OA 5-2-94

21

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

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 83,301

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

REPLY BRIEF OF THE FLORIDA SUGAR CANE LEAGUE, INC. 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

Attorneys for The Florida Sugar Cane League, Inc.

Joseph W. Little, Esq.
Florida Bar #196749
3731 N.W. 13th Place
Gainesville, Florida 32605
(904) 392-2211

Judith S. Kavanaugh, Esq.
Florida Bar #219401
Earl, Blank, Kavanaugh & Stotts, P.A.
1800 Second Street, Suite 888
Sarasota, Florida 34236
(813) 366-1180

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

The Florida Sugar Cane League, Inc. ("FSCL") submits this Reply Brief in reply to the Initial Brief of Florida Audubon Society in Support of Save Our Everglades Trust Initiative (hereinafter referred to as "Audubon"), and the Initial Brief of Save Our Everglades Committee in Support of Save Our Everglades Trust Initiative (hereinafter referred to as the "S.O.E. Committee").

A. BURDEN OF PROOF.

Both Audubon and the S.O.E. Committee assert that the proposed amendment comes to this Court with something like a presumption of correctness [S.O.E. Committee, p. 5; Audubon, p. 12]. None of the authorities relied upon addressed this issue in the context of the new Florida constitutional "pretest" procedure that brings the S.O.E. petition before this Court in this matter. Every previous Florida case involved an issue of whether a proposed amendment already approved for ballot position, either by legislative resolution or by full compliance with the complete petition gathering process as it then existed, should be removed from the ballot.

As this Court knows, the very purpose of the present procedure is to permit proponents to pretest ballot language prior to expending the time and effort of obtaining the number of petitions required to place the measure on the ballot. If the pretest fails, proponents may make their petition right and then finish the process. In short, in this procedure there is no issue of whether

or not to remove an already approved measure from the ballot. Accordingly, to the extent that any legal burden is to be imposed in these proceedings, it should be on proponents for three separate reasons:

1) The petition is the product of no legislative, administrative or judicial proceeding.

2) The purpose of this proceeding is to provide proponents a pretest opportunity to get the measure right.

3) To approve a questionable measure places the state in the position of vouching for its legal and constitutional sufficiency in the remaining major petition gathering effort.

In sum, the questions raised herein are all questions of law and not questions of fact. This requires this Court to render de novo review of the legal sufficiency of all the issues raised pertaining to the title and summary of the S.O.E. Committee proposal, and whether or not it violates the single-subject requirement. As stated in a similar context by the Supreme Court of Missouri in Missourians to Protest Init. Proc. v. Blunt, 799 S.W.2d 824 (Mo. 1990)(en banc), "When a proposal deals with matters that were previously the subject of an article other than the one being amended, the Court must scrutinize the proposal to see if all matters included relate to a readily identifiable and reasonably narrow central purpose." Id. at 831 (emphasis added). The S.O.E. proposal cannot withstand de novo scrutiny by this Court; nor, indeed, could it survive the requirement that opponents show it to

be "clearly and conclusively defective," if that should be the test.

B. THE S.O.E. TITLE IS DEFECTIVE.

Neither Audubon nor the S.O.E. Committee have addressed the sufficiency of the S.O.E. title. As clearly and conclusively demonstrated in the FSCL's Initial Brief [pp. 43-46], the S.O.E. title is defective in that it is nothing but a blatant partisan political slogan ("Save Our Everglades") with no capacity to inform the voter of the structural effect of the measure on the Constitution and with plenary capacity to propagandize and mislead. For the reasons stated before in its Initial Brief, the FSCL respectfully submits that the S.O.E. petition should be disapproved on this ground alone. The initiative process is too central to the heart of democratic governance to permit it to become polluted by the clever use of appealing campaign slogans as a device to either ignore or divert attention from vital constitutional substance or to mislead the voters.

C. THE S.O.E. BALLOT SUMMARY IS DEFECTIVE.

Although both Audubon [pp. 15-20] and the S.O.E. Committee [pp. 21-23] give brief and conclusory treatment to the ballot summary requirement, neither deals with the corrosive campaign sloganeering issue, and neither identifies the crucial "chief purpose" of the S.O.E. measure in constitutional terms.

For reasons stated in its initial brief [pp. 42-43] and part B. supra, FSCL respectfully submits that the blatant political sloganeering in the ballot summary renders it invalid, whatever the

legal standard. In addition, Audubon [pp. 15-19] never states what it deems the chief purpose of the measure to be, but contents itself with stating that "all possible effects" need not be revealed [p. 18], that the voters can rely upon the media to inform them [p. 17], and that initiatives are important [p. 19]. This simply fails to address the constitutional issues extensively elaborated in FSCL's Initial Brief, and ignores the fact that the restrictions placed by the people on the initiative process in the Constitution must be complied with by those who seek to use the process. Proponents have no superior rights to opponents or the general populace in the proper application of the Constitution.

The S.O.E. Committee apparently intends to identify a "chief purpose" with this statement: "The S.O.E. Committee ballot summary states that a trust is created to restore the Everglades, describes the source of funding, the amount of the fee, the duration of the fee, and states that the trustees will be citizens." This statement necessarily reveals a fundamental pervasive flaw in the S.O.E. amendment; the proposed change to the Constitution simply attempts to do much more than the people have permitted to be done through an art. XI, § 3, initiative amendment. In short, "to restore the Everglades" is an operational project pertaining to the physical landscape of the State of Florida. "Restoring the Everglades," of itself, is not a change in the constitutional structure of the government of Florida, nor does obtaining the desired restoration of the Everglades require a change in the Florida Constitution. As FSCL noted in its Initial Brief, the

changes to the Florida Constitution that would be rendered by the S.O.E. measure are manifold, directly and substantially affecting articles III, IV, V, VII, I and perhaps others. If the chief purpose were to create a trust fund, the summary should so state; if it were to levy a tax, the summary should so state; if it were to create a governing board, the summary should so state; if it were to give the board legislative powers, the summary should so state; and so on. In fact, S.O.E. attempts to do all these things and, as a consequence, has no identifiable "chief purpose" as required by an art. XI, § 3, single-subject amendment. By attempting to do more than a citizens' initiative permits to be done, the S.O.E. proponents have rendered themselves unable to identify a constitutionally permissible chief purpose and the measure fails.

Because of its blatant political sloganeering and because it fails to reveal the chief purpose of the measure in constitutionally permissible terms, the S.O.E. proposal should be disapproved.

D. THE S.O.E. AMENDMENT VIOLATES THE SINGLE-SUBJECT TEST.

Both Audubon [pp. 11-15] and the S.O.E. Committee [pp. 14] make conclusory statements that the S.O.E. measure does not unconstitutionally infringe upon multiple functions of government. But neither makes any attempt to describe how S.O.E. directly and importantly restricts powers of the Florida Legislature (article III), the Executive (article IV) and the Judiciary (article V) as the FSCL Initial Brief demonstrates in detail that it does. In its

Initial Brief, the FSCL clearly and conclusively demonstrates that the S.O.E. measure violates the single-subject requirement in three different ways -- 1) substantially affects more than one distinct function of the existing government structure [pp. 26-33]; 2) fails to identify the articles and sections substantially affected [pp. 33-34]; and 3) leaves to this Court the job to determine which articles and sections are substantially affected [pp. 34-35]. Those demonstrations will not be repeated here.

Both Audubon [p. 13] and the S.O.E. Committee [p. 7] allude to the Game and Fresh Water Fish Commission ("GFWFC") found in Fla. Const., art. IV, § 9, as a model to sustain the S.O.E. petition. Although it is true that the GFWFC exercises powers of both an executive and legislative character (but not judicial), and also administers a trust fund (which is subject to legislative oversight), even brief scrutiny reveals that its powers do not affect multiple portions of the Constitution to the same extent as the S.O.E. measure. This, however, is beside the point and wholly irrelevant to the issues before the Court. The GFWFC measure could never be initially added to the Florida Constitution by the currently existing initiative process authorized under art. XI, § 3. The GFWFC measure was proposed by the Legislature in 1941 (Senate Joint Resolution No. 28 ("SJR #28")) and approved by the people in the 1942 general election. See **Exhibit 1.** At the time SJR #28 was adopted by the Legislature and approved by the people, the Constitution imposed no single-subject requirement on the

Legislature in proposing constitutional amendments. At that time in 1942, art. XVII, § 1, 1885 Const. provided:

> "Section 1: - Either branch of the Legislature, at a regular session thereof, may propose amendments to this constitution; and if the same be agreed to by three-fifths of all the members elected to each House, such proposed amendments shall be entered upon their respective Journal's with the yea's and nay's, and published in one newspaper in each county where a newspaper is published, for three months immediately preceding the next general election of Representatives, at which election the same shall be submitted to the electors of the State, for approval or rejection. If a majority of the electors voting upon the amendments at such election shall adopt the amendments, the same shall become a part of the Constitution. The proposed amendments shall be so submitted as to enable the electors to vote on each amendment separately."

Fla. Stat. Ann., Vol. 25, p. 649, Historical Note. Note that this measure imposes no single-subject limitation. Thereafter, in 1948, the Constitution was amended to place a single-subject restriction on the Legislature's power to propose amendments. Fla. Stat. Ann., Vol. 25, p. 648. Hence, the presence of the GFWFC measure in the Constitution has no relevance to the validity of S.O.E. as an art. XI, § 3, initiative. In any event, this Court's precedents make plain that the GFWFC amendment could never satisfy the more restrictive art. XI, § 3, criteria in the current Constitution; a fortiori, the S.O.E. measure cannot satisfy those criteria.

The S.O.E. Committee [p. 18] points to the state lottery amendment, Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986), as precedent for the S.O.E. measure. This, too, fails. The lottery amendment, art. X, § 14, had the sole constitutional effect of

removing the prior constitutional restriction upon the Legislature's power to authorize and regulate a state lottery. Under the amendment, the Legislature retains its complete article III powers to legislate in that regard (including the power to repeal the educational trust fund and dedicate the funds to other purposes), subject to all the remaining provisions of the Constitution, none of which was altered by the amendment.

The S.O.E. Committee also seeks to rely upon certain trust funds created by popularly initiated statutes in other jurisdictions to support the S.O.E. measure. The distinction between requirements for popularly initiated statutes, which Florida law does not now acknowledge, and a proposed amendment to the Florida Constitution under the novel provisions of art. XI, § 3, render these foreign decisions useless in deciding this case. Nevertheless, the FSCL observes that the measure in both Associated Industries of Massachusetts v. Secretary of Com., 595 N.E.2d 282 (Mass. 1992), and Sunbehm Gas, Inc. v. Conrad, 310 N.W.2d 766 (N.D. 1981), had far fewer substantial infringements upon multiple departments of government and multiple articles of the Constitution in the respective states than does the S.O.E. measure. Indeed, neither the Sunbehm nor the Associated Industries measure created a governmental body, such as the S.O.E. fund Trustees, to exercise any governmental powers, much less to exercise legislative and judicial and executive powers as the S.O.E. authorizes the fund Trustees to do. Hence, these foreign measures provide no support for the S.O.E. measure.

Both Audubon [pp. 20-21] and the S.O.E. Committee [pp. 23-25] seek to rely upon other statutory taxing and trust fund measures to support the S.O.E. proposal. These attempts, too, reveal the true reason for the defects in and the invalidity of the S.O.E. proposal. No one can reasonably doubt that, subject to the United States and Florida Constitutions, the Florida Legislature possesses the power to accomplish all the operational governmental purposes that the S.O.E. Committee seeks to accomplish; the Legislature can levy a tax, it can create a trust fund, it can create a governing board in the executive department of government, it can direct that the trust funds be used to restore the Everglades, it can determine and change boundaries, it can provide for regulations within the boundaries, and it can provide for the exercise of all other governmental powers to accomplish the intended purposes. The Florida Legislature has the power to do all this because it is the expressed will of the people of Florida that, "the Legislative power of the state shall be vested in a Legislature of the State of Florida . . . " Fla. Const., art. III, § 1. For themselves, the people have not reserved the right to act as an alternative legislature, but have reserved the right to amend the Constitution by the various methods reserved in article XI. The S.O.E. proponents have sought to attain their legislative purposes by invoking the initiative process of art. XI, § 3, which is the most restrictive of the measures the people have reserved for changing the Constitution. They may not convert an art. XI, § 3, initiative into a broad revision.

The Supreme Court of Missouri faced this same issue in Missourians to Protest Init. Proc. v. Blunt, 799 S.W.2d 824 (Mo. 1990)(en banc), and rejected, on single-subject grounds, a similar attempt to make pervasive revisions through the limited Missouri amendment process which is subject to a single-subject restriction. The proponents in Missourians attempted to place all the aspects of a multi-faceted proposal in a single article just as the S.O.E. Committee attempts to cram its multi-article measure into a subsection of Fla. Const., art. X. In rejecting the Missouri attempt, the Missouri Supreme Court stated, inter alia, "If [the proponents'] argument were accepted, a proposed amendment could, so long as it is denominated as an amendment to a single article, repeal the entire document and enact a new constitution." 799 S.W.2d at 829 (emphasis added). This the Missouri court would not permit. If the S.O.E. proposal is approved, similar so-called "single purpose" amendments may be adopted pertaining to a limitless number of topics -- crime, policing, prisons, education or the judiciary -- by cramming all the substance in a single section of a single article of the Constitution. This would, of course, destroy the textual construction of the Florida Constitution according to functions of government and separation of powers as it has existed in every Florida Constitution since 1838. Worse than that, it would render the coherence and democratic accountability of Florida government into an ungovernmental accretion of separate heads of powers. The people have not reserved the right to do this through a single-subject art. XI, §

3, initiative amendment. Accordingly, the petition should be disapproved.

CONCLUSION

For all the reasons stated above, and in its Initial Brief, the FSCL respectfully submits that this Court must disapprove the S.O.E. petition.

Respectfully submitted,

William L Hyde for

Joseph W. Little, Esq.
Florida Bar #196749
3731 N.W. 13th Place
Gainesville, Florida 32605
(904) 392-2211

Judith S. Kavanaugh, Esq.
Florida Bar #219401
Earl, Blank, Kavanaugh & Stotts, P.A.
1800 Second Street, Suite 888
Sarasota, Florida 34236
(813) 366-1180

Dated April 15, 1994

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY 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 15th day of April, 1994.

William L. Hyde
William L. Hyde

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 83,301

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

APPENDIX TO REPLY BRIEF OF THE FLORIDA SUGAR CANE LEAGUE, INC. 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

Attorneys for The Florida Sugar Cane League, Inc.

Joseph W. Little, Esq.
Florida Bar #196749
3731 N.W. 13th Place
Gainesville, Florida 32605
(904) 392-2211

Judith S. Kavanaugh, Esq.
Florida Bar #219401
Earl, Blank, Kavanaugh & Stotts, P.A.
1800 Second Street, Suite 888
Sarasota, Florida 34236
(813) 366-1180

APPENDIX
TABLE OF CONTENTS

RESOLUTIONS AND MEMORIALS

COMMITTEE SUBSTITUTE
for
SENATE JOINT RESOLUTION NO. 334

Proposed Constitutional Amendment relating to Election of Circuit Judges.

A JOINT RESOLUTION Proposing an Amendment to Article Five of the Constitution of Florida by Adding Thereto an Additional Section Relating to the Election of Circuit Judges.

Be It Resolved by the Legislature of the State of Florida:

That Article 5 of the Constitution of the State of Florida be amended by adding thereto an additional Section to be known as Section 46 of said Article relating to the Election of Circuit Judges be, and the same is hereby agreed to and shall be submitted to the electors of the State of Florida for ratification or rejection at the General Election to be held on the first Tuesday after the first Monday in November, 1942, as follows:

"Section 46. Circuit Judges shall hereafter be elected by the qualified electors of their respective judicial circuits as other State and County officials are elected.

The first election of Circuit Judges shall be held at the General Election in 1948 to take office on the first Tuesday after the first Monday in January, 1949, for a term of six years.

The terms of all such offices as they shall severally exist at the time of adoption of this Amendment shall be and they are hereby extended to terminate on the first Tuesday after the first Monday in January, 1949."

Approved by the Governor June 12, 1941.

Filed in Office Secretary of State June 13, 1941.

COMMITTEE SUBSTITUTE FOR
SENATE JOINT RESOLUTION NO. 28

Proposed Constitutional Amendment Creating a Game and Fresh Water Fish Commission.

A JOINT RESOLUTION Proposing an Amendment to Article IV of the Constitution of the State of Florida Relative to the Executive Department, by Adding Thereto an Additional Section to Create a Game and Fresh Water Fish Commission.

Be It Resolved by the Legislature of the State of Florida:

Proposed Constitutional Amendment Creating a Game and Fresh Water Fish Commission.

That the following Amendment to Article IV of the Constitution of the State of Florida relative to the Executive Department by adding thereto an additional Section to be known as Section 30 of said Article IV, creating a Game and Fresh Water Fish Commission be and the same is hereby agreed to and shall be submitted to the Electors of the State of Florida for ratification or rejection at the General Election to be held on the first Tuesday after the first Monday in November 1942, as follows:

Section 30. 1. From and after January 1, 1943, the management, restoration, conservation, and regulation, of the birds, game, fur bearing animals, and fresh water fish, of the State of Florida, and the acquisition, establishment, control, and management, of hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida, shall be vested in a Commission to be known as the Game and Fresh Water Fish Commission. Such Commission shall consist of five members, one from each congressional district, as existing on January 1, 1941, who shall be appointed by the Governor, subject to confirmation by the Senate. The members so appointed shall annually select one of their members as Chairman of the Commission.

2. The first members of the Commission shall be appointed on January 1, 1943 and shall serve respectively for one, two, three, four, and five years. At the expiration of each of such terms, a successor shall be appointed to serve for a term of five years.

3. The members of the Commission shall receive no compensation for their services as such, but each Commissioner shall receive his necessary traveling or other expenses incurred while engaged in the discharge of his Official duties, but such shall not exceed the sum of $600.00 in any one year.

4. Among the powers granted to the Commission by this Section shall be the power to fix bag limits and to fix open and closed seasons, on a state-wide, regional or local basis, as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians. The Commission shall also have the power to acquire by purchase, gift, all property necessary, useful, or convenient, for the use of the Commission in the exercise of its powers hereunder.

Proposed Constitutional Amendment Creating a Game and Fresh Water Fish Commission.

5. The Commission shall appoint, fix the salary of, and at pleasure remove, a suitable person, as Director, and such Director shall have such powers and duties as may be prescribed by the Commission in pursuance of its duties under this Section. Such Director shall, subject to the approval of the Commission, appoint, fix the salaries of, and at pleasure remove, assistants, and other employees who shall have such powers and duties as may be assigned to them by the Commission or the Director. No. Commissioner shall be eligible for any such appointment or employment.

6. The funds resulting from the operation of the Commission and from the administration of the laws and regulations pertaining to birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians, together with any other funds specifically provided for such purpose shall constitute the State Game Fund and shall be used by the Commission as it shall deem fit in carrying out the provisions hereof and for no other purposes. The Commission may not obligate itself beyond the current resources of the State Game Fund unless specifically so authorized by the Legislature.

7. The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect. All laws fixing penalties for the violation of the provisions of this amendment and all laws imposing license taxes, shall be enacted by the Legislature from time to time.

Approved by the Governor May 5, 1941.

Filed in Office Secretary of State May 5, 1941.

SENATE JOINT RESOLUTION NO 88

Proposed Constitutional Amendment expediting passage and adoption of amendments in emergency.

A JOINT RESOLUTION Proposing an Amendment to the Constitution of the State of Florida to be Known as Section 3 of Article XVII, Relating to Amendments.

Be It Resolved by the Legislature of the State of Florida:

That the following Amendment, to be known as Section 3 of Article XVII of the present Constitution be and the same is hereby agreed to and shall be submitted to the electors of the State

THAELL & ASSOCIATES

PUBLIC RELATIONS and MARKETING CONSULTANTS