

IN THE
SUPREME COURT
OF FLORIDA

NO. 83,301

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

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

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ARGUMENT

THE BRIEFS OF THE SAVE OUR EVERGLADES COMMITTEE AND THE FLORIDA AUDUBON SOCIETY CONFIRM "SAVE OUR EVERGLADES" VIOLATES THE SINGLE SUBJECT, TITLE AND FAIR SUMMARY REQUIREMENTS FOR BALLOT PLACEMENT

The Save Our Everglades Committee and the Florida Audubon Society have filed Briefs supporting the proposed Save Our Everglades constitutional amendment. Both Briefs use the Game and Fresh Water Fish Commission constitutional provision as the paradigm for Save Our Everglades, and both contend that Save Our Everglades meets the single-subject, summary, and title tests imposed by Florida law.

The only deviation between the proponents' Briefs is Audubon's argument that "others will call the fees a 'tax' trying to gain negative advantage," and Save Our Everglades' admission that the fee on sugar is a tax. Compare Audubon Brief, p. 21 with Save Our Everglades Brief pp. 18-19: "[T]he SOE Initiative is an excise tax...." We accept the Save Our Everglades characterization -- the fee is a tax. That fact is now undisputed. The proposed amendment thus usurps the legislative power to tax.

Also now undisputed is the fact that the Trustees of the Save Our Everglades Trust are to perform executive branch functions:

In the SOE Initiative the functions of the Trustees in executing the purposes of the Everglades restoration are executive rather than legislative.

Save Our Everglades Brief, p. 11 (emphasis in original).

Those concessions condemn the proposed amendment. It substantially affects legislative and executive functions, and fails to inform voters of those effects and changes in organic law. Fine v. Firestone, 448 So. 2d 984 (Fla. 1984).

Seeking safer harbor, the Save Our Everglades Brief likens its proposal to the Game and Fresh Water Fish Commission:

The expenditure of funds is made only after the legislature appropriates funds, just as the legislature does in the analogous situation of the Game and Fresh Water Fish Commission. The provisions designating that the legislature appropriate funds is key since appropriation is a legislative function.

Save Our Everglades Brief, p. 11 (footnote omitted).

Having conceded its executive and legislative (taxing power) roles, Save Our Everglades must also concede its failure to meet the single-subject test if their Game and Fresh Water Fish Commission analogy fails.

A. THE FAILURE OF THE FISH AND FRESH WATER GAME COMMISSION ANALOGY

The Game and Fresh Water Fish Commission analogy is flawed. The proponents fail to recognize the constitutional derivation of the Commission. The Game and Fresh Water Fish Commission, in its current form in article IV, section 9, was created by the adoption in 1974 of Committee Substitute for House Joint Resolution No. 637 (1973). An amendment proposed by a legislative joint resolution is not limited by a single-subject

rule. The SAVE OUR EVERGLADES initiative is so limited. Compare article XI, section 1 to article XI, section 3; see Fine, 448 So. 2d at 988. Thus, the Game and Fish Commission amendment does not define the constitutional contours for the SAVE OUR EVERGLADES single-subject initiative.¹

A fair comparison with the Game and Fish Commission is dangerous to the SAVE OUR EVERGLADES proponents. The scope of the Game and Fish Commission amendment and the Commission's extensive powers show that any initiative modeled after the Commission could not meet the single-subject rule. And yet, in several important instances, the scope of the SAVE OUR EVERGLADES proposal and the powers sought to be bestowed on the Trustees are more expansive than the reach of the Game and Fish Commission amendment.

Most notably the proposed amendment imposes a specific tax of one cent per pound on raw sugar, while article IV, section 9, does not impose a tax or a fee. Article IV, section 9 merely provides that "all license fees...shall be prescribed by specific statute." The Game and Fish Commission article does not usurp, but explicitly defers to the Legislature's authority to tax and raise revenue under article VII, section 1(a) and 1(d). The suggestion that the proposed amendment merely "identifies a funding source and describes a purpose for expenditure" (Save Our Everglades Brief, p.

¹ The Commission's source of power, article IV, section 9, clearly affects multiple governmental functions. The Commission's constitutional authority to "exercise the regulatory and executive powers of the state" prohibits the Legislature "from adopting statutes in conflict with such rules." Airboat Assoc. of Florida v. Florida Game and Fresh Water Fish Commission, 498 So. 2d 629, 631 (Fla. 3rd DCA 1986).

6) is disingenuous. SAVE OUR EVERGLADES, in contrast to article IV, section 9, does not identify a funding source for legislative enactment; it imposes a tax.

While the Commission is authorized to exercise certain regulatory and executive powers, its "exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing, shall be as provided by law." Article IV, section 9, Fla. Const. The SAVE OUR EVERGLADES Trustees have no such limitation. Indeed, the proposed amendment's silence on this point signals that the Trustees are not limited by legislative restrictions, nor are they governed by the new constitutional provisions dealing with budgeting, planning, and appropriations in article III, section 19, which were proposed by the Taxation and Budget Reform Commission in 1992. Under the proposed amendment, the Trustees are not bound to participate in submitting an "agency legislative budget request," an agency "planning document consistent with the state planning document," or a "prioritized listing of planned expenditures for review." Article III, section 19(a) and (h). Nor do the Trustees appear to be governed by the revenue shortfall procedures of article IV, section 13. These undisclosed collateral effects of the Save Our Everglades initiative encroach upon the Legislature's appropriation powers.

They also cast grave doubt on the Save Our Everglades Brief's suggestion that the Legislature would appropriate to the Trust, just as it does for the Commission. Id. at 3, 7, 11-12, 14-15, and that the Legislature would have "discretion" and be "free

to appropriate" within the purpose of the Trust. Id. at 19. Such discretion could destroy the Trust's function. It is disingenuous for the Save Our Everglades Brief to suggest a diminution of the Trust's power in order to argue single-subject compliance in this Court, while proposing an amendment which is premised upon wresting control of the Everglades from the legislative branch. Compare, Florida Dept. of Natural Resources v. Florida Game and Fresh Water Fish Comm'n, 342 So. 2d 495, 497 (Fla. 1977):

[W]hile the legislature may pass laws affecting the Commission's exercise of its executive budgetary authority, it may not pass laws depriving the Commission of such authority.

SAVE OUR EVERGLADES strips the legislature of budgeting authority for the Trust funds. Suggesting that the Legislature can achieve budgeting authority via discretionary appropriations for the Trust's purpose is contrary to the text of the amendment. Making that argument here to save the proposed amendment sacrifices the amendment's raison d'etre on the altar of single-subject compliance expediency.

**B. THE FAILURE TO MEET THE
BALLOT TITLE AND SUMMARY TESTS**

The Save Our Everglades Brief acknowledges the Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) admonition that "the ballot be fair and advise the voter sufficiently to enable him to intelligently cast his ballot." See also Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective

Offices, 592 So. 2d 225, 228 (Fla. 1991).

The Briefs of both proponents confirm the proposed amendment's failure to meet those tests. Save Our Everglades seeks to distinguish Fine v. Firestone, 487 So. 2d 984 (Fla. 1984) and other cases saying: "In each of those cases, the impacts on multiple functions were substantial, diverse and not easily understood by voters." Save Our Everglades Brief, p. 14. They continue: "The initiative in Fine affected state and local governments, as well as government utilities like electrical utilities and water and sewer." Id. at 16. The Flo-Sun Brief, p. 23, addressed the proposed amendment's silent intrusion into federal, Indian, State, regional, and local governmental units with jurisdiction over aspects of the Everglades. Attached as Exhibit A is the document promulgated pursuant to section 373.453(2)(b), Florida Statutes, which lists those 100 governmental units. A glance at that list, and the proposed amendment's sub silentio effect on them, exemplifies the "not easily understood" doctrine's application to this case.

The proposed amendment does not write on a clean slate; it must give fair notice to voters of its effect on federal, state, local, and Indian governments and statutorily created districts. By failing to do so it offends the principle which the Save Our Everglades Committee recognizes, but refuses to address.

Other admissions in the proponents' Briefs buttress the unfair, misleading ballot title and summary argument.

Flo-Sun said the title -- SAVE OUR EVERGLADES -- was a

"dishonest promise." Flo-Sun Brief, p. 8. The Save Our Everglades Brief, at page 6, supports our complaint: "The single subject and purpose of the SOE Initiative is to create a trust fund to assist in cleaning up the Everglades." The amendment title is hyperbolic; the Save Our Everglades Brief's softer rhetoric reflects the proponents' willingness to distort the title to mislead voters, while sounding temperate to meet the single subject inquiry.

The "fee" or "tax" dispute provides a similar insight. The Save Our Everglades Brief was candid: the "fee" is a tax. The Brief says so, repeatedly: "a tax contribution to clean up;" "an excise tax on an industry;" "excise tax on production of sugar;" "similar excise taxes." Save Our Everglades Brief pp. 19, 23, 24. The proposed amendment speaks only, and repeatedly, of a fee. See Summary: "a fee on raw sugar;" subsection (a) "a fee on raw sugar;" subsection (c) "a fee on raw sugar."

The proposed amendment's misleading title and summary, and the Save Our Everglades proponents' ability to know the difference, is apparent from their Brief's cautious approach referring to the sugar industry's "impact on the environment of the Everglades." Save Our Everglades Brief, p. 6. The amendment summary is neither cautious nor fair: "Directs the sugarcane industry, which polluted the Everglades...."

The Audubon Brief confirms the proposed amendment's misleading nature. Quoting the April, 1994 National Geographic article "The Everglades: Dying for Help," Audubon admits the cost to the Everglades of 110 years of "building canals, levees, and

water impoundments to satisfy human needs" (Audubon Brief, p. 6) and introduces the reader to an evenhanded summary of the issue.

[P]oliticians have pushed the transformation of the Everglades into high gear. They instructed the Army Corps of Engineers to dredge, dike, and divert to provide flood control, create and irrigate farmland, dry out land for new homes and businesses, and supply freshwater to the millions of newcomers to South Florida.

* * *

"South Florida was not meant to be lived in by so many millions of people" says Nathaniel Reed, a Hobe Sound businessman and environmentalist...."Their demands are straining the entire ecosystem."

National Geographic, p. 18.

The proposed amendment title and summary play on exaggeration and emotion instead of accuracy and fairness. Asking for inclusion in a constitution imposes a duty of honesty. The Court has recognized the importance of the section 101.161(1), Florida Statutes, requirement of a fair title and summary. SAVE OUR EVERGLADES carries its emotive effort beyond the permitted limits.

C. STANDARD OF REVIEW

The proponents assert that challengers must demonstrate an initiative is "clearly and conclusively defective." Save Our Everglades Brief, p.1. The challengers meet this standard, although it is not the standard under the article IV, section 10

advisory opinion process. The clearly and conclusively defective standard is based upon pre-1986 cases, prior to the advent of the advisory opinion process. Then challengers utilized mandamus to remove an initiative that had already received the necessary signatures to be placed upon the ballot. E.g., Weber v. Smathers, 338 So. 2d 819, 822 (Fla. 1976); Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337, 339 (Fla. 1978).²

While the Court has not explicitly articulated the burden of proof and standard of review in an advisory opinion proceeding, the burden has apparently been placed on proponents who are seeking ballot position and a finding of compliance with the gatekeeper statute and amendment article. In Advisory Opinion to the Attorney General--Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993), no briefs were filed in opposition to the petition. Id. n.1. But even without a challenger, the Court thoroughly analyzed the proposed amendment to determine if "the initiative petition and the proposed ballot summary [met] the legal requirements of Article XI, Section 3, of the Florida Constitution and Section 101.161(1)." Id. at 999.

The purpose of section 101.161 is "to assure that the electorate is advised of the true meaning and ramifications, of an amendment.... Although we are wary of interfering with the public's right to vote on an initiative proposal...we are

² The only post-1986 case referring to the clearly and conclusively defective standard is Florida League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992), involving a mandamus challenge after an advisory opinion validating the proposed amendment.

equally cautious of approving the validity of a ballot summary that is not clearly understandable.

In re: Advisory Opinion to the Attorney General--Restricts Laws Related to "Discrimination, 19 Fla. L. Weekly S109-110 (citation omitted).

The advisory opinion preview process places the burden where it belongs -- on a proponent seeking an organic law change to do so only via an amendment which accurately informs the voters. SAVE OUR EVERGLADES fails for reasons similar to those which forced Restricts Laws Related to Discrimination from the ballot. With the bracketed additions, the Restricts Laws language may be superimposed on this case:

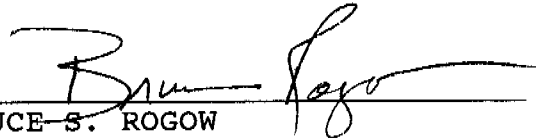
Both the summary and the text of the amendment omit any mention of the myriad of laws, rules and regulations that may be affected...[by the Save Our Everglades Trust]. The summary also fails to state that the proposed amendment would curtail the authority of [federal, state, local, statutory, and Indian] government entities.

Id.

CONCLUSION

SAVE OUR EVERGLADES should share the fate of Restricts Laws Against Discrimination. It should be stricken from the ballot.

Respectfully submitted,



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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a correct copy of the foregoing Flo-Sun Inc. Reply Brief has been furnished to (1) ROBERT BUTTERWORTH, Attorney General, The Capitol, Tallahassee, Florida 32399-1050, (2) JON L. MILLS, P.O. Box 2099, Gainesville, FL 32602 (SOE); (3) FLETCHER BALDWIN, JR., Univ. of Fla. College of Law, Holland Hall, Gainesville, FL 32611 (SOE); (4) KENNETH HART, Roy, Stan, Peeler etc., P.O. Box 391, Tallahassee, FL 32302-0391 (Fla.

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CLBarton

for BRUCE ROGOW

Everglades SWIM Plan - Supporting Information Document

Table 1. Governmental Units.

Section 373.453(2)(b), F.S., requires that the SWIM Plan contain an "identification of all governmental units that have jurisdiction over the water body and its drainage basin within the approved surface water improvement and management plan area, including local, regional, state, and federal units." This chart lists those governmental units with jurisdiction over Everglades National Park, the Water Conservation Areas, and their drainage basins.

A. Federal

- Army Corps of Engineers
- Department of Agriculture
 - Soil Conservation Service
- Department of Interior
 - Fish and Wildlife Service
 - National Park Service
 - U.S. Geological Survey
 - Marine Fisheries Service
 - Bureau of Indian Affairs
- Environmental Protection Agency

B. Indian

- Miccosukee Indian Nation
- Seminole Indian Nation

C. State

- Department of Agricultural and Consumer Services
 - Soil and Water Conservation Services
- Department of Community Affairs
- Department of Environmental Regulation
- Department of Health and Rehabilitative Services
- Department of Natural Resources
- Department of Transportation
- Florida Game and Fresh Water Fish Commission

D. Regional

- South Florida Water Management District
- South Florida Regional Planning Council
- South West Florida Regional Planning Council
- Treasure Coast Regional Planning Council
- EAA Everglades Protection District

E. Local

1. County

- Broward County
- Collier County
- Dade County
- Glades County
- Hendry County
- Monroe County
- Martin County
- Palm Beach County

2. Municipal

- Broward County
 - Cooper City
 - Coral Springs
 - Lauderhill
 - Margate
 - Miramar
 - North Lauderdale
 - Parkland
 - Pembroke Pines
 - Plantation
 - Sunrise
 - Tamarac
- Dade County
 - Florida City
 - Homestead
 - Miami Springs
 - Sweetwater
- Hendry County
 - Clewiston

E. Local (Continued)

2. Municipal (Continued)

- Palm Beach County
 - Belle Glade
 - Boca Raton
 - Boynton Beach
 - Delray Beach
 - Hypoluxo
 - Lake Worth
 - Lantana
 - Royal Palm Beach
 - West Palm Beach

3. Drainage Districts (Ch. 190 and 298 Districts)

- Broward County
 - Central Broward Drainage District
 - Coral Springs Improvement District
 - Indian Trace Improvement District
 - North Lauderdale Water Control District
 - North Springs Improvement District
 - Old Plantation Water Control District
 - Plantation Acres Improvement District
 - South Broward Drainage District
 - Sunshine Drainage District
 - West Lauderdale Water Control District
 - West Parkland Water Control District
- Glades County
 - Disston Island Conservancy District
 - Flaghole Drainage District
 - Newhall Drainage District
 - Sugarland Drainage District
- Hendry County
 - Bolles Drainage District
 - Clewiston Drainage District
 - Hendry-Hilliard Drainage District
 - Ritta Drainage District
 - South Florida Conservancy District
 - Sugarland Drainage District
- Palm Beach County
 - Acme Improvement District
 - Bolles Land Water Control District
 - East Beach Water Control District
 - East Shore Water Control District
 - Gladeview Drainage District
 - Highland Glades Drainage District
 - Islands Flood Control District
 - Indian Trail Water Control District
 - Lake Worth Drainage District
 - North Palm Beach Heights Water Control District
 - Northern Palm Beach County Water Control District
 - Pahokee Water Control District
 - Pal Mar Water Control District
 - Pelican Lake Water Control District
 - Pine Tree Water Control District
 - Ritta Drainage District
 - Seminole Water Control District
 - Shawano Drainage District
 - South Florida Conservancy District
 - South Shore Drainage District