at 156 (emphasis added).

4. "The burden of informing the public should not fall only on the press and opponents of the measure - the ballot title and summary must do this." Id. (emphasis added).

5. "Fair notice" requires "clear and unambiguous explanation of the measure's chief purpose." Id.

In Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984), this Court particularized these additional facts of what is a "fair" ballot under Fla. Stat. § 101.161:

6. " . . . the ballot summary is no place for subjective evaluation of special impact." 457 So. 2d at 1355 (emphasis added).

7. "The ballot summary should tell the voter the legal effect of the amendment, and no more." Id. (emphasis added)

8. "The political motivation behind a given change must be propounded outside the voting booth." Id. (emphasis added)

Smith v. American Airlines, 606 So. 2d 618 (Fla. 1992), further particularized:

9. Voters may not be required to "infer a meaning which is not evident on the face of the summary itself." 606 So. 2d at 620.

10. A ballot summary that is "ambiguous about its chief purpose cannot be included on the general election ballot." 606 So. 2d at 621.

This Court's most recent initiative opinion, In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109 (Fla. March 3, 1994), summed up this jurisprudence with the statements: "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;" and "the ballot title and summary are expected to be 'accurate and informative.'" Id. at 110.

c. Careful application of these principles is particularly important at this advisory opinion stage because of the potential for lending unfair official sanction to the wording of the title and summary.

In applying these standards, this Court should be mindful that each of the decisions cited above, except the last, was decided in the context of an action to remove initiatives from the ballot after ballot position had been certified by the Secretary of State. In those cases (excluding the last), the proponents had already obtained the whole number of verified signatures required for ballot position; hence, the Court's ruling could not have had any effect by way of "vouching for" the partisan coloring of the ballot title and summary in the campaign to obtain signatures (although it could have that effect in the election campaign on the approved proposal). Despite that, in Askew, Evans and American Airlines, this Court removed the measures from the ballot after initial ballot position certification because the titles or summaries were defective under the foregoing tests.

This Court knows that Fla. Const., art. IV, § 10, and art. V, § 3(b)(1), were added to the Constitution primarily to provide sponsors of initiatives a means of pretesting their proposals with advisory opinions at an early stage in the drive to obtain verified signatures on petitions. As a validating condition precedent, Fla.

Stat. § 15.21(3) requires the sponsors to obtain only ten percent (10%) of the number of verified signatures ultimately required for ballot position as a trigger to these proceedings. If this Court gives an approving advisory opinion, the proponents may thereafter refer to this Court's opinion as effectively "vouching for" the legal effect and validity of the statements made in the ballot title and summary when soliciting the remaining ninety percent (90%) of the verified signatures. This being so, the Court should apply an elevated level of scrutiny to the measures even as compared to the scrutiny given in Askew, Evans and American Airlines. To the extent any burden of proof is assigned, the burden should plainly be placed upon proponents who have elected to include wording throughout this proposal that is hortatory and argumentative rather than descriptive or informative about the legal effect of the measure (i.e., "the sugarcane industry . . . polluted the Everglades") in order to garner support for the proposal.

d. Application of the "no partisan coloring" standard insures fair notice to the electorate.

One of the earliest decisions addressing the "no partisan coloring standard" was In Re Opinion of the Justices, 171 N.E. 294 (Mass. 1930), involving the adequacy of a ballot "description," i.e., title. The Massachusetts court laid down these standards:

> It must be free from any misleading tendency, whether of amplification, of omission or of fallacy. It must contain no partisan coloring.

171 N.E. at 297 (emphasis added).

The "no partisan" coloring standard has been followed by numerous courts. An Arkansas decision involved a measure including in the title the words "An Act to provide for the assistance of aged and/or blind persons and funds therefor . . ." but omitting to state the fact that a primary effect was to impose a tax. Invalidating this measure, the Arkansas court stated:

> The title carries an appeal to all humane instincts. Few would object to some provision being made for the support of the aged and blind; but to levy a general sales tax of 2 percent, for that, or any other purpose is a different question altogether and would furnish the elector, however generous his impulses might be, serious ground for reflection if that information were imparted to him by the title of the question upon which he exercised his right of suffrage.

Walton v. McDonald, 97 S.W.2d 81, 82 (Ark. 1936). The court affirmed that the legal doctrine "must contain no partisan coloring." 97 S.W.2d at 83.

Numerous other Arkansas decisions have endorsed the "no partisan coloring" standard, see, e.g., Plugge v. McCuen, 841 S.W.2d 139, 140 (Ark. 1992), as have decisions in Arizona, Kromke v. Miller, 811 P.2d 12, 20 (Ariz. 1991) (condemning "inflammatory language calculated to incite partisan rage"), North Dakota, Municipal Services Corporation v. Kusles, 490 N.W.2d 700, 702 (N.D. 1992) and Alaska, Burgess v. Alaska Lieutenant Governor Terry Miller, 654 P.2d 273, 275 (Alaska 1982).

This standard is equally inherent in this Court's pronouncements as to what constitutes a "fair" ballot provision that:

6. ". . . the ballot summary is no place for subjective evaluation of special impact."

7. "The ballot summary should tell the voter the legal effect of the amendment and nothing more."

8. And, "the political motivation behind a given change must be propounded outside the voting booth."

Evans, 457 So. 2d at 1355.

This case provides this Court the opportunity to particularize the standard succinctly: ballot titles and ballot summaries may not be used as platforms to promote a partisan point of view on the merits of the measure, or, stated more traditionally, the ballot title and summary must be free of "partisan coloring." This is wholly consistent with the Court's recent opinion in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109 (Fla. March 3, 1994), in which the court condemned the omission of "material information from the summary and text of a proposed amendment because to do so "is misleading and precludes voters from being able to cast their ballots intelligently." Id. at 110. A fortiori, loading titles, summaries and texts with unproven "facts" and partisan slogans is misleading and cries out for this Court's straightforward rejection.

II.

THE PROPOSED SAVE OUR EVERGLADES AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT AND THE FILING REQUIREMENT OF FLORIDA CONSTITUTION, ARTICLE XI, SECTION 3(C)

The "full text of proposed amendment" as designated by the proponents themselves to be addressed by this Court is composed of two sections. Section (a) is in the nature of a preamble, and Section (b) contains specific amendatory language. A copy of the text of the proposed amendment as it appears on the petition form is attached hereto as **Appendix A.**

A. THE S.O.E. PREAMBLE VIOLATES THE FILING REQUIREMENT OF FLA. CONST., ART. XI, § 3.

Pursuant to Fla. Stat. § 16.061, Fla. Const., art. IV, § 10, and art. V, § 3(b)(1), the justices of this Court are requested in this proceeding to give "an advisory opinion regarding the compliance with the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution." Fla. Stat. § 16.061. In addition to the single-subject limitation elaborated in preceding portions of this brief, article XI, § 3, contains the following filing requirements with which the petitioners of initiative proposals must comply:

> It [i.e., the power to amend by initiative] may be invoked by filing with the Secretary of State a petition containing a copy of the proposed revision or amendment, signed by a number of electors . . .

Fla. Const., art. XI, § 3. This proceeding was instituted only after proponents of S.O.E. had obtained verified signatures on petition forms containing the "Full Text of Proposed Amendment," in

the numbers prescribed by Fla. Stat. § 15.21. Both preamble and amendatory language comprise the "full text," and this text is now before this Court to be scrutinized for conformity with Fla. Const., art. XI, § 3. As discussed above, the people have limited the matter that may be filed with the Secretary of State to "a copy of the proposed revision or amendment." Fla. Const., art. XI, § 3. Here, the proponents improperly seek inclusion on the ballot and in the Constitution both a preamble and a specific amendment to article X. For this reason alone, the Court's advisory opinion should be that the measure does not comply with article XI, § 3.

Furthermore, to permit the amendment and the ballot title incorporating the facts it asserts to survive this advisory opinion test under Fla. Stat. § 16.061 would violate the League's rights guaranteed by Fla. Const., art. I, §§ 4 and 9, and the First and Fourteenth Amendments to the United States Constitution. The preamble portion makes various highly partisan factual assertions that are neither legislative findings of the Florida Legislature, nor adjudicated facts in any court of law, nor the final and binding factual determinations of any administrative agency affording FSCL due process of law. Whether these facts are ultimately true or false is not placed in issue in this proceeding--they are simply placed before this Court as political assertions of the proponents.\[3] These "facts" include: what the "people of

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[3] This Court may take judicial notice that existing state law, specifically the Marjory Stoneman Douglas Everglades Protection Act of 1991, Fla. Stat. § 373.4592, already provides a neutral procedure for determination of the existence and cause of any pollution damage in the Everglades, and fair funding mechanism

Florida" believe; that the Everglades is "damaged" by "pollution" and in need of "restoration;" that the "sugarcane industry" polluted the Everglades; that the sugarcane industry "profited" by "damaging the Everglades" and "altering water supply;" and that the sugarcane industry should pay to "clean up the pollution" and restore "clean water" to the Everglades. These partisan assertions plainly violate the standards of In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109 (Fla. March 3,1994), that the ballot be free of "misleading" tendencies and ambiguities. Any such partisan statements, until established as a legal fact in a proceeding affording due process, must be considered misleading and an impediment to voters being able "to cast their votes intelligently."

Up until this point, the proponents of S.O.E. have been exercising their political rights without invoking the imprimatur of the state. Neither the state nor FSCL could have lawfully impeded that effort, no matter how false the political rhetoric. This limitation dramatically changes in context with the advent of these proceedings, which require this Court to render an advisory opinion that the content of the proposed amendment complies with or

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for any Everglades restoration duly established to be necessary. See **Appendix B.** That process is already underway in the presently ongoing adjudicatory proceedings in Florida Sugar Cane League, Inc., et al. v. South Florida Water Management District, DOAH Case No. 92-3039, as consolidated with Case Nos. 92-3038 and 92-3040, to establish the very facts the proponents of S.O.E. seek to establish by plebescite and incorporate into the Constitution.

fails to comply with the Florida Constitution and laws.

Should the Court render an opinion essentially "vouching for" the amendment and its factual claim, the FSCL, its members, as well as others, who deny that these so-called "facts" are true facts and are parties to a present proceeding to determine the true facts, will be in the position of defending against a set of highly colored partisan assertions that would now carry the imprimatur of the state itself, including most importantly the imprimatur of this Court's advisory opinion. This would plainly violate the members of FSCL and others of their rights of political expression and freedom under Fla. Const., art. I, §§ 4 and 9, and the First and Fourteenth Amendments to the United States Constitution as acknowledged by this Court's opinion in State v. Republican Party of Florida, 604 So. 2d 477 (Fla. 1992), and cases cited therein.

The League is aware of this Court's decision in Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986), in which the Court declined "to embroil this Court in the accuracy or inaccuracy of political advertisements clearly identified as such," but this case differs in two decisive ways from Carroll. First, Carroll was decided before this advisory opinion process was added to the Constitution and laws of Florida, and involved a petition for Writ of Mandamus seeking to order the Secretary of State to remove from the ballot a proposal that had already been certified for ballot position. Consequently, the Court's decision in Carroll could not have been used by proponents to assist them in their political campaign to obtain the signatures needed to obtain ballot position,

as the proponents of S.O.E. would be able to do.

Second, the political language complained about in Carroll was political advertising, not a part of the full text of the proposed amendment itself, and was not incorporated into the printed state approved ballot title or summary. By contrast, the partisan language disputed herein, if approved, will become a part of the official ballots of the state, printed and distributed at the expense of the state and, ultimately, of the people, and will take on a presumption of correctness in the minds of the electorate which will be virtually insurmountable, all without ever being tested in a neutral adjudicatory proceeding. Carroll was radically different from the facts of this case and did not involve the certain political connection between an advisory opinion at this stage of the process and the political campaigning that is sure to ensue.

B. THE S.O.E. AMENDMENT ADDS SUBSTANTIVE TEXT TO THE CONSTITUTION THAT VIOLATES THE SINGLE-SUBJECT LIMITATION OF FLA. CONST., ART. XI, § 3.

As elaborated in part I.A., supra, the purposes of the single-subject limitation are to restrict the Fla. Const., art. XI, § 3, initiative process to proposals that have a sufficient "oneness of purpose" to assure that the electorate is not subjected to "log-rolling," i.e., being required to accept some constitutional amendment they oppose as the price of voting for another amendment they favor, and also to avoid against "multiple, precipitous changes in our constitution." As demonstrated below, like the preamble language, the text to be added to article X of the

constitution by S.O.E. also blatantly violates this Court's single-subject test in several different and independently sufficient respects.

1. S.O.E. violates the single-subject limitations that an initiative amendment may not affect more than one distinct function of the existing governmental structure.

As noted in Part I.A., supra, an initiative amendment may not "affect separate, distinct functions of the existing governmental structures of Florida." Fine, 448 So. 2d at 990. More specifically, "where such an initiative performs the functions of different branches of government, it clearly fails the functional test." Evans v. Firestone, 457 So. 2d at 1353. As demonstrated below, S.O.E. overtly violates both expressions of the single-subject test. The following is an analysis of the specific amendatory language in the proposed S.O.E. amendment at Section (b) of the proposed amendment. See **Appendix A.** References to subsections are to the structure of the S.O.E. proposal itself.

Subsection 16(a)

Subsection (a) establishes a Save Our Everglades Trust Fund. The act of establishing a Trust Fund is legislative in character and the constitutional effect of this measure, if adopted, would be to deprive the Legislature of the legislative power to abolish the fund. An oft-repeated principle of Florida constitutional law is, perhaps, best expressed by this Court's statements in Weinberger v. Board of Public Instruction, 112 So. 253, 256 (Fla. 1927):

> The principle is well-established that where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its

> being done in a substantially different manner. Even though the Constitution does not in turn prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it.

Hence, if S.O.E. were to be adopted, the Legislature would lose control of the power to amend or abolish the S.O.E. tax or to appropriate the revenues for other state purposes.

Subsection (a) also prescribed that the monies in the Trust Fund are to be expended to "recreate the historical, sociological functions of the Everglades Ecosystem by restoring water quality," and other related matters. This designation is plainly legislative in character and imposes a separate set of limitations on the article III powers of the Legislature different from those referred to in the preceded paragraph.

Section 16(b)

Subsection (b) specifies that the Trust shall be administered by five Trustees appointed by the Governor subject to confirmation by the Senate. This provision directly affects existing Fla. Const., art. IV, § 6, in that it creates a new governmental entity to execute the laws and amends pro tanto the Legislature's power to prescribe the structure of the executive branch within the confines of Fla. Const., art. IV, § 6. The measure also affects the powers of the Governor by adding new constitutional duties in addition to those in Fla. Const., art. IV, § 1. Hence, this measure affects article IV in at least three respects and indirectly limits the Legislature's article III power to prescribe the structure of the

executive departments of government pursuant to existing Fla. Const., art. IV, § 6.

Subsection (b) prescribes eligibility requirements for members of the Trustees and provides that the Trustees may "adopt their own operating rules and regulations." Prescribing eligibility criteria and delegating rule-making authority are legislative in character. Hence, these provisions affect the Legislature's article III powers.

Subsection (b) also deprives the Legislature of the power of legislate how the Trust monies are used to carry out the program of Subsection (a), 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." Although S.O.E. makes the Trustees subject to "generally-applicable law," that term has no orthodox legal constitutional meaning (i.e., because every word in the Constitution must have meaning, the term means something different from "general law" as used elsewhere in the Constitution), but plainly prevents the Legislature from regulating the Trustees or their powers by special law. Thus, the provision implicitly adds a new category to the subjects that the Legislature cannot regulate by special law to those now found in article III, § 11, of the current constitution. In short, the S.O.E. measure transfers a large measure of the Legislature's article III powers to the Trustees, and pro tanto amends Fla. Const., art. III, § 1, by transferring legislative powers to a non-elected body.

Subsection 16(c)

Subsection (c) affects the Governor's supreme executive powers under Fla. Const., art. IV, § 1, by positing the powers in the Trustees to administer the program they themselves devise. Hence, the measure affects article IV in this manner just as it also affects article III. Consequently, just as the proposal in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. 1. Weekly S109, 110 (Fa. March 3, 1994) invalidly encroached on multiple legislative powers, home rule powers and the rulemaking authority of executive agencies and the judiciary," the S.O.E. provisions collectively constitute multiple subjects which must likewise be rejected.

Subsection (c) also imposes a tax (referred to as a "fee") of one-cent ($.01) per pound of raw sugar from "sugarcane grown in the Everglades Ecosystem." The subject of taxation is a subject of itself. Furthermore, this measure affects the Legislature's article III powers to tax and also affects article VII, § 1, that imposes the restriction that "no tax shall be levied except in pursuant of law." Heretofore, article VII, § 1, has limited the power to authorize taxes to acts of the Legislature. Florida Department of Education v. Glasser, 622 So. 2d 644 (Fla. 1993).

Subsection (c) imposes the tax upon sugarcane grown only in the "Everglades Ecosystem." Thus, sugarcane growers who produce sugar in other parts of the state and non-Florida growers who sell their products in this state are not burdened by the tax. Such a legislative enactment under the existing Constitution would violate

the equal protection provision of Fla. Const., art. I, § 2, i.e., "all natural persons are equal before the law . . . " Hence, S.O.E. amends pro tanto Fla. Const., art. I, § 2, in the same manner that the proposal considered in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109, 100 (Fla. March 3, 1994) would have amended "article I, section 6, of the Constitution, dealing with the rights of employees to bargain collectively."

Subsection (c) also requires the Legislature to appropriate all the revenues of the tax to the Trust referred to above. This affects the Legislature's article III powers to appropriate the revenue of the state for any lawful expenditure.

Subsection (c) also requires that the amount of the tax to be routinely adjusted to reflect designated changes in national economic indexes. Changes in tax rates are legislative in character. Hence, subsection (c) affects this additional article III legislative power. In sum, subsection (c) affects both article III legislative powers, and article IV executive powers in multiple ways.

Subsection 16(d)

Subsection (d) defines the boundaries of the Everglades Ecosystem as "Lake Okeechobee, the historical Everglades watershed west, south and east of Lake Okeechobee, Florida Bay and the Florida Keys Coral Reef," providing this definition is an act of legislative character. Hence, the measure affects the Legislature's article III powers to make this basic definition.

Subsection (d) also states, "the Trustees may refine this definition." This, too, is an act of legislative character affecting article III legislative powers. But, more than that, it purports to be a delegation to the Trustees of the power to make the final determination of the boundaries of its own powers, thus depriving this Court of its historical judicial function of construing the Constitution and ruling on the validity of its application by other departments of government. Hence, subsection (d) not only affects the Legislature's article III powers in more than one way, but it also affects and abridges this Court's article V powers.

Subsection 16(e)

Subsection (e) begins, "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." This measure again affects article V powers by depriving this Court of the historical judicial function of interpreting the Constitution, including the function of determining what it means, what governmental powers are affected by it, and whether or not a particular provision is self-executing.

Moreover, subsection (e) affects both article III and article IV powers in the statement "by law or otherwise." The Legislature may act only by making law. The effect of this measure, then, is to prescribe to a special entity of the executive branch (and perhaps the judicial branch) the power to establish "other measures" to protect the Everglades. Hence, the measure affects

the powers and functioning of all three branches of government.

Subsection (e) also states, "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." Given the detailed complexity of S.O.E., as demonstrated in the foregoing paragraphs, this is not a simple savings clause as found in several of the initiative statements previously considered by this Court. No signor of a petition or voter could predict which portions might be held unconstitutional, and no two signors might make the same predictions, whatever they were. As a result, this measure affects the powers of the people to revise or amend the Constitution pursuant to article XI, § 3, by transferring to this Court the obligation to shape the final substance of the amendment by curing the defects. Hence, subsection (e) affects the article XI, § 3, reserved powers of the people and the article V judicial powers of this Court.

The foregoing analysis demonstrates that S.O.E. affects importantly the functions and powers of the Legislature, the Executive, the Judiciary and the people themselves. Thus, the measure clearly violates the single-subject limitations under the test of Evans v. Firestone.

S.O.E. affects several distinctly different powers of the Legislature: the power to tax; the power to regulate through legislation; the power to legislate by special laws; the power to control the powers delegated to administrative bodies; the power to

prescribe the method of designating administrative heads of executive bodies; the power to determine the boundaries of any area subject to particular legislative regulation; the power to adjust boundaries; and perhaps others. Consequently, S.O.E. also violates the single-subject test of Fine v. Firestone.

In a similar manner, S.O.E. affects more than one distinctively different function of the executive branch of government and more than one distinctly different function of the judicial branch. These, too, violate the single-subject limitation.

2. S.O.E. violates the single-subject limitation that an initiative proposal should identify the articles or sections of the Constitution substantially affected.

In Fine v. Firestone, this Court states that "an initiative proposal should identify the articles or sections of the constitution substantially affected," so that "the public [will] be able to comprehend the contemplated changes in the constitution." 448 So. 2d at 989. So construed, the single-subject limitation expresses a common sense restriction that the people have impressed upon those citizens who undertake to persuade all the people to change their basic governing document. That common sense restriction is, in effect, that proponents must present the measure to the people in a manner that reveals the changes to be made in the Constitution without the need for elaborate explanation and certainly without the need for augmentation or judicial construction.

Although this Court might choose to excuse inconsequential

deviations from this requirement, the deviations in the case of S.O.E. are massive and far from inconsequential. The measure is offered disingenuously as an addition to article X, the "miscellaneous" article, without identifying its effect on any other article or section. The measure substantially affects the Legislature's article III powers; the executive's article IV powers; and this Court's article V powers, articles VII and XI, and potentially article I. None of this is open and obvious to the lay reader of S.O.E. and the measure itself fails to draw attention to the extent and importance of these changes. Accordingly, S.O.E. violates the single-subject requirement that substantially affected articles be identified within the measure by reference to the articles and sections affected.

3. S.O.E. violates the single-subject limitations that this Court not be left with the responsibility to determine what articles and sections of the Constitution are substantially affected by the initiative measure.

A second limb of the test elaborated above is that the initiative must be complete, clear and unambiguous in its effects "to avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what articles or sections are substantially affected by the proposal." Fine v. Firestone, 448 So. 2d at 989. This Court has no power to amend or change the Constitution. See, e.g., Thomas v. State, 58 So. 2d 173, 174 (Fla. 1952) ("We can only construe the Constitution as it is and not as we might like it to be."); Perez v. State, 620 So. 2d 1256, 1266 (Fla. 1993) (Shaw, J., dissenting) (quoting Justice Overton's statement below); Bernie v. State, 524 So. 2d 988, 994 (Fla. 1988)

(Overton, J., concurring) ("[n]either our legislature, by statute, nor our courts, through decisions, can amend the Florida Constitution."); Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board, 183 So. 759, 766 (Fla. 1938) (Brown, Jr., dissenting) ("[t]his court has no power (nor do any of its members intend) to amend the Constitution by judicial decree."). That power is reposed only with the people themselves, and may be initiated only through the methods prescribed in Fla. Const., art. XI.

To permit an initiative to transfer to this Court (or to some other agency such as the Trustees proposed to be created by S.O.E.) the power to determine the substantive effect of an initiative on the unnamed portions of the Constitution would be to create a new method of amending the Constitution. Such an effect would itself constitute an amendment to the methods of amending the Constitution prescribed by the people in Fla. Const., art. XI.

S.O.E. plainly leaves multitudinous questions of constitutional construction and effect upon other portions of the constitution to be determined either by this Court or by the Trustees. Consequently, S.O.E. fails the test of not leaving to some other agency the job of the people of determining the substance of the Constitution.

III.

THE BALLOT TITLE OF THE PROPOSED SAVE OUR EVERGLADES AMENDMENT VIOLATES THE STANDARDS PRESCRIBED BY SECTION 101.161, FLORIDA STATUTES

The proposed "Save Our Everglades" amendment carries the

ballot title: SAVE OUR EVERGLADES. As the foregoing sections demonstrate, this title was selected solely by the sponsors of the measure and has not been approved in substance by any agency of government.

Under Fla. Stat. § 16.061, this Court in these proceedings is required to give an advisory opinion on "the compliance of the proposed ballot title and substance with Section 101.161." Fla. Stat. § 16.061. In turn, Fla. Stat. § 101.161 requires the substance of the measure to be printed in a "clear" and "unambiguous . . . explanatory statement," and prescribes that "the ballot title shall consist of a caption . . . by which the measure is commonly referred to or spoken of." Fla. Stat. § 101.161(1).

The key question raised by the SAVE OUR EVERGLADES title is whether Florida law permits sponsors of initiatives to employ the ballot title as a campaign tactic or selling device for the proposed amendment. This is apparently the first time this question has been raised in connection with these advisory opinion proceedings, or indeed with any reported Florida appellate decision. All the previous initiatives considered by this Court since article IV, § 10, was added to the Constitution have invoked ballot titles that were descriptive of the legal effect of the amendment and that were not misleading or colored for partisan effect. These were:

> "Limited Political Terms in Certain Elective Offices," Advisory Opinion to the Attorney General, 592 So. 2d 225 (Fla. 1991).

"Homestead Valuation Limitation," Advisory Opinion to the Attorney General, 581 So. 2d 586 (Fla. 1991).

"English is the Official Language of Florida," In Re Advisory Opinion to the Attorney General, 520 So. 2d 11 (Fla. 1988).

"Limitation on Non-Economic Damages in Civil Actions," In Re Advisory Opinion to the Attorney General, 520 So. 2d 284 (Fla. 1988).

"Limited Marine Net Fishing," Advisory Opinion to the Attorney General, 620 So. 2d 997 (Fla. 1993).

"Laws Related to Discrimination are Restricted to Certain Classifications," Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109 (Fla. March 3, 1994).

All of these titles were descriptive of effect, were non-argumentative and non-partisan. Accordingly, none was challenged on the ground of overt partisanship.

Although Fla. Const., art. XI, § 3, makes no express mention of ballot title, the Legislature pursuant to Fla. Const., art. VI, § 5, has enacted Fla. Stat. § 16.061(1), quoted above, requiring a ballot title "by which the measure is commonly referred to or spoken of." To be consistent with the entire scheme of constitutional amendment, the meaning of the term "the measure" must be construed to refer to the legal effect of the amendment upon the Constitution and not to the political slogan of the sponsors. This is wholly consistent with the constitutional restrictions placed upon titles to legislative enactments by Fla. Const., art. III, § 6. That measure, like its predecessor in article III, § 6, 1886 Const., mandates that the "subject" of each

law be "briefly expressed in the title."

Without there being any expressly stated mention of "misleading" titles in the various Florida constitutions, this Court has repeatedly construed title provisions to require that:

> . . . titles to bills must not be misleading or tend to avert inquiry as to the provisions of the Act. The title taken as a whole must not be so worded as to mislead an ordinary mind as to the real purpose and cope of the enactment.

Christensen v. Commercial Fishermen's Ass'n., 187 So. 699, 701 (Fla. 1939). In State v. Knott, 154 So. 143, 146 (Fla. 1934), this Court elaborated the purpose of the non-misleading title, as follows:

> The main purpose of requiring the subject of an act to be briefly expressed in its title is not so much to inform members of the Legislature of its contents (since they are supposed to apprise themselves not only of the subject as expressed in the title but as to the contents of the body of the act as well), but to apprise the citizens of the state of what their representatives in the Legislature are about to enact as a part of the law of the land, so that the people may exercise their constitutional right of petition and remonstrance to their representatives if they object to what it is proposed, or to the Governor if what is proposed is passed over their protest to the Legislature.

154 So. at 146 (emphasis added).

If for the reasons stated by this Court in the foregoing authorities, the Constitution impliedly condemns deceptive and misleading titles to bills enacted by the Legislature, a fortiori, the Constitution impliedly condemns deceptive and misleading ballot titles to initiatives that would amend the Constitution. The idea

of deception of the electorate is repugnant in both processes, but the repugnance is more severe in the instance of deceptive ballot titles. Whereas the electorate at least has the remedy of removing deceiving legislators at subsequent elections for office, no such remedy is available to reprove sponsors of initiatives who use deception to amend the Constitution. The only reasonable remedy is for this Court to refuse to permit the state to print the deceptive or misleading title on ballots that the State would otherwise present to the electorate at the polls.

The law pertaining to ballot titles for initiatives in other states uniformly condemns "partisan coloring," "catch phrases," and political "sloganeering." See, e.g., Mason v. Jernigan, 540 S.W.2d 851, 852 (Ark. 1976) ("We have said that a popular name [as well s a ballot title] must be free from catch phrases and slogans which tend to mislead and color the merit of the proposal."); Bradley v. Hall, 251 S.W.2d 470, 471 (Ark. 1952) (condemning the word "modern" in the title because "the word is used as a form of salesmanship, carrying the connotation that the original Constitution is old-fogyish and out-moded, while the proposed amendment is modern and therefore desirable"); Johnson v. Hall, 316 S.W.2d 194, 196 (Ark. 1958) (condemning the use of the words "unsafe" and "inadequate" because the fact of what is "unsafe and inadequate remains to be proved"); Arkansas Women's Political Caucas v. Riviere, 677 S.W.2d 846, 848 (Ark. 1984) (condemning the use of the term "unborn child" in an abortion restricting measure because, "very few would vote against a child, born or unborn, even though they are for a woman's

right to have an abortion or for the state paying for it"); Jackson v. Clark, 703 S.W.2d 454, 455 (Ark. 1986) (condemning the terms "closed-door deal-making" and "influence-peddling" as illegal partisan coloring); Moore v. C. G. Hall, 316 S.W.2d 207, 208 (Ark. 1958) (condemning the use of terms "feather-bedding" and "freedom" in ballot title as "catch phrases and slogans which tend to mislead and to color the merit of the proposal on one side or the other"); In the matter of the Title, Ballot Title, etc., 830 P.2d 963 (Colo. 1992) en banc (invalidating a measure with inaccurate and misleading ballot title); In Re Initiate Petition, etc., 797 (P.2d 326 (Okla. 1990) (invalidating measure with deceptive and misleading ballot title); In Re Initiative Petition No. 342, etc., 797 P.2d 331, 333 (Okla. 1990) (invalidating a ballot title as so insufficient as to be deceptive and misleading).

If this is true in all the cited jurisdictions, a fortiori, it is true in Florida where this Court's advisory opinion lends the credibility of the state and this Court to the validity of the constitutional effects implied in the ballot title. As noted by this Court in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109 (Fla. March 3, 1994) "the ballot title and summary are expected to be 'accurate and informative'" id. at 110 (emphasis added). No voter can understand the legal consequences, including the taxing, governing and regulatory consequences of voting for or against SAVE OUR EVERGLADES. That title is nothing but a "catch phrase" form of "salesmanship" through "sloganeering" that has the

easy penchant for misleading and deceiving. This Court should render an advisory opinion that the title complies with neither Fla. Stat. § 101.161 nor the implied requirements of fairness in the Florida Constitution.

IV.

THE S.O.E. BALLOT SUMMARY VIOLATES THE STANDARDS PRESCRIBED BY FLORIDA STATUTES SECTION 101.161

The text of the ballot summary to be addressed by this Court states:

> 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 growers in the Everglades Ecosystem of one cent per pound, increased for inflation; Florida citizen trustees will control the trust.

A. THE S.O.E. BALLOT SUMMARY FACIALLY VIOLATES FLA. STAT. § 101.161.

As expressed in detail above, Fla. Stat. § 101.161(1) requires that the ballot summary provide an "explanatory statement" of the "substance" of the proposed amendment in "clear and unambiguous language." As summed up in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109, 110 (Fla. March 3, 1994), the role of this Court in these proceedings is to preview "the ballot summary to determine if the chief purpose of the amendment is explained with sufficient clarity." The S.O.E. ballot summary fails this test, prima facie, because it fails to address the "substance" of the

measure, i.e., its "chief purpose," in terms of legal effect on the Constitution itself.

The "substance" of the proposal takes away from the Legislature the power, inter alia, not to impose a one cent per pound tax on sugarcane produced in the Everglades; the power to direct how the funds are to be employed; to legislate the clean-up plan for the Everglades; to define the limits of the Everglades Ecosystem by law; and to prescribe how the heads of executive agencies are to be selected in the case of the fund trustees. The substance of the measure has similar legal effects on the article IV powers of the executive branch, and upon articles I, VII and XI. None of this is explained at all, much less clearly and unambiguously, in the ballot summary. Hence, this Court should on the prima facie grounds advise the attorney general that S.O.E. should not appear on the ballot as written.

B. THE S.O.E. BALLOT SUMMARY VIOLATES THE STANDARDS OF FAIRNESS PRESCRIBED BY THIS COURT IN ASKEW V. FIRESTONE, 421 SO. 2D 151 (FLA. 1982).

As examined in detail in Part I.B, supra, Askew v. Firestone prescribes a number of fairness standards to particularize the requirements of Fla. Stat. § 101.161(1), and the implied requirements of Fla. Const., art. XI, § 3. These include that the ballot summary be "fair" that it permits the voter "intelligently to cast his ballot," that it not "fly under false colors," that it "not be disguised as something else," and, that it not "fall only to the press and opponents of the measure" to disclose to the public the chief purpose of the measure. This jurisprudence was

applied in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, supra.

The S.O.E. ballot summary violates all those standards. It is not "fair" because it does not reveal the legal effects on the Constitution itself, which is the prime function of the ballot summary. A fortiori, it fails to guide the voter in making an "intelligent" decision about how to vote. It blatantly attempts to fly under false colors. Rather than name the sugar tax as a tax (with unknown incidence), the summary refers to it as a "fee on raw sugar grown in the Everglades Ecosystem." The only purpose of this disguise is to make the voter believe that the fee would be absorbed by the growers and would not act like a tax raising the price of sugar paid by consumers. In addition, the measure violates the standard of placing the burden upon someone else (i.e., the press and opponents) to attempt to explain the true legal effect of the measure to the voters.

For these reasons, the S.O.E. ballot summary facially violates the particularized standards laid down in Askew v. Firestone and applied in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, supra, and this Court should render its advisory opinion disapproving of the measure.

C. THE S.O.E. BALLOT SUMMARY VIOLATES THE STANDARDS OF FAIRNESS AND PROSCRIPTION OF PARTISAN COLORING PRESCRIBED BY THIS COURT IN EVANS V. FIRESTONE, 457 SO. 2D 1351 (FLA. 1984).

As examined in detail in Part I.B., supra, Evans v. Firestone prescribed a number of additional fairness standards to particularizing further the requirements of Fla. Stat. §

101.161(1), and the implied requirements of Fla. Const., art. XI, § 3. These include that the ballot summary "tell the voter the legal effect of the amendment, and no more," that the summary is "no place for subjective evaluation of special impact," and that the summary must eschew propounding "the political motivation behind a given change."

The S.O.E. ballot summary violates all these standards. First, as established above, S.O.E. woefully fails to inform the voter of the "legal effect of the amendment" on the Constitution itself. Instead, it purports to explain the existing physical and ecological condition of the Everglades, and the effects upon the land and sugarcane growers hoped for by the amendment's sponsors; i.e., inter alia to "Save Our Everglades," to direct "the sugarcane industry" to "clean up the Everglades," and "to help pay to clean up pollution and restore clean water supply," when these "facts" are the mere ipse dixit of the sponsors, and have not been determined to be an actual physical or legal fact through any legislative, administrative or judicial process. All of this violates the standard that the ballot summary inform of "the legal effect of the amendment, and nothing more."

Second, the S.O.E. ballot summary violates the requirement that it not include "subjective evaluation of special impact," and not refer to the "political motivation behind the change." As examined in detail in Part III, supra, these restrictions, which are inherent in both Fla. Stat. § 101.161(1) and Fla. Const., art. XI, § 3, have been more fully developed in several other

jurisdictions under the rationale that ballot summaries and titles must be free of "partisan coloring." The ballot summary is no place for the sponsor of a measure to conduct a partisan political campaign. The opponents can never enlist the resources and credibility of the state in having their message printed and distributed to each and every voter, as the sponsors do in having their partisan position included on the ballot summary printed on the ballot itself. Because of the impact of state actions in these regards, the nonpartisan coloring standard must be strictly applied by this Court in these proceedings.

Up until the sponsors of S.O.E. undertook to use the ballot title, ballot summary and text of the S.O.E. initiative as platforms for their political sloganeering, Florida initiative titles and summaries had been remarkably free of this artifice. In Re Advisory Opinion to the Attorney General - Homestead Valuation Limitation, 581 So. 2d 586 (Fla. 1991), provides an instructive example. Although this Court may take judicial notice that the sponsors of the initiative approved in that opinion used the phrase "Save Our Homes" in their independent campaigning, the ballot title employed the explanatory phrase, "Homestead Valuation Limitation." The partisan "Save Our Homes" language appeared nowhere in the title, summary or text. Similarly, although complaints were made about the content of campaign materials publicly disseminated by the sponsors to obtain signatures and promote the amendment considered in Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986), no one challenged that the ballot title, summary or the text of the

amendment were themselves infected with partisan or misleading sloganeering.

By contrast to what has gone before in Florida, the S.O.E. ballot summary title and text are replete with partisan catch phrases and slogans. Most prominent is the use of the term "Save Our Everglades Trust." This is equally offensive to the use of the term "unborn children" condemned by the Arkansas Supreme Court in Women's Political Caucas v. Riviere, 677 S.W.2d 846, 848 (Ark. 1984), because "very few would vote against a child, born or unborn, even though they are for a woman's right to have an abortion or for the state paying for it." By the same token, few Floridians would vote against the Everglades, especially if they thought someone else was paying for it. In this respect, S.O.E. is more egregious than the "unborn child" measure because the S.O.E. tells the voter that the "sugarcane industry" will be "directed" to "help pay to clean up pollution and restore clean water supply." Moreover, to worsen matters, the ballot summary tells the voter that the sugarcane industry "polluted the Everglades." Hence, the S.O.E. ballot summary sloganeers for a cause most voters would deem to be worthy, identifies someone other than the voter as the one that will pay the cost to achieve the good purpose, and labels the designated payor as a "black hat." This plainly violates the standards set down by this Court in Evans.

D. THE S.O.E. BALLOT SUMMARY VIOLATES THE REQUIREMENT THAT THE BALLOT SUMMARY NOT BE VAGUE OR AMBIGUOUS ABOUT THE CHIEF PURPOSE OF THE INITIATIVE MEASURE.

As examined in detail in Part I.B., supra, Smith v. American Airlines, 606 So. 2d 618 (Fla. 1992), condemned ballot summaries that require voters to "infer a meaning that is nowhere evident on the face of the summary itself" and those summaries that are "ambiguous" about their "chief purpose." See also, In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, supra. As fully developed herein, the "meaning" and "chief purpose" have reference to the legal effect of the measure on the governmental structure prescribed by the Constitution. For this reason alone, the S.O.E. summary is defective. The same defaults would also make the summary ambiguous to those voters who might be confused by a number of purposes that seem to be reasonably implied by the measure.

For all the reasons expressed in subparts A. through D. above, the S.O.E. ballot summary violates the explanatory and fairness standards in Fla. Stat. § 101.161(1) and implied in Fla. Const., art. XI, § 3, as applied in this Court's previous decisions. Accordingly, this Court should issue an opinion disapproving the proposal.

V.

USE OF THE S.O.E. BALLOT TITLE, SUMMARY AND TEXT WOULD VIOLATE FSCL'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

Although this Court's opinion in In Re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, supra,

stated an advisory opinion "is limited to determining whether the proposed amendment complies with Fla. Const., art. XI, § 3, and Section 101.161 (1993), Fla. Stat.", FSCL nevertheless deems itself compelled to bring to the attention of the Court certain constitutional issues that will of necessity be litigated in collateral proceedings if the S.O.E. amendment should be approved in these proceedings. Throughout this brief, FSCL has alluded to the fact that certain of its members' First and Fourteenth Amendment rights and rights guaranteed by Fla. Const., art. I, are raised in these proceedings. If the Court were to render an advisory opinion that the S.O.E. initiative complies with Fla. Stat. § 101.161(1) and Fla. Const., art. XI, § 3, then the sponsors of S.O.E. would be enabled to conduct their campaign to collect the number of signatures required to place the initiative on the ballot under the claim that this Court, and hence, the state, had "vouched for" the legal sufficiency--and impliedly the accuracy--of the S.O.E. ballot title and ballot summary. These include the "Save Our Everglades" slogan and the statement that the "sugarcane industry . . . polluted the Everglades." As noted throughout this brief, that statement is the ipse dixit of the sponsors and has not been determined through the lawful processes of the Legislature, the Executive or the Judiciary. Nor does this proceeding present a proper forum for adjudicating the validity of the statements.

The League does not assert that the state, after having reached a decision through democratic legislative proceedings, may never expend public funds to inform the electorate of the

government's legislatively determined view on a referendum issue. This Court held as much in People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373 (Fla. 1991). This case raises no such issue. Instead, this case presents the potential specter of the state's taking a partisan position as to a referendum hotly disputed within the electorate without having reached that position through the normal legislative processes. Although the decision in Palm Beach County v. Hudspeth, 540 So. 2d 147 (Fla. 4th DCA) held that a county may spend tax dollars to educate the electorate about a referendum initiative, the same decision held that it must do so impartially, citing as authority Stanson v. Mott, 551 P.2d 1 (Cal. en banc 1976), a leading decision for the proposition that the state must not "take sides" in referenda submitted to the people.

The underlying constitutional point is stated in Stanson v. Mott: "government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factors." 551 P.2d at 9 (underlining supplied). For this Court to render a favorable advisory opinion as to the legal sufficiency of the S.O.E. ballot title and summary would unconstitutionally bestow an unfair political advantage upon the S.O.E. sponsors.

VI.

CONCLUSION

In conclusion, FSCL respectfully submits that this Court should issue an advisory opinion stating that the S.O.E. ballot title, summary and text do not comply with the requirements of Fla. Stat. § 101.161(1) and Fla. Const., art. XI, § 3, because the proposal violates the single-subject requirement, the ballot title does not refer to the legal effect of the measures, the ballot title is impermissibly partisan, the ballot summary violates Fla. Stat. § 101.161(1) in failing to state the chief purpose of the measure clearly and unambiguously, and the ballot summary is impermissibly partisan and misleading.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing **INITIAL BRIEF OF THE FLORIDA SUGAR CANE LEAGUE, INC. ("FSCL") SUGGESTING THAT THE TEXT OF THE AMENDMENT DOES NOT COMPLY WITH FLORIDA CONSTITUTION, ARTICLE XI, SECTION 3, AND THAT THE TITLE AND BALLOT SUMMARY VIOLATE FLORIDA STATUTES SECTION 101.161,** was served by regular U.S. Mail upon:

Robert A. Butterworth
Attorney General
Office of Attorney General
The Capitol
Tallahassee, Florida 32399-1050

This 31 day of March, 1994.

429\7(A)

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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 _____

[X] _____

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 ecoonomy 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,s775.084.

MAIL COMPLETED PETITION FORMS TO:

Paid Political Advertisement: SAVE OUR EVERGLADES COMMITTEE _____

necessary, such modifications or additions shall be subject to the review process established in s. 373.455.
History.—s. 4, ch. 87-97; s. 28, ch. 89-279; s. 10, ch. 93-260.

373.459 Surface Water Improvement and Management Trust Fund.—

(1) There is created, within the department, the Surface Water Improvement and Management Trust Fund to be used for the deposit of funds appropriated by the Legislature for the purposes of ss. 373.451-373.4595. The department shall administer all funds appropriated to or received for the Surface Water Improvement and Management Trust Fund. Expenditure of the moneys shall be limited to the costs of detailed planning for and implementation of programs prepared for priority surface waters. Moneys from the fund shall not be expended for planning for, or construction or expansion of, treatment facilities for domestic or industrial waste disposal.

(2) The secretary of the department shall authorize the release of money from the Surface Water Improvement and Management Trust Fund within 30 days after receipt of a request adopted by the governing board of a water management district or by the executive director when authority has been delegated by the governing board, certifying that the money is needed for detailed planning for or implementation of plans approved pursuant to ss. 373.453, 373.455, and 373.456. A water management district may not receive more than 50 percent of the moneys in the Surface Water Improvement and Management Trust Fund in any fiscal year unless otherwise provided for by law. Beginning in fiscal year 1990-1991, and each year after funds are appropriated, each water management district shall receive the amount requested pursuant to s. 373.453(4) or 10 percent of the money in the appropriation, whichever is less. The department shall allocate the remaining money in the appropriation annually, based upon the specific needs of the districts. The department, at its discretion, may include any funds allocated to a district in previous years which remain unencumbered by the district on July 1, to the amount of money to be distributed based upon specific needs of the districts.

(3) The amount of money that may be released to a water management district from the Surface Water Improvement and Management Trust Fund for approved plans, or continuations of approved plans, to improve and manage the surface waters described in ss. 373.451-373.4595 is limited to not more than 60 percent of the amount of money necessary for the approved plans. The district shall provide at least 40 percent of the amount of money necessary for the plans.

(4) Moneys in the trust fund which are not needed to meet current obligations incurred under this section shall be transferred to the State Board of Administration, to the credit of the trust fund, to be invested in the manner provided by law. Interest received on such investments shall be credited to the trust fund.
History.—s. 5, ch. 87-97; s. 29, ch. 89-279; s. 9, ch. 91-79; s. 11, ch. 91-305.

373.4592 Everglades improvement and management.—

(1) FINDINGS AND INTENT.—

(a) The Legislature finds that the Everglades ecological system not only contributes to South Florida's water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life. The system is unique in the world and one of Florida's great treasures.

(b) The Legislature further recognizes the efforts of the South Florida Water Management District to implement a comprehensive plan pursuant to the Surface Water Improvement and Management Act which will provide strategies, programs, and projects for the restoration and protection of water quality in the Everglades. The Legislature does not intend by this section to limit the authority of the district in the implementation of such plan.

(c) It is the intent of the Legislature to facilitate the surface water improvement and management process, to assist the district and the [1]Department of Environmental Regulation in the performance of their duties and responsibilities, and to provide funding mechanisms which will contribute to the implementation of the strategies incorporated in the Everglades Surface Water Improvement and Management Plan or contribute to projects or facilities determined necessary to meet water quality requirements established by rulemaking or permit proceedings.

(2) DEFINITIONS.—As used in this section:

(a) "District" means the South Florida Water Management District.

(b) "Everglades Agricultural Area" shall have the meaning set forth in the Everglades Surface Water Improvement and Management Plan or interim permit issued pursuant to subsection (6).

(c) "Everglades Protection Area" means Water Conservation Areas 1, 2A, 2B, 3A, and 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Everglades National Park.

(d) "Master permit" means a single permit issued to a legally responsible entity defined by rule authorizing the construction, alteration, maintenance, or operation of multiple stormwater management systems which may be owned or operated by different persons and which provides an opportunity to achieve collective compliance with applicable department and district rules and the provisions of this section.

(e) "Plan" shall, except as otherwise indicated, refer to the Everglades Surface Water Improvement and Management Plan adopted by the South Florida Water Management District, as amended from time to time.

(f) "Stormwater management program" shall have the meaning set forth in [2]s. 403.031(15).

(g) "Stormwater utility" shall have the meaning set forth in [3]s. 403.031(17).

(3) ADOPTION OF SWIM PLAN.—

(a) The district shall adopt the Everglades Surface Water Improvement and Management Plan pursuant to the provisions of ss. 373.451-373.456. In addition to the criteria contained in s. 373.453, the plan shall include:

1. Strategies for developing programs and projects designed to bring facilities into compliance with applicable water quality standards and restore the Everglades hydroperiod, including the identification and acquisition of lands for the purpose of water treatment or implementation of stormwater management systems, the develop-

ment of funding mechanisms, and the development of a permitting system for discharges into waters managed by the district.

2. Specific goals for stormwater management systems funded pursuant to subsection (5) and a periodic evaluation process to determine whether such goals are being achieved.

3. Strategies for establishing monitoring protocols to ensure the accuracy of data.

4. Strategies for establishing research programs to measure program and project effectiveness.

(b) The plan shall not be reviewable as a rule under s. 120.54 or s. 120.56. However, the final agency action of the governing board of the district under s. 373.456(4) or (5)(b) shall constitute an order of the district subject to review as provided in s. 373.456(5)(b). The order shall also be subject to the provisions of s. 120.57. If a provision of the plan is to be implemented through permits for which there is no existing rule requirement, the district shall engage in rulemaking procedures pursuant to chapter 120 for the adoption of the requirement. To the extent feasible, any review proceeding under chapter 373 or any administrative proceeding under s. 120.57, with respect to a challenge to the plan, shall be expedited and shall be consolidated with any pending review proceedings relating to an interim permit issued pursuant to subsection (6).

(c) This section shall not be construed to prohibit the district prior to approval of the plan from pursuing interim permits pursuant to subsection (6) or from engaging in restoration or protection measures, including the acquisition, construction, or operation of the Everglades Nutrient Removal Project or the project referred to as Water Management Area 3, as identified in the September 28, 1990, draft of the Everglades Surface Water Improvement and Management Plan. The department may release funds under ss. 373.451-373.456 for such projects.

(4) ACQUISITION OF LANDS.—

(a) The Legislature declares that it is necessary for the public health and welfare that the Everglades water and water-related resources be conserved and protected. The Legislature further declares that certain lands may be needed for the treatment or storage of water prior to its release into the Everglades Protection Area. The acquisition of real property for this objective constitutes a public purpose for which public funds may be expended. In addition to other authority pursuant to this chapter to acquire real property, the governing board of the district is empowered and authorized to acquire fee title or easements by eminent domain for the limited purpose of implementing stormwater management systems, identified and described in the plan or determined necessary to meet water quality requirements established by rule or permit.

(b) In addition to the acquisition of lands by eminent domain pursuant to paragraph (a), the Board of Trustees of the Internal Improvement Trust Fund and the district may enter into cooperative agreements with property owners within a stormwater management system area to provide for the exchange of property subject to condemnation under paragraph (a) for state-owned property which the owner or an affiliate of such owner leases from the board of trustees or other agency of the state and which was used for agricultural production on January 1, 1991. Any such agreement shall include the following:

1. The landowner shall acquire property covered by the lease by paying any deficiency in cash or by transferring other private lands which the district or any other agency of the state has sought to acquire, or by a combination of land transfer and cash payment.

2. The exchange shall be made on the basis of appraisals performed in a manner consistent with the provisions of s. 253.025(7).

3. Title to any land conveyed to the Board of Trustees of the Internal Improvement Trust Fund as a result of such an exchange shall be conveyed to the South Florida Water Management District upon payment of the appraised value thereof by the district to the board of trustees.

(5) STORMWATER FUNDING; DEDICATED FUNDS FOR STORMWATER MANAGEMENT.—In addition to any other funding mechanism legally available to the district to plan, acquire, construct, finance, operate, or maintain stormwater management systems, the district may:

(a) Create one or more stormwater utilities within or without the Everglades Agricultural Area and adopt stormwater utility fees not to exceed an amount sufficient to plan, acquire, construct, finance, operate, and maintain stormwater management systems where such utilities and systems are identified and described in the plan or permits issued pursuant to subsection (6). If adopted, stormwater utility fees shall be charged to property owners in the district based on the relative contribution of each property owner to the need for stormwater management systems and programs. The district may establish stormwater utility fees adopted pursuant to this paragraph in accordance with the procedures set forth in s. 120.54, and may enforce the payment of such fees through actions or proceedings in any court of competent jurisdiction for unpaid deposits and charges, or through the imposition of liens upon real property for which utility fees are charged and unpaid.

(b) Establish and set aside, as a continuing source of revenue, other funds sufficient to plan, acquire, construct, finance, operate, and maintain stormwater management systems identified and described in the plan or permits issued pursuant to subsection (6). Such funds may include contributions from the Everglades Agricultural Area Environmental Protection District, created pursuant to chapter 89-423, Laws of Florida, as amended. The district shall apply any such contributions as a credit against any fee imposed pursuant to paragraph (a) or assessment levied pursuant to paragraph (c).

(c) Create, alone or in cooperation with counties, municipalities, and special districts pursuant to s. 163.01, the Florida Interlocal Cooperation Act of 1969, one or more stormwater management system benefit areas within the Everglades Agricultural Area or any other area of the district identified and described in the plan or permits issued pursuant to subsection (6). The district may levy upon property owners within said benefit areas a per acreage assessment to fund the planning,

acquisition, construction, financing, operation, maintenance, and administration of stormwater management systems for the benefited areas. Any benefit area in which property owners receive substantially different levels of stormwater management system benefits shall include stormwater management system benefit subareas within which different per acreage assessments shall be levied from subarea to subarea based upon a reasonable relationship to benefits received. The assessments shall be calculated to generate sufficient funds to plan, acquire, construct, finance, operate, and maintain the stormwater management systems identified and described in the plan or permits issued pursuant to subsection (6). The district may use the non-ad valorem levy, collection, and enforcement method as provided in chapter 197 for assessments levied pursuant to this paragraph. The district shall publish notice of the certification of the non-ad valorem assessment roll pursuant to chapter 197 in a newspaper of general circulation in the counties wherein the assessment is being levied, within 1 week after the district certifies the non-ad valorem assessment roll to the tax collector pursuant to s. 197.3632(5). The assessments so levied shall be final and conclusive as to each lot or parcel unless the owner thereof shall, within 90 days of certification of the non-ad valorem assessment roll pursuant to s. 197.3632(5), commence an action in circuit court. Absent such commencement of an action within such period of time by an owner of a lot or parcel, such owner shall thereafter be estopped to raise any question related to the special benefit afforded the property or the reasonableness of the amount of the assessment. Except with respect to an owner who has commenced such an action, the non-ad valorem assessment roll as finally adopted and certified by the South Florida Water Management District to the tax collector pursuant to s. 197.3632(5) shall be competent and sufficient evidence that the assessments were duly levied and that all other proceedings adequate to the adoption of the non-ad valorem assessment roll were duly held, taken, and performed as required by s. 197.3632. If any assessment is abated in whole or in part by the court, the amount by which the assessment is so reduced may, by resolution of the governing board of the district, be payable from funds of the district legally available for that purpose, or at the discretion of the governing board of the district, assessments may be increased in the manner provided in s. 197.3632.

(d) In no event shall the amount of funds collected for stormwater management facilities pursuant to paragraph (a) or paragraph (c) or any combination thereof exceed the cost of providing water management attributable to water quality treatment resulting from the operation of stormwater management systems of the landowners to be charged. Such water quality treatment may be required by the plan or permits issued pursuant to subsection (6). Prior to the imposition of fees or assessments pursuant to paragraph (a) or paragraph (c) for construction of new stormwater management systems or the acquisition of necessary land, the district shall establish the general purpose, design, and function of the new system sufficient to make a fair and reasonable determination of the estimated costs of water management attributable to water quality treatment resulting from operation of stormwater management systems of the landowners to be charged. This determination shall establish the proportion of the total anticipated costs attributable to the landowners. In determining the costs to be imposed by fees or assessments, the district shall consider the extent to which nutrients originate from external sources beyond the control of the landowners to be charged. Costs for hydroperiod restoration within the Everglades Protection Area shall be provided by funds other than those authorized by paragraph (a) or paragraph (c). The proportion of total anticipated costs attributable to the landowners shall be apportioned to individual landowners considering the factors specified in paragraph (e). Any determination made pursuant to this paragraph or paragraph (e) may be included in the plan or permits issued pursuant to subsection (6).

(e) In determining the amount of any fee or assessment imposed on an individual landowner to be charged under paragraph (a) or paragraph (c), the district shall consider the quality and quantity of the stormwater discharged by the landowner, the amount of treatment provided to the landowner, and whether the landowner has provided equivalent treatment or retention prior to discharge to the district's system.

(f) No fee or assessment shall be imposed under paragraph (a) or paragraph (c) for the operation or maintenance of a stormwater management system or facility for which construction has been completed on or before July 1, 1991, except to the extent that the operation or maintenance, or any modification of such system or facility, is required to provide water quality treatment.

(g) The district shall suspend, terminate, or modify projects and funding for such projects, as appropriate, if the projects are not achieving applicable goals specified in the plan.

(h) The Legislature hereby determines that any property owner who contributes to the need for stormwater management systems and programs, as determined for each individual property owner either through the plan or through permits issued to the district pursuant to subsection (6) or to the property owner, is deemed to benefit from such systems and programs, and such benefits are deemed to be directly proportional to the relative contribution of the property owner to such need. The Legislature also determines that the issuance of a master permit provides benefits, through the opportunity to achieve collective compliance, for all persons within the area of the master permit which may be considered by the district in the imposition of fees or assessments under this section.

(6) PERMITS.—The department and the district shall develop a permitting program consistent with the plan, if adopted. Pursuant to such program:

(a) The district shall apply to the department by October 1, 1991, for 5-year interim permits for the construction, operation, and maintenance of stormwater management systems for district structures discharging into or within the Everglades Protection Area. In addition to the requirements of ss. 373.413 and 373.416, the applications shall include the following:

1. To the extent information is available, recommended ambient concentration levels and discharge

limitations for phosphorus appropriate to achieve and maintain compliance with applicable state water quality standards.

2. Proposed interim concentration levels designed to achieve such compliance to the maximum extent practicable.

3. Strategies for achieving and maintaining compliance with such interim concentration levels, including the acquisition of lands and the construction and operation of facilities for the purpose of water treatment, the development of funding mechanisms, and the development of a regulatory program to improve the quality of water entering the stormwater management systems. Such regulatory program shall include the identification of structures or systems requiring permits or modifications of existing permits and the development, where appropriate, of a master permit for a specified area, such as the Everglades Agricultural Area.

4. Appropriate schedules to carry out such strategies.

5. A monitoring program to ensure the accuracy of data and measure progress toward achieving interim concentration levels and applicable water quality standards.

(b) The department shall issue such interim permits to the district upon the district's demonstration of reasonable assurance that such permits will achieve compliance with interim concentration levels to the maximum extent practicable and otherwise comply with the provisions of ss. 373.413 and 373.416. The district shall also apply for an interim permit or for the modification of an existing permit, as provided in paragraph (a), for any new structure or for any modification of an existing structure subsequent to October 1, 1991.

(c) Permits issued pursuant to paragraph (b) shall be consistent with the plan, if adopted. Applications for modifications necessary to maintain consistency with the plan shall be filed within 90 days of the adoption of any change to the plan necessitating such modifications.

(d) At least 60 days prior to expiration of any interim permit issued pursuant to paragraph (b), the district may apply for a renewal thereof for a period of 5 years for the purpose of achievement and maintenance of applicable water quality standards.

(e) Nothing in this subsection shall relieve any person from the need to obtain any permit required by the department or the district pursuant to any other provision of law.

(f) The district shall publish notice of rulemaking pursuant to chapter 120 by October 1, 1991, allowing for a master permit or permits authorizing discharges from landowners within that area served by structures identified as S-5A, S-6, S-7, S-8, and S-150. For discharges within this area, the district shall not initiate any proceedings to require new permits or permit modifications for nutrient limitations prior to the adoption of the master permit rule by the governing board of the district or prior to April 1, 1992, whichever first occurs. The district's rules shall also establish conditions or requirements allowing for a single master permit for the Everglades Agricultural Area including those structures and water releases subject to rule 40E-61, Florida Administrative Code. No later than the adoption of rules allowing for a single master permit, the department and the district shall provide appropriate procedures for incorporating into a master permit separate permits issued by the department under this chapter. The district's rules authorizing master permits for the Everglades Agricultural Area shall provide requirements consistent with the Everglades Surface Water Improvement and Management Plan and with interim or other permits issued by the department to the district. Such a master permit shall not preclude the requirement that individual permits be obtained for persons within the master permit area for activities not authorized by, or not in compliance with, the master permit. Nothing in this subsection shall limit the authority of the department or district to enforce existing permit requirements or existing rules, to require permits for new structures, or to develop rules for master permits for other areas. To the greatest extent possible the department shall delegate to the district any authority necessary to implement this subsection which is not already delegated.

(7) APPLICABILITY OF LAWS AND WATER QUALITY STANDARDS; AUTHORITY OF DISTRICT AND DEPARTMENT.—

(a) Nothing in this section shall be construed to limit, detract from, or compromise the application or implementation of the Surface Water Improvement and Management Act, ss. 373.451-373.4595. This section shall be construed, in all respects, to enhance and strengthen the provisions of the act as applied to the Everglades Protection Area. As provided in ss. 373.451-373.4595, the plan shall include recommendations and schedules for bringing all pollution sources into compliance with state water quality standards. This section does not, nor shall the plan, authorize any existing or future violation of any applicable statute, rule, or permit requirement, nor diminish the authority of the department or the district.

(b) Except to the extent authorized in subsection (6), nothing in this section shall be construed as altering any currently applicable state water quality standards in the areas impacted by this section.

(c) The provisions of this section shall not be construed to limit or restrict the authority granted the district and the department pursuant to this chapter or chapter 403 to control, regulate, permit, construct, or operate a stormwater management system, or to plan, design, or implement a surface water improvement and management plan, and the provisions of this section shall be deemed to be supplemental to the authority granted pursuant to this chapter and chapter 403.

(8) ANNUAL REPORTS.—Beginning January 1, 1992, the district shall submit to the department, the Governor, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President of the Senate, and the Minority Leader of the Senate annual progress reports regarding implementation of the plan.

History.—s. 2, ch. 91-80.

[1]Note.—Section 3, ch. 93-213, transferred all existing legal authorities and actions of the Department of Environmental Regulation and the Department of Natural Resources to the Department of Environmental Protection.

[2]Note.—Substituted by the editors for a reference to s. 403.031(14) to conform to the addition of a new s. 403.031(8) by s. 22, ch. 91-305.

[3]Note.—Substituted by the editors for a reference to s. 403.031(16) to conform to the addition of a new s. 403.031(8) by s. 22, ch. 91-305.

[4]Note.—The word "this" preceding the word "paragraph" was deleted by the editors. As amended by Senate Amendment 1, Journal of the Senate 1991, p. 1040, the sentence read, "Costs for hydroperiod restoration shall be provided by funds other than those authorized by this subsection." Senate Amendment 1A, Journal of the Senate 1991, p. 1042, deleted the word "subsection" and inserted "paragraphs (a) or (c)."

373.4595 Lake Okeechobee improvement and management.—

(1) LAKE OKEECHOBEE PROGRAM.—The South Florida Water Management District shall immediately design and implement a program to protect the water quality of Lake Okeechobee. Such program shall be based upon the recommendations of the Lake Okeechobee Technical Advisory Committee report entitled "Final Report: Lake Okeechobee Technical Committee" and dated August 1986, including the recommendations relating to the diversion of Taylor Creek–Nubbins Slough, but such program may include other projects. In addition, the program design shall be completed by December 1, 1988, and shall be designed to result, by July 1, 1992, in reductions of phosphorous loadings to the lake by the amount specified as excess in the South Florida Water Management District's Technical Publication 81-2.

(2) DIVERSIONS; LAKE OKEECHOBEE TECHNICAL ADVISORY COUNCIL.—

(a) The Legislature finds that efforts to reduce nutrient levels in Lake Okeechobee have resulted in diversions of nutrient-laden waters to other environmentally sensitive areas, which diversions have resulted in adverse environmental effects. The Legislature also finds that both the agriculture industry and the environmental community are committed to protecting Lake Okeechobee and these environmentally sensitive areas from further harm and that this crisis must be addressed immediately. Therefore:

1. The South Florida Water Management District shall not divert waters to the Indian River estuary, the Caloosahatchee River or its estuary, or the Everglades National Park, in such a way that the state water quality standards are violated, that the nutrients in such diverted waters adversely affect indigenous vegetation communities or wildlife, or that fresh waters diverted to the Caloosahatchee or Indian River estuaries adversely affect the estuarine vegetation or wildlife, unless the receiving waters will biologically benefit by the diversion. However, diversion is permitted when an emergency is declared by the water management district, if the secretary of the [1]Department of Environmental Regulation concurs.

2. The South Florida Water Management district may divert waters to other areas, including Lake Hicpochee, unless otherwise provided by law. However, the district shall monitor the effects of such diversions to determine the extent of adverse or positive environmental effects on indigenous vegetation and wildlife. The results of the monitoring shall be reported to the Lake Okeechobee Technical Advisory Council. If the monitoring of such diversions reveals continuing adverse environmental effects, the district shall make recommendations to the Legislature by July 1, 1988, on how to cease the diversions.

(b)1. There is hereby created a Lake Okeechobee Technical Advisory Council. Council members shall be experts in the fields of botany, wildlife biology, aquatic biology, water quality chemistry, or hydrology and shall consist of:

a. Three members appointed by the Governor;

b. Three members appointed by the Speaker of the House of Representatives;

c. Three members appointed by the President of the Senate;

d. One member from the Institute of Food and Agricultural Sciences, University of Florida, appointed by the President of the University of Florida; and

e. One member from the College of Natural Sciences, University of South Florida, appointed by the President of the University of South Florida.

Members shall be appointed not later than July 15, 1987.

2. The purpose of the council shall be to investigate the adverse effects of past diversions of water and potential effects of future diversions on indigenous wildlife and vegetation and to report to the Legislature, no later than March 1, 1988, with findings and recommendations proposing permanent solutions to eliminate such adverse effects.

3. The South Florida Water Management District shall provide staff and assistance to the council. The [1]Department of Environmental Regulation, the Game and Fresh Water Fish Commission, and the district shall cooperate with the council.

4. The council shall meet not less than once every 2 months at the call of the chairman, or at the call of four other members of the council. The council shall elect from its members a chairman and vice chairman and such other officers as the council deems necessary. The council may establish other procedures for the conduct of its business.

5. The members of the council are not entitled to compensation but are eligible for per diem and travel expenses pursuant to s. 112.061.

History.—s. 6, ch. 87-97.

[1]Note.—Section 3, ch. 93-213, transferred all existing legal authorities and actions of the Department of Environmental Regulation and the Department of Natural Resources to the Department of Environmental Protection.

373.4596 State compliance with stormwater management programs.—The state, through the Department of Management Services, the Department of Transportation, and other agencies, shall construct, operate, and maintain buildings, roads, and other facilities it owns, leases, or manages to fully comply with state, water management district, and local government stormwater management programs.

History.—s. 40, ch. 89-279; s. 298, ch. 92-279; s. 55, ch. 92-326.

PART V

FINANCE AND TAXATION