OA 5-2-94 047

16

FILED
SID J. WHITE
APR 15 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Case No. 83,301

Upon 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 FUND**

REPLY BRIEF OF ASSOCIATED INDUSTRIES OF FLORIDA [redacted] OPPOSING THE SAVE OUR EVERGLADES INITIATIVE

Cecilia F. Renn
Vice President & General Counsel
Associated Industries of Florida
[redacted]
516 N. Adams St.
Tallahassee, FL 32301
(904) 425-5127

Julian Clarkson
Susan L. Turner
HOLLAND & KNIGHT
P.O. Drawer 810
Tallahassee, FL 32302

(904) 224-7000

Attorneys for Associated Industries of Florida [redacted]

IN THE SUPREME COURT OF FLORIDA

Case No. 83,301

Upon 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 FUND**

REPLY BRIEF OF ASSOCIATED INDUSTRIES OF FLORIDA SERVICE CORPORATION OPPOSING THE SAVE OUR EVERGLADES INITIATIVE

Cecilia F. Renn
Vice President & General Counsel
Associated Industries of Florida
Service Corporation
516 N. Adams St.
Tallahassee, FL 32301
(904) 425-5127

Julian Clarkson
Susan L. Turner
HOLLAND & KNIGHT
P.O. Drawer 810
Tallahassee, FL 32302

(904) 224-7000

**Attorneys for Associated Industries
of Florida Service Corporation**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA STATUTES (1993

REPLY ARGUMENT

ASSOCIATED INDUSTRIES OF FLORIDA SERVICE CORPORATION ("AIF") submitted one of eight initial briefs filed by interested parties opposing the "Save Our Everglades" initiative petition (the "Everglades Initiative"), and hereby responds to the arguments raised in the two briefs filed in support of the Everglades Initiative. The sponsor of the Everglades Initiative, Save Our Everglades, Inc. ("SOE"), filed one of the two supportive briefs; Florida Audubon Society ("Audubon") filed the other.[1]

I. AN IMPORTANT CONCESSION BY THE SPONSOR ESTABLISHES A DISPOSITIVE DEFECT IN THE EVERGLADES INITIATIVE BALLOT SUMMARY.

The Court need look no further than page 3 of the sponsor's brief for proof of a "clear and conclusive" defect that invalidates the Everglades Initiative. There, SOE concedes that the funding mechanism for the proposed trust fund, euphemistically denominated a "fee" in both the ballot summary and the full text of the proposed amendment, is actually a tax:

> Florida, as well as the federal government and other states, routinely uses a tax on an industry to assist in restoration or clean up of the environment. The Save Our Everglades initiative uses precisely this mechanism to assist in restoring the Everglades.

[SOE In. Br. 3 (emphasis added).] Again, later:

> [T]he SOE Initiative is an excise tax ... .

---

[1] The eight interested parties filing briefs opposing the Everglades Initiative were as follows: Associated Industries of Florida Service Corporation; Florida Chamber of Commerce; The Florida Sugar Cane League; Flo-Sun, Inc.; Florida Farmers for Fairness Committee; Florida Fruit and Vegetable Association; United States Sugar Corporation; and Sugar Cane Growers Cooperative of Florida, Inc.

[Id. at 18 (emphasis added).][2]

If the Everglades Initiative depends upon a tax, why does neither the proposed amendment nor the ballot summary say so? The voter is entitled to a fair disclosure, not to a euphemistic portrayal that avoids an unpopular -- although accurate -- characterization. Omission of the "T" word renders the Everglades Initiative fatally misleading under the test applied in Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) (requiring "fair notice" to voters).[3]

The same failure to disclose the real nature of a proposed constitutional amendment was fatal in In Re: Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination, 19 Fla. L. Weekly S109 (Fla. March 3, 1994). In Discrimination, the Court soundly rejected a proposal containing an ambiguity that "will in all probability confuse the voters" by failing to include details necessary to make the proposed amendment "accurate and informative." 19 Fla. L. Weekly at S110 (quoting the latter phrase from Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992)).

---

[2] Ironically, Audubon assiduously avoids the "T" word in favor of "fee," predicting that "Others [opponents] will call the fees a 'tax' trying to gain negative advantage." [Audubon In. Br. 21.]

[3] Audubon predicts that "the voters will know there will be some impact on the cost of sugar because of the imposition of a fee on sugar production ... ." [Audubon In. Br. 16.] This subjective prediction is only that and nothing more. Speculation could have been avoided if the Everglades Initiative and ballot summary had specifically advised the voters that a tax was being imposed on a very popular consumer product.

Like the Discrimination proposal, the Everglades Initiative omits details necessary to inform and to avoid confusion: not just the "T" word, but also the extensive powers delegated to the citizen Trustees who would govern the proposed trust, control the enormous revenues generated by the tax, and manage the clean-up and restoration processes. The Everglades Initiative further misleads by saying that the industry will "help" pay, leaving the voter to guess who else will pay, or to assume that other funds are already in place and that the public will have no further economic burden to bear in the clean-up.

SOE argues that the ballot summary is legally sufficient because it mentions the trust, the source of funding, the amount and duration of the fee imposed, and that the Trustees will be citizens [SOE In. Br. 22]. SOE, like the ballot summary itself, fails to mention the facts that make up the majority of the proposed amendment: the extensive powers granted to the citizen Trustees. Those powers are the real heart of the proposal, and the voter cannot reasonably be expected to make an informed decision if the ballot summary is completely silent about what the citizen Trustees can do, especially where the scope of their powers is so broad and will have such an enormous impact on the rights of the public and the current laws of Florida. Askew, 421 So. 2d at 155.

Most troubling, the Everglades Initiative neglects to advise voters that its conclusory assignment of liability to the sugarcane industry is no more than a subjective, partisan position. SOE in its brief makes no apology for this, merely repeating it as the factual basis for its arguments [SOE In. Br. 6]. Audubon draws

upon literary opinions on the causes and cures of Everglades pollution [Audubon In. Br. 6-8], merely illustrating that the assertion lacks legal foundation. These ambiguities and omissions are clear and conclusive defects that must keep the Everglades Initiative off the ballot.[4]

II. THE SPONSOR'S MISPLACED RELIANCE ON LEGISLATIVELY-CREATED TRUST FUNDS HELPS DEMONSTRATE VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

SOE claims that the tax, trust fund, and mandatory appropriation proposed in the Everglades Initiative create a valid mechanism "and has met the legislative single-subject test," [SOE In. Br. 23 (emphasis added)], because a similar method was used for the Game and Fresh Water Fish Commission established in article IV, section 9, Florida Constitution [Id. at 14-15],[5] and for various other trust funds established by the state or federal legislatures. [Id. at 23-25.] Audubon relies on the same comparison. [Audubon In. Br. 13, 20.]

The key phrase is "legislative single-subject test." Legislation must deal with one subject and matter "properly" connected therewith. Art. III, § 6, Fla. Const. An initiative

---

[4] Audubon suggests as a fall-back position that the notice provisions of section 101.161 are unconstitutional because they are not expressly stated in the constitution. [Audubon In. Br. 18.] There is a difference between "constitutionally required" notice and "constitutional" notice requirements; the legislature can certainly add to the former so long as it does not stray from the latter -- otherwise nearly all of the Florida Statutes would be invalid.

[5] SOE fails to acknowledge that the Game and Fresh Water Fish Commission was established by legislative initiative, not by citizen initiative. Sylvester v. Tindall, 145 Fla. 663, 18 So. 2d 892, 898 (1944).

must embrace one subject and matter "directly" connected therewith. Art. XI, § 3, Fla. Const. The two requirements are very different, and compliance with the more lenient standard for legislation falls far short of the more strict standard for popular initiatives. See Fine v. Firestone, 448 So. 2d 984, 988-89 (Fla. 1984). Therefore, SOE's reliance on legislatively-created trust funds furnishes no support for the proposed Everglades Trust Fund. To the contrary, it illustrates the impropriety of utilizing the constitutional initiative process to establish another such fund. In addition to its executive and judicial functions, it impinges on the legislative function and thus violates the single-subject requirement of article XI, section 3.

III. THE EVERGLADES INITIATIVE FAILS THE FUNCTIONAL AND LOGROLLING TESTS OF THE SINGLE-SUBJECT REQUIREMENT.

SOE concedes that impact on other sections of the Florida Constitution is a factor to be considered in single-subject analysis [SOE In. Br. 10], but summarily concludes that the Everglades Initiative does not "substantially impact other sections of the [c]onstitution," or that such impact is "minimal." [SOE In. Br. 12.] Anticipating one of the opponents' arguments, SOE asserts that a pertinent question is the proposal's "possible impact on the separation of powers section of the [c]onstitution," which SOE concedes is "a strict standard" compared to other states and the federal standard [Id. at 11]. SOE then characterizes all of the functions of the citizen Trustees as executive, and thus consistent with the separation of powers doctrine.

Even if the functions of the citizen Trustees are purely executive, that is not the issue. The issue is whether the proposed amendment itself affects more than one function of government, and an appropriate factor is impact on other sections of the Florida Constitution. The opponents have identified no fewer than seven functions of government that the Everglades Initiative performs:

1. the legislative function of selecting a funding method (the levy of a tax) and designating the recipient of collected funds;

2. the legislative function of selecting the detailed implementing method for the proposed amendment;

3. the legislative function of designating the administrative heads of executive bodies;

4. the executive function of regulating the state's land and water resources;

5. the executive rulemaking and problem-resolution functions;

6. the judicial function of determining liability and damages for pollution; and

7. the judicial function of determining boundary disputes concerning real property within the so-called "Everglades Ecosystem."

In addition, the opponents have identified at least 21 sections of the Florida Constitution that the Everglades Initiative affects:

1. article I, section 2 (equal protection);

2. article I, section 6 (collective bargaining);

3. article I, section 10 (bill of attainder);

4. article I, section 21 (access to courts);

5. article II, section 3 (separation of powers);

6. article II, section 5(a) (dual offices);

7. article II, section 7 (executive function of environmental protection);

8. article III, section 1 (legislative powers);

9. article III, section 13 (four-year limit on terms for holders of public office);

10. article III, section 14 (civil service);

11. article III, section 19 (budgeting, planning, appropriations);

12. article III, section 19(f) (creation of trust funds);

13. article IV, section 1 (Governor's powers and duties);

14. article IV, section 6 (executive structure of Florida);

15. article IV, section 9 (Game and Fresh Water Fish Commission);

16. article V (judicial review);

17. article VII, section 1(a) (legislative power to tax);

18. article VII, section 1(c) (legislative power to appropriate);

19. article VII, section 14 (state bonds for pollution control and water facilities);

20. article X, section 11 (sovereignty lands); and

21. article XI, section 3 (power to amend).

The Everglades Initiative is thus even worse than the proposed amendment at issue in Discrimination, where the Court mentioned only two other provisions of the constitution that would have been affected by the proposed amendment. 19 Fla. L. Weekly at S110. This impact on other constitutional sections is an appropriate factor to consider, and in view of the unprecedented breadth of the Everglades Initiative, this factor clearly requires invalidation.

SOE argues at some length that the Everglades Initiative does not impinge on the legislative function because the

legislature "is free to review the priorities within the designated purpose of the trust and make its decisions in compliance with its own priorities," and "[n]o specific percentages of funds are directed to go to any particular purpose. ... [T]he legislature is free to appropriate within those purposes." [SOE In. Br. 15, 19.] If by this SOE means to assert that the proposed amendment retains for the legislature the discretion as to the details of implementing Everglades clean-up and spending the money, SOE contradicts the plain language of the proposal itself.

The Everglades Initiative expressly mandates deposit of all revenues generated by the "fee" directly into the Trust, and mandates appropriation of all such revenues "to the Trustees to be expended solely for the purpose of the Trust." [Everglades Initiative, proposed article X, section 16(c).] No discretion whatever is left to the legislature; the proposed amendment performs that legislative function in addition to its executive and judicial functions. That is a fatal flaw. Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984).

Finally, SOE attempts to evade the logrolling issue by relying on the broad generality that the entire proposal relates to a funding source to clean up the Everglades [SOE In. Br. 9]. Nearly all initiatives could make the same claim; it is ineffective. Evans, 457 So. 2d at 1353.

A vote for the Everglades Initiative is in reality at least three votes: one for cleaning up the Everglades, one for funding it with a "fee" on raw sugar, and one for doing it in exactly the method prescribed by the sponsor (which itself involves

a number of disparate, broad, and complex provisions). To vote for one, the voter must vote for all. This is logrolling, and it is impermissible. Discrimination, 19 Fla. L. Weekly at S110.

CONCLUSION

Because the Everglades Initiative affects more than one function of government, affects multiple sections of the Florida Constitution, and presents the voter with competing policy choices, it violates the single-subject requirement. Because the ballot summary for the Everglades Initiative omits critical facts such as that the funding source is a tax, it is misleading and violates the applicable requirements of Florida law. For any or all of these reasons, the Court should prohibit placement of the Everglades Initiative on the ballot.

HOLLAND & KNIGHT

Julian Clarkson (FBN 013930)
Susan L. Turner (FBN 772097)
P.O. Drawer 810
Tallahassee, FL 32302
(904) 224-7000

Cecilia F. Renn (FBN 717398)
Vice President & General Counsel
Associated Industries of Florida
Service Corporation
516 N. Adams St.
Tallahassee, FL 32301
(904) 425-5127

Attorneys for AIF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished to the following by United States mail, this 15th day of April, 1994.

Attorney

The Honorable Robert A. Butterworth
Attorney General
The Capitol
Tallahassee, FL 32301

Jon L. Mills
P.O. Box 2099
Gainesville, FL 32602
Counsel for Save Our Everglades, Inc.

Fletcher N. Baldwin, Jr.
University of Florida
College of Law
Holland Hall
Gainesville, FL 32611
Counsel for Save Our Everglades, Inc.

Gary L. Printy
Douglass & Powell
211 E. Call St.
Tallahassee, FL 32301-7607
Counsel for Florida Audubon Society

Kenneth R. Hart
Roy Stan Peeler
Macfarlane, Ausley, Ferguson
& McMullen
P.O. Box 391
Tallahassee, FL 32302-0391
Counsel for Florida Chamber
of Commerce

Terry P. Cole
Oertel, Hoffman, Fernandez
& Cole, P.A.
P.O. Box 6507
Tallahassee, FL 32314-6507
Counsel for Florida Fruit &
Vegetable Growers' Association

Joseph W. Little
3731 N.W. 13th Place
Gainesville, FL 32605
Counsel for The Florida Sugar
Cane League, Inc.

Judith S. Kavanaugh
Earl, Blank, Kavanaugh & Stotts, P.A.
1800 Second Street, Suite 888
Sarasota, FL 34236
Counsel for The Florida Sugar
Cane League, Inc.

Howell L. Ferguson
Landers & Parsons
P.O. Box 271
Tallahassee, FL 32302-0271
Counsel for Flo-Sun Inc.

Bruce S. Rogow
Beverly A. Pohl
350 S.E. Second St., Ste. 200
Ft. Lauderdale, FL 33301-1965
Counsel for Flo-Sun Inc.

William B. Killian
Steel, Hector & Davis
200 S. Biscayne Blvd., Ste. 4000
Miami, FL 33131-2310
Counsel for Flo-Sun Inc.

Arthur J. England, Jr.
Christopher L. Kurzner
Greenberg, Traurig, Hoffman, Lipoff,
Rosen & Quentel
1221 Brickell Ave.
Miami, FL 33131
Counsel for Florida Farmers for
Fairness Committee

Barry S. Richard
Greenberg, Traurig, Hoffman, Lipoff,
Rosen & Quentel
101 E. College Ave.
Tallahassee, FL 32301
Counsel for Florida Farmers for
Fairness Committee

Cass D. Vickers
Robert S. Goldman
Messer, Vickers, Caparello, Madsen,
Lewis, Goldman & Metz
P.O. Box 1876
Tallahassee, FL 32302-1876
Counsel for U.S. Sugar Corporation

Carol Sullivan
Robert H. Buker, Jr.
U.S. Sugar Corporation
P.O. Box 1207
Clewiston, FL 33440-1207

Robert P. Smith, Jr.
Wade L. Hopping
Hopping, Boyd, Green & Sams
P.O. Box 6526
Tallahassee, FL 32302
Counsel for Sugar Cane Growers
Cooperative of Florida

TAL-42123