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IN THE

SUPREME COURT OF FLORIDA

Case No. 83,301

Upon A Request From The
Attorney General For An
Advisory Opinion As To The
Validity Of An Initiative Petition

IN RE:

ADVISORY OPINION
TO THE ATTORNEY GENERAL -
SAVE OUR EVERGLADES TRUST

REPLY BRIEF OF SAVE OUR EVERGLADES COMMITTEE IN SUPPORT OF SAVE OUR EVERGLADES TRUST INITIATIVE

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INTRODUCTION

The impact of an initiative on Florida government is not, as suggested, a "usurpation of authority." The briefs in opposition fail to recognize the fundamental power of the citizens to make judgments on constitutional matters. The briefs in opposition also fail to acknowledge the purpose of the single-subject rule and the Advisory Opinion Process. The purpose is to permit the citizens to make policy and the purpose of the advisory process is to facilitate the fair exercise of that power. This Court continuously acknowledges the importance of the initiative process. "We are dealing with a constitutional democracy in which sovereignty resides in the people." Weber v. Smathers, 338 So. 2d 819, 821 (1976). Consequently, opponents must carry the burden of showing the SOE Initiative is "clearly and conclusively defective."

Public policy favors citizen initiatives when other attempts fail to achieve the public will. In the case of the Everglades, the initiative has become the last available forum.

Opponents must show this Court, clearly and conclusively, that the SOE Initiative violates the single-subject provisions of Article XI, section 3 or the requirements of fair notice in the ballot language. Although opponents briefs asserted many arguments (some mutually inconsistent)[1] the two principal issues raised were:

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[1] Some briefs alleged the Trust dangerously affected many functions and branches of Government. Others alleged the trust was "not connected in any way with the existing government of Florida." Brief of Opponents Florida Farmers for Fairness at 14.

(1) whether the initiative usurps power of various governmental functions and Everglades Trust has broad uncontrolled powers which would violate the single subject rule and (2) whether the ballot language provides fair and adequate notice regarding the impact of the fee and the impact of the sugar industry on the Everglades.

I.

THE SOE INITIATIVE MEETS THE SINGLE-SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION BECAUSE IT HAS A SIMPLE UNIFIED CONCEPT WHICH IS EASY FOR VOTERS TO UNDERSTAND AND HAS NO COLLATERAL CONSTITUTIONAL EFFECTS

The single-subject rule requires a single theme, plan and oneness of purpose. The SOE Initiative explicitly states that: "the sole purpose of the Trust is to expend funds to recreate the historical ecological functions of the Everglades Ecosystem..."

Trust funds can be established in the Constitution. Article III, section 19 (f) (3). All other language directly relates to the purpose of the trust fund by describing the source of the funding, the method and purpose of expenditure and the administration of the trust. In SOE, the people have before them precise language rather than uncertain generalities.

The one-subject rule has been described as logically demonstrating oneness of purpose through the integral nature of the initiative's provisions. In re Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 231 n. 5 (Fla. 1991) [hereinafter Limited Political Terms]. Each provision of the SOE Initiative is integral to its purpose. The funding source, designation of the purpose for the funds, and the Trust itself whose sole purpose to expend those

funds for that purpose are all inextricably related, providing a perfect example of this definition.

A. The SOE Initiative creates a mechanism the same as those approved in Carroll and Floridians.

Opponents question whether raising and spending revenue can meet the single-subject test. That issue is clearly decided under Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986) and Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978). The structures established by the SOE Initiative are entirely consistent with this Court's decisions in Carroll and Floridians.

In Floridians, proceeds from taxes on casinos were explicitly required to be "appropriated to the several counties, school districts and municipalities for the support and maintenance of the free public schools and local law enforcement." Floridians, 363 So. 2d at 338. The Court upheld this arrangement against charges of log-rolling. Id. at 339. This direction for appropriation was allowed even though the Court noted that the amendment would "direct[] the anticipated tax revenues . . . to education and local law enforcement." Id. at 340. The majority in Floridians saw a single subject in the "generation and collection of taxes, and the distribution thereof" related to casino gambling. Id. The dissent in Floridians, distinguished the "allocation of tax revenue" as "separate from and not directly connected to the subject of casino gambling". Id. at 343 (Alderman, J., dissenting). However, the heart of Justice Alderman's dissent, and the reason he found the casino amendment to be a "blatant attempt at 'logrolling'," was

that he viewed the source of the tax revenues (casino gambling) as separate and distinct from the mandated target of the tax revenues (education and law enforcement). Id.

In Carroll, the lottery amendment provided that tax proceeds "derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education Lotteries Trust Fund, to be appropriated by the Legislature." Carroll, 497 So. 2d at 1205-06. The Court in Carroll saw "no essential distinction between the amendment here and the one [it] approved in Floridians . . ." Id. at 1206. This Court, while recognizing some difference, did "not consider this distinction significant" and considered the implementation section contained matter directly connected to the authorization for lotteries. Id.

Significantly, the amendment and summary in Carroll were attacked as deceptive and misleading exactly because the provision gave the legislature discretion to appropriate or not appropriate the funds and possibly not for educational purposes. Id. In the SOE Initiative, the public is not faced with those uncertainties.

The SOE Initiative meets the standard of Floridians and Carroll. The SOE Initiative creates the Trust and imposes the fee. It also lists uses to which the revenues should be put, but provides that the legislature appropriate. Importantly, the purposes for which the revenues will be spent (clean up in the Everglades) are integrally related to the source of the funding (a fee on one source of Everglades pollution).

The SOE Initiative also does not usurp legislative

appropriations powers. Funds are not transferred automatically, rather they are appropriated for policy purposes chosen by the legislature among those described in the initiative.

Opponents suggest the initiative improperly affects taxing authority. Creating the fee on raw sugar, whether it is called a tax or a fee, is within the power of the citizens of Florida. There is no restriction against creating a fee by initiative. Creation of the fee in no way limits or increases future legislative authority to raise taxes.

The SOE Initiative does not constitutionally create new legislative taxing authority. The fee in the SOE Initiative is created on one industry, to be expended for specific purposes related to the effect that industry has had on the Everglades ecosystem.

B. The SOE Initiative is specific, narrow and targeted and, therefore, meets the functional impact test as interpreted by this Court.

The functional impact test is much cited in opposing briefs. This test, which is not in the Constitution, is only one means of analyzing whether a proposal meets the single-subject test. The fact that a proposal may relate to more than one governmental function does not ipso facto make a proposal multi-subject. The purpose is to "protect against multiple precipitous changes in our state constitution." Fine v. Firestone, 448 So. 2d 984 (Fla. 1984).

For purposes of the single-subject requirement, a proposed amendment is not objectionable simply because it may have some

relationship or hypothetical effect on different branches of government. Proposed amendments have met the single-subject test "even though they affected multiple branches of government." Limited Political Terms, 592 So. 2d at 227. E.g., In re Advisory Opinion to the Attorney General - Limitation of Non-Economic Damages in Civil Actions, 520 So. 2d 284 (Fla. 1988) (judicial and legislative); Carroll, supra (executive and legislative). The analysis adopted by this Court in Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984), and relied upon here by the opponents themselves, is that "where such an initiative *performs* the functions of different branches of government, it clearly fails the functional test." Id. at 1354 (emphasis added). Because the initiative does not authorize and the trustees do not *perform* multiple functions of government within the meaning of Evans, the SOE initiative does not fail the functional test of the single-subject requirement.

Measures which have restricted the taxing authority of sixty seven counties (In re Advisory Opinion to the Attorney General - Homestead Valuation Limitation, 581 So. 2d 586, 587-88 (Fla. 1991) [hereinafter Homestead Valuation]) or affected the terms of office for two branches (Limited Political Terms, 592 So. 2d at 227) have also fallen within the single-subject test. The SOE Initiative is very narrow by comparison. SOE does not restrict the authority of any branch or governmental function as did the initiative in Fine. 448 So. 2d at 990.

In support of their claim that the SOE Initiative performs multiple functions, the opponents assert that the Initiative

divests the Department of Environmental Protection, an Executive Department, of its authority to determine geographic boundaries subject to environmental regulation. Brief of Opponents Holland & Knight at 10. The Trust has no regulatory authority. It has only authority to expend funds. See section C, infra.

Opponents assert that the SOE Initiative performs judicial functions with findings that the sugarcane industry polluted the Everglades. In fact, such findings are similar to provisions in legislative history as an aid to courts in performing the judicial function. Compare Limited Political Terms, 592 So. 2d at 226, where this Court upheld an amendment with a similar findings statement.

Opponents cite the dispute resolution provision of the initiative as performing a judicial function. Such disputes may only relate to the purpose of the trust: expending funds. Further, the language of the initiative specifically says such disputes are subject to general law. SOE Initiative section 16(b).

In Evans, this Court found that, by actually amending rules within the jurisdiction of the Supreme Court, the initiative was directly performing a judicial function. 457 So. 2d at 1354. In contrast, the SOE Initiative has no such effect. Here, there is no impact on the *power or functions* of the judiciary.

C. The authority of the Trust is narrowly defined and limited by Florida Law and the Constitution.

The SOE Trust is created to facilitate the accountability and administration of the funds used to restore the Everglades. The authority of the trust and the trustees is limited to the "sole

purpose of expending funds." Trustees are appointed by the Governor and confirmed by the Senate. They would make financial disclosure. Art. II, § 8(a), Fla. Const.; Fla. Stat. §§ 112.311-112.326. Employees would be controlled by legislative appropriation and by Florida statutes. Fla. Stat. ch. 216. Internal rules of the Trust are subject to review under generally applicable law.[2]

Actions by the trustees are, of course, subject to the laws and the constitutions of Florida and the United States.[3] Some arguments of the opponents intimate the Trust is above the law. This argument has no merit. The Trustees and the Trust cannot violate the laws which control the Everglades, Wetlands, or the laws granting authority to the Water Management districts. For example, the Department of Environmental Protection has the authority to regulate activities in Wetlands as does the Water Management District. Fla. Stat. ch. 373, 403.

The Game and Fresh Water Fish Commission, which is explicitly granted "regulatory authority," (art. IV, § 9, Fla. Const.) must still comply with the Constitution, the law and obtain approvals

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[2] SOE Initiative section 16(b) specifically says that while the trustees may adopt there own operating rules they are "subject to generally applicable law." The Game and Fresh Water Fish Commission has no such limitation in the Constitution. See Brief of Opponents Florida Farmers for Fairness Committee, at 15-16 and Exhibit 2 (citing GFWFC claims that its rules are outside Administrative Procedure Act review).

[3] Cf. Alford v. Finch, 155 So. 2d 790 (Fla. 1963) (invalidating the Game and Fresh Water Fish Commission's administrative designation of private land as a game refuge which resulted in a prohibition on hunting as an unconstitutional taking).

from other agencies when they have an impact on their jurisdiction. See note 3.

To support their claim that this encroaches on executive power, the opponents cite this Court's recent decision in In re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 19 Fla.L.Weekly S109, S110 (Fla. March 3, 1994), where this Court expressed concern over encroachments on "rulemaking power of executive agencies," which in that case would have restricted all agencies authority to make rules relating to discrimination. By comparison, the SOE Trust is NOT granted regulatory authority. A grant of such authority cannot be implied from the absence of such a statement where the purpose of the Trust is explicitly and unequivocally stated. Clarity of intent is valued by this court. See Carroll, 497 So. 2d at 1206.

The ballot initiative makes no substantive change in jurisdiction and grants no regulatory authority to the Trustees. The Trustees are not exempt from the law or the Constitution. They are subject to all laws relating to the Everglades and to other laws of Florida in the performing of defined duties.

II.
THE SOE BALLOT LANGUAGE PROVIDES FAIR NOTICE AND IS CLEARLY UNDERSTANDABLE

Where this Court has taken the drastic step[4] of removing an

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[4] "We also must acknowledge that there is a strong public policy against courts interfering in the democratic processes of elections." Florida League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992); see also Robert J. Lowe, Jr., Comment, Solving the Dispute Over Direct Democracy in Florida: Are Ballot Summaries Half-Empty or Half-Full, 21 STETSON L. REV. 565, 589 (1992) ("The overwhelming stakes involved, therefore, make it crucial that

initiative from the voters consideration because of ballot language, it was found that language was substantively and directly misleading on a major issue or a "material recasting of issues."[5] In the instant case the language is fair and accurate as to future impacts. A ballot summary meets the requirement of section 101.161(1) if the summary as a whole "fairly reflects the chief purpose of the amendment." In re Advisory Opinion to the Attorney General - English -- The Official Language, 520 So. 2d 11, 13 (Fla. 1988) [hereinafter English]. The ballot summary need not "explain in detail what the proponents hope to accomplish," Id., and it is "not necessary to explain every ramification of a proposed amendment." Carroll, 497 So. 2d at 1206. A ballot summary will not be deemed defective unless it misleads voters by deception or omission of material facts that are essential to an understanding of the changes effected.

A. The ballot language provides adequate notice of the nature of the fee on sugar production.

Opponents argue that taxpayers receive inadequate notice because the word "tax" is not used in the ballot language or the initiative. In fact, the SOE fee can be analogized either to an impact fee or an excise tax. The term "fee" is not unusual in the

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courts should be highly deferential in deciding to strike a proposition from the ballot because of problems with the summary").

[5] See Askew v. Firestone, 421 So. 2d 151 (Fla. 1982); Evans, 457 So. 2d at 1355; Smith v. American Airlines, Inc., 606 So. 2d 618 (Fla. 1992); In re Advisory Opinion to the Atty. Gen., Restricts Laws Related to Discrimination, 19 Fla. L. Weekly at S109.

parlance of Everglades restoration.[6] For example, the provisions for payment of Everglades restoration by the sugar industry in the bill currently being considered by the legislature is termed a fee. Id.; cf. Everglades Sugar and Land Co. v. Bryan, 87 So. 68, 77 (Fla. 1921) (upholding taxes and assessments for drainage).

Understandability to citizens is critical. Arguments concerning the word "tax" would have merit if the proposed fee were, instead, a general tax on the retail sale of sugar in Florida on all citizens. If a general sales or income tax were proposed to the populace, a more explicit use of the word "tax" would be appropriate. However, this argument misapprehends the nature of the fee, the nature of the sugar industry in Florida, and the nature of the impact on Florida citizens.

To understand the effect of the fee on citizens, one must first understand the effect of the fee on the sugar industry. Florida has the largest sugar producing industry in the United States.[7] Sugar production and acreage of production has increased over the last few years.

The cost of growing and producing sugar in Florida is lower than the rest of the United States. "Florida's cost of producing

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[6] The measure considered by the legislature to tax agricultural interests was termed a fee CS/SB 1350. See Brief of Opponents Holland & Knight, App., Staff of Senate Comm. on Natural Resources, 13th Leg., 2d Sess., Analysis and Economic Impact Statement of Senate Bill CS/SB 1350 at 1 (1994).

[7] See United States Department of Agriculture, Economic Research Service, Sugar and Sweetener, Situation and Outlook Yearbook, The Florida Sugar Industry - Its Evolution and Prospects at 11-28 (1992).

sugarcane translates to 12.37 cents per pound of raw sugar, compared with a national average of 13.34 cents." Id. at 17. "Combined production and processing costs in Florida averaged 18.7 cents a pound in 1990/91 .... The national average was 20.2 cents." Pricing targets are set by the federal government. A fee in Florida should not have a precipitous impact on sugar prices in Florida. Florida produced sugar is a national commodity.[8]

If sugar prices go up based on a fee in Florida, that price change would have an impact nationwide. The disclosure more than meets the standard of fair disclosure. A summary need not describe every possible implication. English, 520 So. 2d at 13; Homestead Valuation, 581 So. 2d at 588.

The ballot language itself accurately portrays "the chief purpose of the amendment." English, 520 So. 2d at 13. In addition to the fact that the industry will make its case and the SOE Initiative will make theirs, the ballot language clearly informs the citizens of its purpose.

B. Ballot language that the sugar industry "polluted the Everglades" is accurate and a necessary disclosure in the ballot summary.

While the opponents have protested the conclusion that the sugar industry has polluted the Everglades, reports are legion that the industry has contributed to the pollution of the Everglades.

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[8] Unlike the phosphate industry, which also sells a commodity worldwide, the sugar industry does not pay a special fee to Florida for its impact on the land and environment that it has used to produce this worldwide commodity. See Fla. Stat. § 211.3103 which imposes a severance tax on phosphates, the proceeds of which are distributed among three funds, the General Revenue Fund and counties.

As stated in a 1992 United States Department of Agriculture Report:

> South Florida's Sugar Industry is confronted with significant environmental challenges concerning water, especially with heightened public concern about maintaining the viability of the Everglades... The most prominent one confronting the sugar industry is the level of phosphorus concentration runoff water from the EAA.
> Federal and State agencies have determined that phosphorus is exported via canals from the EAA and has impaired the ecological integrity of the Loxahatchee National Refuge and is threatening the Everglades National Park.

Sugar and Sweetener, supra note 6 at 23. Indeed, legislative staff reports cited by opponents describe the very phosphorous problem mentioned in the Department of Agriculture report above.[9] Scientific arguments exist as to the extent of the impact of pollution but even the industry has recognized the need to reduce their phosphorous discharge.[10] Through impairment of water flows and phosphorous discharge, the sugar industry has had an undeniable affect on the Everglades. This Initiative simply asks the industry to "help pay" to remedy these impacts.

Opponents suggest that statements stating that the sugar industry polluted the Everglades are rhetoric.[11] In fact, the

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[9] Brief of Opponents Holland & Knight, App., Staff of Senate Comm. on Natural Resources, 13th Leg., 2d Sess., Analysis and Economic Impact Statement of Senate Bill CS/SB 1350 at 2 (1994); Brief of Opponents Holland & Knight, App., Staff of House Comm. on Natural Resources, 13th Leg., 2d Sess., Analysis and Economic Impact Statement of House Bill PCB NR 94-14A at 3-4 (1994).

[10] U.S. v. South Fla. Water Management Dist., No. 88-1886-CIV-Hoeveler (S.D. Fla. Oct. 11, 1988), Statement of Principles for Settlement Agreement.

[11] See People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373, 1376 (Fla. 1991) where some degree of advocacy is held to be allowable.

statement that the industry polluted the Everglades defines the relationship of the source of revenue to the purpose of expenditure - an issue relating to the legal effect of the initiative.[12]

Opponents also assert that the language in section (a) of the Initiative is inappropriate since it was "intended to be placed in the Constitution." Brief of Opponent Florida Farmers for Fairness Committee at 27. That assertion is incorrect. The same type of finding preceded the actual text to be placed in the Constitution was also found in Limited Political Terms, 592 So. 2d at 225. Those findings do not appear in the Constitutional text. Art. VI, § 4(b), Fla. Const.

If SOE and various scientific authorities are totally incorrect and the sugar industry has had no impact on the Everglades, this is a fact that is relevant in another proceeding. The sugar industry can argue, of course, that it has no impact on the Everglades ecosystem, and that a tax on the industry for the purpose of restoration would constitute a violation of due process, equal protection or a taking. Those issues are not before this Court in this proceeding. The many arguments raised by the opponents are appropriate for proceedings in which these constitutional issues and facts can be examined in detail.

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[12] The equal protection clause of the United States Constitution requires certain legislative findings to support the imposition of a tax. Nordlinger v. Hahn, 112 S.Ct. 2326, 2332 (1992). A preamble can describe those findings for the benefit of a reviewing court, so the court may know the purpose of the amendment.

CONCLUSION

This Court should not strike a proposal from the ballot unless the opposing party shows that the amendment is "clearly and conclusively defective." Askew, 421 So. 2d at 154-56.

The SOE ballot initiative proposes to create a trust that has one unified purpose. "The sole purpose of the Trust is to expend funds to recreate the historical ecological functions of the Everglades Ecosystem..." SOE Initiative section 16(a). The Initiative creates one new section of the Constitution and has no effect on any other section. The narrow grant of power is limited to expending funds. There is no authority to regulate. No constraints are created on the powers and functions of other branches or on local governments. The ballot title discloses, fairly and completely, the chief purpose of the initiative and its impact on citizens.

This Initiative sets up a Trust, subject to state and federal law, to help clean up of a vital Florida ecosystem. A source of revenue is identified, the legislature is empowered to appropriate that revenue for designated purposes and the Trust must expend the funds for that purpose. It is that simple. Therefore, it is respectfully submitted that this Court issue an advisory opinion approving the SOE Initiative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, as required by 16.061(2), Florida Statutes, true copies of the foregoing Reply Brief of the citizens' initiative to amend the Florida Constitution, entitled "Save Our Everglades," have been furnished by United States mail to the following this 14th day of April 1994.

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