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ORIGINAL

IN THE
SUPREME COURT
OF FLORIDA

CASE NOS. 88,343; 88,344; 88,345
(CONSOLIDATED FOR ARGUMENT)

FILED

In re: ADVISORY OPINION
TO THE ATTORNEY GENERAL --
FEE ON EVERGLADES SUGAR PRODUCTION (88,343)

In re: ADVISORY OPINION
TO THE ATTORNEY GENERAL --
EVERGLADES TRUST FUND (88,344)

In re: ADVISORY OPINION
TO THE ATTORNEY GENERAL --
RESPONSIBILITY FOR PAYING COSTS OF WATER
POLLUTION ABATEMENT IN THE EVERGLADES (88,345)

BRIEF OF OSCEOLA FARMS CO., ATLANTIC SUGAR ASSOCIATION, INC., OKEELANTA CORPORATION, AND SUGAR CANE GROWERS COOPERATIVE OF FLORIDA REQUESTING THAT THE PROPOSED AMENDMENTS BE STRICKEN FROM THE BALLOT

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STATEMENT OF THE CASE AND INTERESTS OF OSCEOLA FARMS CO., ATLANTIC SUGAR ASSOCIATION, INC., OKEELANTA CORPORATION, AND THE SUGARCANE GROWERS COOPERATIVE OF FLORIDA

On July 3, 1996, the Court consolidated three Advisory Opinion cases for oral argument and required that interested parties file their briefs by July 23, 1996. The three cases are: Fee on Everglades Sugar Production, No. 88,343; Everglades Trust Fund, No. 88,344; Responsibility for Paying Costs of Water Pollution Abatement in the Everglades, No. 88,345. These cases are presented to the Court by the Attorney General, pursuant to the provisions of article IV, § 10 of the Florida Constitution, and § 16.061, Florida Statutes. The Attorney General's June 27, 1996 letter to the Court in Case No. 88,343 summarizes the circumstances leading to these cases:

> The Court has now received three interrelated initiative petitions after having reviewed and rejected an earlier petition in 1994. That petition sought to amend the Florida Constitution by creating a trust to restore the Everglades funded by a fee on raw sugar. As described in the summary for that petition, it would have
>
> > Create[d] 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 citizens trustees will control the Trust.
>
> The Court in Advisory Opinion to the Attorney General -- Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994), concluded that the 1994 petition violated both the single subject requirement and the ballot title and summary requirements specified in section 101.161, Florida Statutes. The drafters now present three separate petitions seeking to avoid the problems encountered in the 1994 petition.

Osceola Farms Co., Atlantic Sugar Association, Inc., and Okeelanta Corporation are Florida companies whose sugar mills are first processors of sugarcane grown in the Everglades Agricultural Area. The Sugar Cane Growers Cooperative of Florida is a cooperative of sugar farmers in the Everglades area, whose mill also is a first processor of sugarcane grown in the Everglades Agricultural Area. The 1996 proposed amendments seek to impose the same fee on processed sugar as did the 1994 proposal. The parent company of Osceola, Atlantic and Okeelanta (Flo-Sun, Incorporated) and the Growers Cooperative opposed the 1994 sugar fee petition in this Court. Pursuant to article IV, § 10 of the Florida Constitution, which guarantees "interested persons" the right to be heard on questions presented by an initiative petition, Osceola Farms Co., Atlantic Sugar Association, Inc., Okeelanta Corporation, and the Sugar Cane Growers Cooperative of Florida submit this brief in opposition to the "three interrelated initiative petitions."[1]

STATEMENT OF THE FACTS

Save Our Everglades, Inc., doing business as Save Our Everglades Committee, sponsored and funded the 1994 "Save Our Everglades" initiative petition. In re: Advisory Opinion to the Attorney General -- Save Our Everglades, 636 So. 2d 1336, 1337 (Fla. 1994). In March 1996, the Committee submitted to the Secretary of State three petition forms, ballot

[1] The Court's July 3, 1996 Order consolidated the three interrelated and sequentially numbered Everglades cases as to briefing dates and for argument on August 29, 1996. This brief necessarily addresses all three "interrelated initiative petitions" (p. 1, *supra*), and by notices of adoption separately submitted in Case Numbers 88,344 and 88,345 this Brief is being adopted in those cases.

titles and ballot summaries for proposed initiative amendments. They were received and numbered by the Secretary of State as follows:

> Responsibility for Paying Costs of Water Pollution Abatement in the Everglades (Serial No. 96-01)
>
> Everglades Trust Fund (Serial No. 96-02)
>
> Fee on Everglades Sugar Production (Serial No. 96-03)

See **Exhibit A**, March 26, 1996 letter of David A. Rancourt, Division Director, Division of Elections, Florida Department of State. Copies of the petitions proposing each of the amendments are attached as **Exhibits B, C, and D**, respectively. The Rancourt letter and the three forms are also attached to the Court's July 3, 1996 briefing schedule order.

Subsequently Save Our Everglades Committee also circulated for signatures a single form petition. That form differed in text, punctuation, and format from the originally submitted three separate forms, although Rule 1S-2.009(10), Florida Administrative Code, provides in relevant part:

> Any change in a previously approved petition form or additional types of petition forms to be circulated by a previously approved circulator, shall be submitted in accordance with the provisions of this rule. A change to a petition form or an additional type of petition form means a change in the wording of the text of the proposed amendment, the ballot title or ballot summary, including changes in punctuation.

An original of the single form unified petition is attached as **Exhibit E.**[2]

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[2] Osceola, Atlantic and Okeelanta challenged the use of the single form petition in the Circuit Court of the Second Judicial Circuit (Leon County) in Williams et al. v. Save Our Everglades, Inc., et al., No. CV96-83841. The Save Our Everglades Committee filed a "Petition for Constitutional Writ" in this Court requesting this Court to assert all writs

Save Our Everglades collected signatures utilizing the separate forms as well as the single form unified petition. Pursuant to Florida law, the petitions are submitted to local supervisors of elections who then certify the validity of the signatures to the Secretary of State. § 100.371(4), Fla. Stat. On June 18, 1996, the Secretary of State wrote to the Attorney General, informing him:

> Save Our Everglades Committee, the above referenced political Committee, has successfully met the signature requirement [pursuant to § 15.21, Fla. Stat.] and I am therefore submitting its proposed constitutional amendments, ballot titles and substances of the amendments.

Letter of Secretary of State, **Exhibit F**.

The Secretary of State's June 18, 1996 letter led to the Attorney General's June 26, 1996 letter requesting an Advisory Opinion. Between those dates and before any case had been numbered, the Save Our Everglades Committee submitted to this Court a Motion to Expedite Briefing and Oral Argument Schedule. That motion, styled "In Re: Advisory Opinion to the Attorney General -- Fee on Everglades Sugar Production," sought "to accelerate the briefing and oral argument in this case." See **Exhibit G**, p. 1. The "Fee on Everglades Sugar Production" Motion to Expedite referred to "the three initiative petitions [sent] to the Attorney General's office" by the Secretary of State. Id. However, references in the motion, like the "Fee on Sugar" style, were often singular:

> Neither the local supervisors of elections nor the Secretary of State's office should be forced to count and certify a large number of signatures on a

---

jurisdiction over the circuit court case. On July 18, 1996 the Court accepted jurisdiction over that case.

> potentially invalid initiative petition. An expedited schedule would help avoid this scenario.
>
> Any significant delay in determining whether the proposed amendment is valid will cost all interested parties significant amount of advertising costs.
>
> * * *
>
> These statutes outline the procedure whereby the Court can examine the proposed amendment language after 10% of the required number of signatures . . . is collected. Hence, the Legislature found a method of testing the amendment language at the early stages of signature gathering and expense.

Ibid., pp. 4-5 (emphasis supplied).

Osceola Farms Co., Atlantic Sugar Association, Inc., Okeelanta Corporation, and the Sugarcane Growers Cooperative argue here that each of the three initiatives fails the applicable tests for ballot placement. But we also contend that the three must be viewed as a single amendment, and that the Committee's lapses of language are a revealing Freudian slip. As we argue in Point IV, *infra*, p. 29, the language of the amendments, the linkage of the petitions, and the law of the 1994 case support an across-the-board rejection of the Committee's attempt to tinker with the Florida Constitution.

SUMMARY OF THE ARGUMENT

The three interrelated proposed constitutional amendments offered by the Save Our Everglades Committee should be stricken from the ballot. They are a reincarnation of the fatally flawed proposal which was rejected two years ago in In re: Advisory Opinion to the Attorney General -- Save Our Everglades, 636 So. 2d 1336 (Fla. 1994). There, a single amendment imposed a "fee," created a trust fund, and adjudicated the sugar industry guilty of pollution. This time around, the same concepts (a fee, a fund, and targeting "polluters") are presented as separate proposed amendments. But the Committee's plain language, promotion, and unified petition format confirm that the voters are being presented with a Save Our Everglades proposal which differs only slightly from that which has already been rejected. The individual proposals must therefore fail, either as a unit, or when examined individually under the textual "single-subject" and "clear and unambiguous" summary and title guideposts for the advisory opinion process. See Art. XI, § 3, Fla. Const.; § 101.161(1), Fla. Stat.

I. "Fee on Everglades Sugar Production"

This proposed amendment to the "Local Taxes" section of the Constitution, article VII, § 9, misleads the voters by *never* using the word "tax" -- not in the title, summary, text, nor in the reference to article VII, § 9. The levy proposed on sugar is a tax, not a fee. The two words have different meanings, and are not interchangeable. By misrepresenting the penny-a-pound levy, the proposal fails to provide the fair notice demanded by § 101.161(1), Fla. Stat.

The amendment also violates the single subject rule by linking the fee on sugar to Everglades cleanup (logrolling), and by creating multiple and distinct legislative and executive

functions for the South Florida Water Management District (levying the "fee," identifying to whom it applies, collecting the fee, and appropriating the monies). Other parts of the Constitution already govern taxing and spending; this proposed amendment both interferes with the existing scheme, *and* fails to advise the voters of the multiple other constitutional provisions which would be touched and affected by their approval of this initiative. The cases require adherence to the single subject requirement, and identification of the changes to be made to the Constitution. By failing both standards, the proposed amendment forfeits its claim to ballot placement.

II. Responsibility for Paying Costs of Water Pollution Abatement in the Everglades

The proponents of this amendment have created a substantial inconsistency between the summary and the text. The text imposes liability on "those who cause water pollution within the Everglades . . ." and the summary says "those in the Everglades . . . who cause water pollution" are to be held responsible. (emphasis supplied). Thus, the scope of the summary and text are vastly different, and voters are not informed who is being held responsible for paying the costs of water pollution abatement in the Everglades -- is it only those in the Everglades, or is it those both within and without the area who are to be held responsible? By failing to clearly state the chief purpose of the proposal, it runs afoul of the § 101.161 command for a clear and unambiguous statement of an amendment's reach.

The single subject rule is violated by the amendment's performance of a statewide public policy legislative function (creating liability) and the judicial function (imposing economic responsibility) on a targeted group. The proposed amendment's vagueness about exactly where

and how its judgments should be effectuated renders it an "empty vessel" presenting "formidable difficulties to the three branches of government which [may] have to obey it." Fine v. Firestone, 448 So. 2d 984, 998 (Shaw, J., concurring).

III. Everglades Trust Fund

This provision is another empty vessel. It creates a place and a purpose for money, without any source of money. The unspoken but intended source is obviously the penny-a-pound "fee" on raw sugar, but neither the "fee" amendment nor the "trust" amendment requires that result. Without it, the trust is meaningless. As with the other two proposals, the various affected constitutional provisions are not identified, as required under this Court's precedents. Nowhere does the proposal reveal that it usurps the legislative environmental protection mandates of article II, § 7, Fla. Const., or that it alters the article III, § 19(f)(1) limitation on trust funds; or that it usurps the legislative and executive functions of planning, budgeting, and appropriation, and impinges on the jurisdiction of various executive agencies. The 1994 Save Our Everglades decision is equally applicable here.

IV. The Trilogy is an Unacceptable Ploy

Save Our Everglades was not an invitation to split an unconstitutional amendment into three parts to make the parts less offensive than the sum. Any fair reading of these three amendments, and the way they have been presented and promoted, leads to a single conclusion: this trilogy is Save Our Everglades *redux*. The three proposals should meet the same fate: they should be stricken from the ballot.

ARGUMENT

I.

THE "FEE ON EVERGLADES SUGAR PRODUCTION" PROPOSED CONSTITUTIONAL AMENDMENT SHOULD BE STRICKEN FROM THE BALLOT AS VIOLATIVE OF ARTICLE XI, § 3, FLORIDA CONSTITUTION, AND SECTION 101.161(1), FLORIDA STATUTES

A. THE GUIDING PRINCIPLES

The legal principles are straightforward, easily stated, and oft-repeated by this Court. Proposed constitutional amendments demand careful pre-ballot scrutiny:

> The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus for general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended and adaptable to the political, economic and social changes of our society.

Advisory Opinion to the Attorney General - Limited Marine Net Fishing, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring, joined by Barkett, C.J., and Overton and Kogan, JJ.). That majority-of-the-court concurrence expressed a preference for use of the legislative process "on matters that are statutory in nature." Id.

Justice Shaw, concurring in Fine v. Firestone, 448 So. 2d 984 (Fla. 1984), reflected on the words of two former justices in Weber v. Smathers, 338 So. 2d 819, 824 (Fla. 1976), who voiced the need for caution in the citizen initiative process:

> Having wrestled with the issues here, I understand better the views of Justices Terrell and Roberts that "[i]t is hard to amend the Constitution and it ought

> to be hard," and that the citizen's initiative method of amending the Constitution deserves particular care because it does not have the structural safeguards which are built into the other three methods.

448 So. 2d at 999.

1. The Single Subject Rule

One inhibition on the citizen initiative process is the requirement that a proposed amendment "shall embrace but one subject and matter directly connected therewith." Article XI, § 3, Fla. Const. The Court has said:

> This single-subject provision is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change.

Save Our Everglades, 636 So. 2d at 1339. The Court explained that the single-subject requirement "'mandates that the electorate's attention be directed to a change regarding one specific subject of government'" in order to avoid "multiple precipitous changes" and to guard "against 'logrolling,' a practice wherein several separate issues are rolled into a single initiative." Save Our Everglades, 636 So. 2d at 1339, quoting Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984). Save Our Everglades stated:

> [N]o single proposal can substantially alter or perform the functions of multiple branches:
>
>> The test . . . is functional, and where a proposed amendment changes more than one government function it is clearly multi-subject . . . [w]here 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., 636 So. 2d at 1340 (emphasis in original) quoting Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984). Similarly, where a single proposed amendment affects multiple functions of one branch of government, it may also fail the single subject test:

> In Fine, we found multiplicity of subject matter because the proposed amendment would have affected several legislative functions.

Evans v. Firestone, 457 So. 2d 1351, 1354 (emphasis in original).

2. The Title and Summary Restraints

Another restraint on the citizen initiative process is the requirement for clarity in an amendment's title and summary. Section 101.161(1), Florida Statutes, requires an "explanatory statement . . . of the chief purpose of the measure," and a "ballot title . . . or a caption . . . by which the measure is commonly referred to or spoken of."

> 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 . . . . [T]he ballot title and summary are expected to be "accurate and informative".

In re: Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1021 (Fla. 1994) quoting Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992). Compare, Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) (internal citations omitted):

> Simply put, the ballot must give the voter fair notice of the decision he must make . . . . "[P]roposal of amendments to the Constitution is a

> highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation . . . . [T]he people who are asked to approve them must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.

See also Save Our Everglades, 636 So. 2d at 1341 (title and summary requirements are "so the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot.").

B. THE "FEE ON EVERGLADES SUGAR PRODUCTION" FAILS THE CONSTITUTIONAL AND STATUTORY TESTS

The title of the initiative -- "Fee on Everglades Sugar Production" -- is misleading. The full text of the Amendment proposes a change to article VII, § 9, Florida Constitution, which is entitled "Local Taxes." Yet nowhere in the title, text or summary is there any mention of the word "tax." The euphemistic "fee" is presented this way:

> **FULL TEXT OF THE PROPOSED AMENDMENT:**
> (a) Article VII, Section 9 is amended by a new subsection (c) at the end thereof, to read:
>
> > (c) The South Florida Water Management District, or its successor agency, shall levy a fee, to be called the Everglades Sugar Fee, of one cent per pound of raw sugar, assessed against each first processor, from sugarcane grown in the Everglades Agricultural Area. The Everglades Sugar Fee is imposed to raise funds to be used, consistent with statutory law, for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades Protection Area and the Everglades Agricultural Area, pursuant to the policy of the state in Article II, Section 7.

> (2) The Everglades Sugar Fee shall expire twenty-five years from the effective date of this subsection.
>
> (3) For purposes of this subsection, the terms "South Florida Water Management District," "Everglades Agricultural Area," and "Everglades Protection Area" shall have the meanings as defined in statutes in effect on January 1, 1996.

> (b) This subsection shall take effect on the day after approval by the electors. If any portion or application of this measure is held invalid for any reason, the remaining portion or application, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

The summary also incorrectly portrays a fee, not a tax, being imposed:

> <u>SUMMARY</u>
>
> Provides that the South Florida Water Management District shall levy an Everglades Sugar Fee of 1 [cent] per pound on raw sugar grown in the Everglades Agricultural Area to raise funds to be used, consistent with statutory law, for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades. The fee is imposed for twenty-five years.

The ballot title and the summary are misleading. "A proposed amendment cannot fly under false colors; this one does." <u>Askew v. Firestone</u>, 421 So. 2d 151, 156 (Fla. 1982). "Fee" has a distinct meaning; "tax" a distinctly different meaning. A "fee" is

> [a] charge fixed by law for services of public officers or for use of a privilege under control of government.

Black's Law Dictionary, Abridged Fifth Edition. A "tax" is

> [a] pecuniary burden laid upon individuals, business entities, or property to support and carry on the legitimate functions of government. Essential characteristics of a tax are that it is not a voluntary

> payment or donation, but an enforced contribution exacted pursuant to legitimate authority.

Id. Florida law follows those definitions: a "tax [is] an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called on to perform." State v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994). Fees are distinguishable: "they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society . . . and they are paid by choice . . . ." Id.

The proposed "fee" is obviously a tax on sugar. One can only speculate on the political motivation that prompted the Committee to use the "fee" word to amend the Constitution's "Local Tax" section. In contrast, an example of a candid approach to constitutional revisions can be found in the recent Tax Limitation case. There the Court concluded that a proposed amendment entitled "Tax Limitation: Should Two Thirds Vote Be Required for New Constitutionally Imposed State Taxes/Fees?" was not misleading:

> The ballot summary clearly explains that the taxes and fees targeted by the Tax Limitation petition are those imposed "by constitutional amendment." Thus when the ballot title is read with common sense and in context with the summary, it is clear that the Tax Limitation ballot title accurately informs the voters of the chief purpose of the proposed constitutional amendment and satisfies the requirements of section 101.161.

Advisory Opinion to the Attorney General Re Tax Limitation, 673 So. 2d 864, 868 (Fla. 1996). There, the proponents had the courage to use plain and honest language, calling a tax a tax, and a fee a fee.

Here, the proposed amendment does not in any way tell the voters that the fee

contemplated by the text is really a tax to be placed in the "Local Taxes" section of the Constitution. That false ballot title and summary sacrifices candor on the altar of political expediency, because "taxes" are anathema to voters. The Committee's masquerade should be rejected. Askew v. Firestone's "false colors" admonition (*supra*, p. 13), requires removal of "Fee on Everglades Sugar Production" from the ballot.

* * *

The proposed amendment also fails the single subject test. It has multiple purposes; it substantially alters or performs multiple functions of government; and it substantially, but silently, affects other provisions of the Florida Constitution.

This Court has already rejected the "logrolling" which was fatal to the 1994 amendment, and which mars the present amendment:

> We note that the initiative embodies precisely the sort of logrolling that the single subject rule was designed to foreclose. There is no "oneness of purpose," but rather a duality of purposes. One objective -- to restore the Everglades -- is politically fashionable, while the other -- to compel the sugar industry to fund the restoration -- is more problematic. Many voters sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup itself, and yet those voters would be compelled to chose all or nothing. The danger is that our organic law might be amended to compel the sugar industry to pay for the cleanup singlehandedly even though a majority of voters do not think this wise or fair.

Save Our Everglades, 636 So. 2d at 1341.

The 1996 Save Our Everglades version mirrors its predecessor. Imposing a "fee" on raw sugar "to be used for purposes of conservation, and protection of natural resources and

abatement of water pollution in the Everglades" creates the same duality of purpose dichotomy. Conservation and clean water are commendable, and politically fashionable. Choosing to charge sugar farmers and processors with the cost is a different question. Forcing a voter to tax "Big Sugar" in order to clean up the Everglades is the antithesis of the single subject anti-logrolling rationale. Indeed, the 1994 Save Our Everglades language is so apt that it resolves this case. If voters in 1994 were spared the choice between not cleaning up the Everglades or having the sugar industry pay for the cleanup, then the 1996 voters are entitled to similar protection from a logrolled amendment.[3]

The proposed amendment substantially alters or performs multiple functions of government by imbuing the South Florida Water Management District with both legislative and executive branch functions. The South Florida Water Management District is a statutorily created special district with defined powers. See § 373.019(2), Fla. Stat. Under the proposed amendment the District would be compelled to determine the "first processors [of] sugarcane

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[3] Attached as **Exhibit H** is a June 20, 1996 letter from the Chairman of Save Our Everglades seeking petition signatures and money. Its rhetoric confirms that the 1994 proposal has been recycled:

> It is with a heavy heart that I write to you today.
>
> Our precious Everglades have been badly damaged over the past 35 years by the "Big Sugar" industry. . . .
>
> However I also write to you with a sense of hope. A hope that, finally, we can make the polluters pay to clean up their mess.

Exhibit H, p. 1.

grown in the Everglades Agricultural Area." This is quintessentially an executive branch function. Then the District is ordered to "levy a fee" on those processors. This is a classic legislative branch function of government. "A levy is a limited legislative function . . . it does not comprehend the entire process by which taxes are imposed. Atlantic CoastLine R. Co. v. Amos, 94 Fla. 588, 605, 115 So. 315, 320 (1927)." Metro Dade County v. Golden Nuggett Group, 448 So. 2d 515, 519 (Fla. 3d DCA 1984). Then the District is required to collect the levied fee. This is an admixture of an executive branch and a legislative function.[4] Thereafter the District is mandated to use the levied and collected funds for "conservation and protection of natural resources and abatement of water pollution." These unbudgeted disbursements are left to the discretion of the District, giving it another mixed legislative and executive duty to appropriate and spend.

"Fee on Everglades Sugar Production" runs afoul of the functional single-subject strictures, as did its predecessor. The Court's 1994 comments are equally apt here:

> This provision implements a public policy

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[4] While the act of collecting a tax is an executive function, establishing the legal framework within which a tax is to be collected is a legislative function. See Williams v. Jones, 326 So. 2d 425, 436 (Fla. 1976); Stubbs v. Cummings, 336 So. 2d 412, 415 (Fla. 1st DCA 1976). Among the legislative policy decisions that must be made when mandating collection of a tax are: frequency of payment; penalties for nonpayment; records required of the taxpayer; confidentiality afforded taxpayer records; statute of limitations for assessment of tax by government; taxpayer remedies when contesting a tax assessment; whether an unpaid tax liability attaches to specific property (as do ad valorem tax debts) or functions as a judgment (as do sales tax debts); whether an outstanding tax liability is transferred automatically to one purchasing the business or assets of the taxpayer; and whether corporate officers and directors are liable personally for taxes owed by a corporation. Under current law, none of these decisions is left to the Department of Revenue, which collects most state taxes. See e.g., Fla. Stat. 212. And, under current law, none of these decisions is left to the South Florida Water Management District, which levies and receives ad valorem tax monies and Everglades agricultural privilege taxes. See Fla. Stat. § 373.539(2) and § 373.4592(6).

provision of statewide significance and thus performs an essentially legislative function. The initiative also proposes a levy -- whether characterized as a fee or a tax -- on raw sugar and gives the trustees complete autonomy in deciding how revenues are to be spent . . . . The exercise of these traditionally legislative functions is not even subject to the constitutional check of executive branch veto.

The initiative also contemplates the exercise of vast executive powers. The trustees are authorized to "administer" the trust, expending funds to restore water quantity and quality that existed at some earlier, "historical" date. They are entrusted with the power to expend trust funds in "pollution cleanup and control" efforts . . . . Because various other executive agencies have jurisdiction in this area, the constitutionally conferred powers of the trustees would impinge on the powers of existing agencies.

Save Our Everglades, 636 So. 2d at 1340.[5]

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[5] The South Florida Water Management District has been given a role in Everglades restoration *via* the Everglades Forever Act, § 373.4592, Fla. Stat. But that role is carefully circumscribed and the contours of the program are the culmination of and the beginning of, a complex process involving many entities.

> The Statement of Principles of July 1993 among the Federal Government, the South Florida Water Management District, the Department of Protection and certain agricultural industry representatives formed a basis to bring to a close nearly 5 years of costly litigation. That agreement should be used to begin the cleanup and renewal of the Everglades Ecosystem.
>
> * * *
>
> The Legislature finds that the Statement of Principles of July 1993, the Everglades Construction Project and the regulatory requirements of this section provide a sound basis for the state's long-term cleanup and restoration of the Everglades. It is the intent of the legislature to provide a sufficient period of time for

The present proposals seek to finesse the Court's decision by promoting the "fee" and the Trust Fund as individual amendments. But whether the 1994 "trustees" or the South Florida Water Management District levy, collect and spend the tax/fee, the result is the same: a constitutionally mandated performance of multiple governmental functions. The irony of the attempt to pass off the "fee" and the Trust Fund as separate amendments is that the effort underscores the disingenuousness of the Committee's approach, by demonstrating that the South Florida Water Management District has merely been substituted for the 1994 Trust. If that Trust could not constitutionally perform legislative and executive functions, then this "fee" cannot be assessed, levied, collected, appropriated and disbursed by the District.

The proposed tax amendment's silent but substantial effect on other parts of the Florida Constitution adds to its failures. "The various parts of the Constitution require a harmony of purpose both internally and within the broader context of the American federal system and Florida law itself." <u>In re: Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination</u>, 632 So. 2d 1018, 1022 (Kogan, J., concurring). The proposed amendment strikes a discordant note in Florida's otherwise harmonious plan for taxing and spending. Consider: Article III, § 1, Fla. Const., vests all "legislative power of the state" in the Florida Legislature. Article VII, § 1 instructs that "no tax shall be levied except in pursuance of law . . ." and then preempts to the legislature all taxing power except for ad

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> construction, testing, and research, so that the benefits of the Everglades Construction Project will be determined and maximized prior to requiring additional measures.

§ 373.4592(c) and (f). On the other hand, the proposed amendment permits the District to substitute its own legislative approaches, affecting the interests of the public, federal, state and local governments, and Indian nations in the Everglades.

valorem taxation. Article VII, § 9 provides for local ad valorem taxation and allows special districts to be authorized by the legislature to levy other taxes. Article VII, § 1(c) directs that "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law." Article III, § 19 establishes statewide comprehensive budgeting, planning and appropriations processes. Article II, § 7 requires the legislature to make "[a]dequate provision . . . for the abatement of air and water pollution . . . ." Article IV, § 1(a) designates the Governor as the chief administrative officer of the state responsible for planning and budgeting. Article III, § 8 grants the Governor the power to "veto any specific appropriation in a general appropriation bill." And, article II, § 3 provides that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The proposed amendment's stealthlike contravention of each of these existing components of the constitutional design for taxing and spending requires that it be stricken from the ballot. Advisory Opinion to the Attorney General Re Tax Limitation, 644 So. 2d 486, 493 (Fla. 1994).

II.

THE "RESPONSIBILITY FOR PAYING COSTS OF WATER POLLUTION ABATEMENT IN THE EVERGLADES" PROPOSED AMENDMENT FAILS THE CONSTITUTIONAL AND STATUTORY TESTS

As we demonstrate below, this proposed amendment violates the single-subject rule by combining both legislative and judicial functions in its effort to make "polluters" those who "shall be primarily responsible for paying the costs of abatement of that pollution." The textual violation of the Constitution's single-subject rule is compounded by a substantial error which renders the summary so inconsistent with the text that the summary fails the statutory fair notice requirements. The title, summary, and text of the proposed amendment are:

RESPONSIBILITY FOR PAYING COSTS OF WATER POLLUTION ABATEMENT IN THE EVERGLADES

SUMMARY

The Constitution currently provides the authority for the abatement of water pollution. This proposal adds a provision to provide that those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution.

FULL TEXT OF PROPOSED AMENDMENT:

(a) The Constitution currently provides, in Article II, Section 7, the authority for the abatement of water pollution. It is the intent of this amendment that those who cause water pollution within the Everglades Agricultural Area or the Everglades Protection Area shall be primarily responsible for paying the costs of abatement of that pollution.

(b) Those in the Everglades Agricultural Area who cause water

> pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For the purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.

(emphasis added).[6]

The textual reach is to all persons, wherever located, "who cause water pollution within the Everglades Agricultural Area or the Everglades Protection Area." The summary advises that only "those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area" are to be "primarily responsible . . . ." Thus, the summary renders liable a limited universe of persons actually in the Area. The text imposes liability on a universal basis -- everyone anywhere who causes water pollution in the Everglades.

The difference is not *de minimis*. The text would subject to liability a potential sweep encompassing non-Everglades Area farmers, fishermen, tourists, industries, developers, residents, local, state and federal governmental entities "who cause water pollution within the Everglades Agricultural Area or the Everglades Protection Area." The failure of the summary lies in its inability to tell the voter the scope of the proposed amendment and its plainly misleading summary of the actual amendment.

Save Our Everglades spoke to the need for notice of the "chief purpose" of an

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[6] The present statutory definitions are found in Florida Statutes § 373.4592, Fla. Stat. Article II, section 7 presently states: "Natural Resources and Scenic beauty. It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

amendment so the voter would be informed and not misled. 636 So. 2d at 1336. Nothing is more central to the notion of "Responsibility for Paying Costs" than a description of who is to be responsible. Because the summary so starkly conflicts with the text, the proposed amendment should be struck from the ballot pursuant to section 101.161's command that the summary state its "chief purpose" in clear and unambiguous language.

* * *

The single-subject violation is as clear as the statutory violation. Deciding who should pay for Everglades pollution is a public policy issue, classically legislative. Creating a mandatory remedy for Everglades pollution (polluters "shall be primarily responsible for paying") is also legislative. The amendment and summary impose a judgment that water has been polluted by persons in and out of the Everglades, and liability for the transgression. The echo from Save Our Everglades is strong:

> This provision implements a public policy decision of statewide significance and thus performs an essentially legislative function.
>
> * * *
>
> Finally, the initiative performs a judicial function. Section (a) finds that the sugar cane industry polluted the Everglades and imposes a flat fee on that industry to cover cleanup costs. This provision renders a judgment of wrongdoing and de facto liability and thus performs a quintessential judicial function. It is as though the drafters drew up their plan to restore the Everglades, then stepped outside their role as planners, donned judicial robes, and made factual finds and determinations of liability and damages.

Save Our Everglades, 636 So. 2d at 1340.

The "Responsibility for Paying Costs" proposal, like the "Fee on Everglades Sugar Production," cannot be saved by attempting to pass itself off as free-standing. Read alone, it suffers the same flaws as those present in Save Our Everglades. Standing alone, its lack of a direct accusatory finger pointing to the sugar industry merely adjudicates a larger group to be guilty, and promises unspecified damages to be assessed in unstated forums. The dangers inherent in that approach have been articulated:

> An ineptly drawn initiative is a legitimate matter for judicial review for three reasons. First, it may be difficult, perhaps impossible, for a court to determine whether such an initiative meets the one-subject limitation. Second, an ineptly drawn initiative may not present the voters with an understandable proposition. Third, if adopted, the amendment or revision may present formidable difficulties to the three branches of government which have to obey it and may have to implement it. Such an "empty vessel," as the majority opinion recognizes, serves to transfer power to the judiciary, for example, which is directly contrary to the underlying purposes of citizen initiatives.

Fine v. Firestone, 448 So. 2d 984, 998 (Fla. 1984) (Shaw J., concurring).

The disingenuous attempt to portray "polluters pay" as a solo proposition presents an "empty vessel" to the voters, matched by its twin empty vessel -- "Everglades Trust Fund." We turn to that proposed amendment, and then to a discussion of the trinity of proposals, in which the truth is revealed: this case is merely a reprise of Save Our Everglades, 636 So. 2d 1336 (Fla. 1994).

III.

THE "EVERGLADES TRUST FUND" PROPOSED AMENDMENT FAILS THE CONSTITUTIONAL AND STATUTORY TESTS

The proposed "Everglades Trust Fund" amendment (1) establishes a trust fund, (2) provides that it "be administered by the South Florida Water Management District or its successor agency," and (3) mandates that any funds received by the trust fund "be expended for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades Protection Area and Everglades Agricultural Area."

Standing alone the "Everglades Trust Fund" is an empty vessel. The amendment allows the trust to "receive funds from any source, including gifts from individuals, corporations or other entities; funds from general revenues as determined by the Legislature; and any other funds so designated by the Legislature, by the United States Congress or by any other governmental entity." The fund's aspirational goal is not even met by the "Fee on Everglades Sugar Production" amendment, for that proposal does not command that the sugar tax be deposited to the trust fund. There is no doubt that the Committee intends that the tax fund the fund:

> <u>And it is time to make the polluters pay!</u>
>
> Your help today is the first step in an effort to make the sugar industry pay its fair share to clean up the mess it's made in the Everglades.
>
> With your help, we plan to have initiatives on the ballot in November that will place a very small one-penny per pound fee on sugar produced in the Everglades Agricultural Area. That money will be placed in a trust fund and used to clean up the pollution caused by the people who put it there: the sugar industry.

Exhibit H, p. 2, June 20, 1996 Letter of Chairman of Save Our Everglades Committee (emphasis in original). The Committee's rhetoric confirms that the three initiatives are inextricably linked together, and should be viewed as one. See Point IV, *infra* p. 29. But even taken alone, the meaningless "Everglades Trust Fund" fails the citizen initiative restraint tests.

An initiative's identification of the articles or sections of the Constitution is "necessary for the public to be able to comprehend the contemplated" changes and so this Court need not have to interpret the proposal to divine "what sections and articles are substantially affected." Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1993). Indeed, the single-subject requirement need not be reached if the initiative substantially, but silently, affects specific constitutional provisions without identifying them for the voters. Advisory Opinion to the Attorney General Re Tax Limitation, 644 So. 2d 486, 492 (Fla. 1994).

Neither the title nor the summary of "Everglades Trust Fund" identifies the articles or sections substantially affected. The text says only this with regard to existing constitutional provisions:

(a) Article X is amended by adding a new section 17 at the end thereof, to read:

> **SECTION 17, EVERGLADES TRUST FUND.**
>
> (a) There is hereby established the Everglades Trust Fund which shall not be subject to termination pursuant to Article III, Section 19(f). The purpose of the Everglades Trust Fund is to make funds available to assist in conservation and protection of natural resources and abatement of water pollution in the Everglades Protection Area and the Everglades Agricultural Area.

The proposed amendment does not reveal that it substantially affects article II, section 7 of the Florida Constitution, which provides:

> It shall be the policy of the state to conserve and

> protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

(emphasis supplied). Thus voters are not told that the "Everglades Trust Fund" (even as an empty vessel) circumvents the constitutional mandates of legislative protection of the environment. Nor does the text's cryptic reference to article III, section 19(f) reveal that the proposal substantially affects section 19 "State Budgeting, Planning and Appropriations Processes," specifically § (f)(1):

> No trust funds of the State of Florida or other public body may be created by law without a 3/5 vote of the membership of each house of the legislature in a separate bill for that purpose only.

A companion statute, § 215.3207, Fla. Stat., legislatively implemented that limitation on trust funds; a limitation which a commentator has addressed in an article on section 19 and the Tax and Budget Reform Commission:

> The hope was to allow reform of budget and fiscal matters and to modernize Florida's Constitution with less political pressure than the Legislature would encounter and with more deliberation than is generated by initiative petition.
>
> * * *
>
> One progressive aspect of section 19, apparently unique to Florida, is the constitutional linkage of planning to budgeting.
>
> * * *
>
> 4. To Reduce the Use of Trust Funds.
>
> Trust Funds constitute a significant segment of the Florida budget. Trust funds raise policy concerns because they are less visible and less

> scrutinized than general revenue funds. Earmarking revenue by placing it in a trust fund is thought to inhibit revenue sources for general government priorities.

Jon Mills, Battle of the Budget: The Legislature and the Governor Fight For Control, 18 Nova L. Rev. 1101, 1104-05, 1108 (No. 2A) (1994).

The proposed amendment contravenes every public policy reason embodied in article 19, and does so without alerting the voters to the organic change it seeks. And the proposed trust fund's eternal life sharply and silently conflicts with the article III, § 19(f)(2) four year (unless extended by the legislature) trust fund existence presently mandated by the Constitution. All those unrevealed effects upon the Florida Constitution are enough to require its removal from the ballot. See Fine v. Firestone and Advisory Opinion to the Attorney General Re Tax Limitation, *supra*, and Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners, 642 So. 2d 724, 727 (Fla. 1994) (Overton, J., concurring): "I firmly believe that any initiative petition that substantially amends or modifies an existing provision of the constitution must mention that fact in its explanation of the proposal; otherwise the initiative petition is misleading." (emphasis in original).

That the proposed trust fund, alone or as part of the intended trilogy, invades multiple legislative and executive functions is beyond cavil. It usurps the legislative function of creating trust funds. It subverts the executive/legislative function of budgeting, and performs the legislative function of implementing article II, section 7's mandate of legislation to abate water pollution. It intrudes upon the Legislature's carefully considered and balanced Everglades Forever Act, § 373.4592 (see p. 18 n. 5, *supra*). It gives the South Florida Water Management District legislative and executive authority to receive and spend monies (assuming the "trust

fund" is funded), and presumably to make rules regarding receipt and expenditure of funds relating to a geographical area already the subject of myriad statutes, rules and regulations involving numerous governmental entities. Save Our Everglades has already rejected that approach:

> [T]he initiative establishes a trust for restoration of the Everglades and provides for funding and operation of the trust . . . an essentially legislative function.
>
> * * *
>
> The initiative also contemplates the exercise of vast executive powers . . . . Because various other executive agencies have jurisdiction in this area, the constitutionally conferred powers of the trustees would impinge on the powers of existing agencies.

Id., 636 So. 2d at 1340.

This trust fund amendment, like its predecessor, should be stricken from the ballot.

IV.

THE THREE AMENDMENTS ARE ONE; THE TRILOGY IS A PLOY WHICH THIS COURT SHOULD REJECT

These consolidated cases must be judged in light of several undisputed facts. First is the failed attempt to propose a tax on sugar in 1994 *via* a single amendment which combined the elements presented here: a tax, a trust fund, and a finding of liability. Save Our

Everglades, *supra*. Second is the 1996 division of the three concepts into separate proposed amendments recognized by the Attorney General as "three interrelated initiative petitions" which seek "to avoid the problems encountered in the 1994 petition." See June 27, 1996 Attorney General letter to the Court in 88,343 (quoted *supra*, p. 1). Third is the Save Our Everglades Committee solicitation of signatures *via* a single form unified petition (**Exhibit E**) which joins all three proposed amendments in a one-page format suggesting to the voters this syllogism: polluters must pay, the monies must be in trust, and a one-cent sugar levy will fund the trust. Fourth is the political rhetoric of the Committee (**Exhibit H**) which states its plan:

> With your help, we plan to have initiatives on the ballot in November that will place a very small one-penny-per pound fee on sugar produced in the Everglades Agricultural Area. That money will be placed in a trust fund and used to clean up the pollution caused by the people who put it there: the sugar industry.

Exhibit H, p. 2.[7]

Fifth is the fact that the Committee itself repeatedly lapses into the singular "amendment" when it describes its three initiative proposals. See **Exhibit G**, Save Our Everglades Motion to Expedite, and discussion at pp. 4-5, *supra*. Finally, the fact that "Responsibility" and "Trust Fund" are empty vessels without the funds from the "Fee on Sugar" compels only one conclusion: these amendments are a single constitutional amendment plan. They attempt to amend the Florida Constitution in multifarious ways to achieve a single goal.

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[7] Despite the letter's promise ("[t]hat money will be placed in a trust fund and used to clean up the pollution. . .") there is nothing in the "Fee on Everglades Sugar" amendment requiring the funds raised to go in the trust to be created by the "Everglades Trust Fund" amendment. Where the money goes appears to be left to the discretion of the South Florida Water Management District.

The Committee treats the Court's decision in Save Our Everglades as merely a roadmap for evading the important constitutional and statutory restraints upon the initiative amendment process.

The Florida Constitution is a delicate document. Justice Roberts wrote:

> There is little doubt that it was the clear intent of the authors of the initiative provision and its amendment that it be more restrictive and more difficult to amend the Constitution by the initiative method rather than Legislative Resolution or a Constitutional Convention in order to prevent the disturbance of other sections of the charter by taking a popular subject as a vehicle and do damage to other sections in the fine print. It should be more difficult by the initiative.

Weber v. Smathers, 338 So. 2d 819, 824 (Fla. 1976) (Roberts, J., dissenting) overruled in part Floridians Against Casino Takeoever v. Let's Help Florida, 363 So. 2d 342 (Fla. 1978). Justice Roberts, quoting the "late and revered Justice Terrell," feared the potential damage to the Constitution caused by "pencil[ing] an amendment, giving it a popular name, get[ting] the signatures, and plac[ing] it on the ballot" without the study and debate designed to protect the integrity of our organic law.

The Save Our Everglades Committee's 1996 attempt to circumvent the constitutional and statutory safeguards to the Florida Constitution should be rejected, whether viewed as three separate amendments, or as the three-in-one amendment it truly is. This Court's Save Our Everglades opinion is equally applicable to this consolidated-for-argument case. The same result should occur: the three proposed amendments should be stricken from the ballot.

CONCLUSION

For the foregoing reasons, Osceola, Atlantic, and Okeelanta, and the Sugar Cane Growers Cooperative of Florida, respectfully request that the Court find the three proposed Everglades amendments violative of article XI, § 3, Fla. Const., and § 101.161, Fla. Stat., and order them stricken from the ballot.

Respectfully submitted,

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Opposing the Proposed Amendments

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a correct copy hereof has been furnished to (1) HON. ROBERT BUTTERWORTH, Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; (2) HON. SANDRA B. MORTHAM, Secretary of State, The Capitol PL-02, Tallahassee, FL 32399-0250; (3) E. THOM RUMBERGER and WILLIAM L. SUNDBERG, RUMBERGER KIRK & CALDWELL, P.A., 106 E. College Avenue, Suite 700, Tallahassee, FL 32301 (Counsel for Save Our Everglades); (4) JON MILLS and TIMOTHY McLENDON, P.O. Box 2099, Gainesville, FL 32602 (Counsel for Save Our Everglades) by Fed Ex (by mail to Mr. Mills) this 22nd day of July, 1996.

BRUCE ROGOW

INDEX TO APPENDIX

A -- March 26, 1996 letter of David A. Rancourt, Division Director, Division of Elections, Florida Department of State

B -- Proposed Amendment: Fee on Everglades Sugar Production, No. 88,343

C -- Proposed Amendment: Everglades Trust Fund, No. 88,344

D -- Proposed Amendment: Responsibility for Paying Costs of Water Pollution Abatement in the Everglades, No. 88,345

E -- Single Form Unified Petition containing all three Proposed Amendments

F -- June 18, 1996 Letter of Secretary of State

G -- Save Our Everglades Committee Motion to Expedite

H -- June 20, 1996 Letter of Chairman of Save Our Everglades