IN THE SUPREME COURT OF FLORIDA
CASE NO. 88,609

CECIL LANE, DEWEY E. DESTIN, JR., BUDDY BROWN,
JULIE A. RUSSELL, and MIKE DAVIS,
Appellants,

vs.

LAWTON M. CHILES, Governor of the State of Florida,
ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,
and the FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
Appellees.

On Certified Judgment from the Circuit Court of the
Second Judicial Circuit, in and for Leon County, Florida
Case No. 95-2972

ANSWER BRIEF OF APPELLEES, CHILES AND BUTTERWORTH

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STATEMENT OF THE CASE AND FACTS

In November, 1994, the voters of the State of Florida adopted Article X, § 14, as an Amendment to the Constitution of the State of Florida. [hereafter "Amendment"] This Amendment was proposed by the initiative process pursuant to Article XI, § 3, Fla. Const., and was passed by a margin of 72% to 28%. The Amendment banned the use of gill and entangling nets in all Florida waters and limited other nets to less than 500 square feet in the nearshore and inshore waters of Florida. Eight months after the passage of the Amendment, but immediately prior to its effective date, Appellants brought an action challenging its validity on both procedural and substantive grounds.

On cross--motions for summary judgment, the trial court found that the time had passed for the Plaintiffs/Appellants to challenge the sufficiency of the ballot summary; that the ballot summary met the requirements of Florida law; that there is no legal restraint on the subject matter of a constitutional Amendment in Florida save the single subject rule; and that the Amendment did not violate the Plaintiffs'/Appellants' rights under the due process, equal protection, impairment of contract, or guarantee clauses of the Florida or Federal constitutions. The court below refused to apply a strict or heightened level of scrutiny in its analysis of Plaintiffs'/Appellants' claims. Rather, the court applied the rational basis test,

finding that thee were no fundamental rights or suspect classes involved in this case.

SUMMARY OF ARGUMENT

This court should review the questions raised concerning the validity of Article X, § 16, Fla. Const., by allowing all presumptions to favor its validity. As the California state and federal courts have held, all presumptions favor the validity of initiative measures. With respect to the substantive constitutional arguments, this is an economic regulation affecting no fundamental rights or suspect classes, and therefore this court should apply the "rational basis test."

There are no limitations on the subject matter of a constitutional Amendment in Florida, even if passed by initiative, other than the single subject rule. This court has held twice that the people of Florida can amend their constitution *in any way they see fit*.

Art. X, § 16, Fla. Const., does not deprive the Appellants of a protected liberty interest. Fishing is not a fundamental right. The limitations of Art. X, § 16 are rationally related to the legitimate state objective of protection of the state's marine resources. Art. X, § 16 does not prohibit anyone from engaging in the profession of commercial fishing; it simply regulates how that industry may operate.

Art. X, § 16 also does not deprive Appellants of a protected property interest. This facial attack is a substantive due process challenge which is also measured by the rational basis test. The Amendment also passes that test. The state does not have to regulate in the least restrictive means to achieve its stated goal.

There has been no taking of Appellants property. No due process violation exists simply because Appellants would have to pursue inverse condemnation for compensation for any property allegedly. This case presents an exercise of the police power, not the power of eminent domain. The regulation of the use of nets is not a taking; Appellants, operating in a highly regulated industry, acquired that property with an accepted risk that valid regulations might diminish its value. It cannot be said that there is no possibility of any reasonable use, and therefore there has been no taking.

Art. X, § 16 does not violate Appellants' equal protection rights. The regulation on its face applies to *all* those who would fish in Florida waters; no distinctions are made. Even if a distinction is perceived to be based on the difference in impact on commercial and recreational fishermen, such a distinction is not a violation, The state can address a problem in a step-by-step manner. Furthermore, the restrictions on net use are rationally related to the state's legitimate objective and are valid. As to the east coast-west coast distinction, the

500 square foot limitation covers one third of the state's territorial waters of both coasts. Because of the differences in the bathymetry between east and west coasts, the effect on the fish populations of the different restrictions are similar. Although this distinction may not be perfect, the state does not violate the equal protection clause because of imperfect classifications.

This court has already ruled that the ballot summary for Art. X, § 16 complied with the requirements of § 10 1.16 1, Fla. Stat. Relitigation of this issue should be allowed only in extraordinary circumstances. There is no basis here for ignoring the general rule that all objections to the form of ballots are cured by the election. Appellants could have sued for mandamus or participated before this court the first time; they admit they were aware of the ballot language long before the election. They chose, however, to wait until the eve of the effective date of the Amendment to bring this challenge; it should be rejected.

Compliance of the ballot summary with the requirements of § 10 1.16 1, Fla. Stat., is a question of law. Examination of the language of the Amendment and the summary will yield the answer. If the chief purpose of the Amendment is stated in a way that does not mislead the voters, then it is sufficient. Here, the chief purpose of the Amendment is to protect the states marine resources and environment by placing limitations on the use of nets in Florida waters. The language of the

summary does not trick the voters into voting for the opposite result of that set forth in the Amendment. Because this is a legal question, Appellants' public opinion poll is irrelevant. Outcomes of elections cannot be impeached by after-the-fact polls. In any event, Appellants' poll is of little or no value because of serious flaws in the questions and the sample.

None of the six issues raised by Appellants are sufficient to find the ballot summary invalid. It is the chief *legal effect* of the Amendment that must be disclosed, ***not*** subjective evaluations of special impact. The issues that Appellants want included in the ballot summary for Art. X, § 16, Fla. Const., are either subjective evaluations of special impact or not the chief legal ramifications of the Amendment. Failure to include any or all of them did not mislead the public. The ballot summary was valid.

There is no basis for finding Art. X, § 16, Fla. Const., invalid either on substantive or procedural grounds. The summary judgment of the circuit court should be AFFIRMED.

ARGUMENT

STANDARD OF REVIEW

Appellants assert that this court should apply a high level of scrutiny to the question of the validity of Article X, § 16, Fla. Const. Various reasons are

presented, none of which are meritorious. Appellants rely heavily on this court's holding in *Fine v. Firestone,* 448 So, 2d 984 (Fla. 1984), for this proposition. In *Fine,* the issue before the court was a question of compliance with the 'constitutionally mandated single subject rule. Based in part on the difference in wording between the single subject rule for statutes (Art. III, § 6, Fla Const.) and for constitutional Amendments by initiative (Art, XI, § 3, Fla. Const.), this court receded from earlier rulings which treated the requirements the same. The ruling in *Fine* applied a narrow interpretation of the single subject rule for constitutional Amendments; it did not apply "strict scrutiny" to any question of the validity of the Amendment for other reasons. This narrowly focused holding regarding the single subject rule, which is not at issue in this case, does not suggest that heightened scrutiny is the proper standard for review of the validity of a constitutional Amendment merely because it was passed by the initiative process. In fact, this court's holding in *Fine* was that the proposal there was "clearly and conclusively deficient," the deferential standard properly applied by the lower court in this case. *Id.* at 993.

The court below did, and this court should, accord the subject Amendment the same deference and presumptions of validity that clothe all legislation coming before the court. Although the Florida courts have never been presented with this

question directly, both federal and state courts in California have. In addressing the validity of Proposition 187, the United States District Court for the Central District of California stated:

> In determining the validity of Proposition 187, the court is mindful of its obligation to uphold the initiative to the fullest extent possible. California law holds that "all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient." [] Initiatives "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears."

League of United Latin American Citizens v. Pete Wilson, et al, 908 F.Supp. 755, *765* (C.D. Cal. *1995). See also, Legislature of State of California v. Eu, 286* Cal.Rptr. 283,287 (Cal. 1991)(It is the court's "solemn duty to jealously guard the precious initiative power and resolve any reasonable doubts in favor of its exercise."); *Raven v. Deukmejian,* 276 Cal.Rptr. *326, 329* (Cal. 1990); *Brosnahan v. Brown,* 186 Cal.Rptr 30, 33 (Cal. 1980).

Appellants assert that this deference should not be accorded to Article X, § 16, because deference to the acts of the legislature is based on the procedural safeguards of the legislative process which are missing from the initiative process. It is common knowledge that not all legislative enactments are passed with such

procedural safeguards. [1] In *Askew v. Firestone, 42* 1 So. 2d 15 1, 155 n.2 (Fla. 1982), this court acknowledged that the proposed Amendment at issue was properly passed even *without* all of the supposed safeguards. Regardless of the presence of any so called "safeguards," great deference is due to the people exercising their inherent and retained sovereignty through the initiative process.

Appellants also assert that strict scrutiny should be applied to Article X, § 16, because the Amendment affects fundamental liberty and property interests. Fishing is *not* a fundamental right. *Sisk v. Texas Parks and Wildlife Dept., 644* F. 2d 1056, 1058 n.5 (5th Cir. 1981)(applying rational basis test to fisherman's challenge to permit denial); *Matson v. Alaska, 785* P. 2d 1200, 1204 (Alaska, 1990)(limited entry regulations reviewed under rational basis test - not a fundamental right); *Washington Kelpers Assn. v. Washington, 502* P. 2d 1170, 1174 (Wa. 1972)(rational relation test applied to salmon gear rules.)

In *LaBauve v. Louisiana Wildlife and Fisheries Commission, 444* F.Supp. 1370 (E.D. La. 1978), the court was faced with a challenge to gill net restrictions in Louisiana. Addressing similar arguments to those made herein, the court found that the Appellants' pursuit of a livelihood was *not* a fundamental interest. *Id.* at 1382

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[1] One only need remember the newspaper accounts of the fight over the "Tobacco Liability Law" to realize that not all laws are passed with what Appellants refer to as procedural safeguards.

(citing, *inter alia, Williamson v. Lee Optical,* 348 U.S. 483 (the right to pursue a particular occupation is not fundamental)). *See also, Commercial Fisheries Enty Corn 'n v. Apokedak,* 606 P. 2d 1255 (Alaska 1980) (availability of employment opportunity not a fundamental right requiring strict scrutiny)(also citing, *inter alia, Williamson).* The Supreme Court recently characterized fundamental rights as those "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno* v. *Flores*, 507 U.S. 292, 303 (1993). It must be recognized that Art. X, § 16 does not ban fishing as a profession or bar any individual or recognizable group from fishing; it merely bans certain types of gear. Commercial fishing, and, as is the case here, fishing with a certain type of gear, does not belong in the class of fundamental rights with the right to vote, and freedom of speech, association or religion. As in *LaBauve* and *Apokedak,* this court is faced with an economic regulation[2] which does not warrant strict scrutiny, but rather is to be tested under the rational basis test.

Appellants also cannot raise the level of scrutiny in this case by claiming a fundamental property interest. Their interests in their nets have not been "taken." (see discussion of takings under due process, *infra*) Appellants' taking claim is a

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[2] Although violation of the provisions of Art. X, § 16, Fla. Const., carry misdemeanor penalties, it must be considered as an economic regulation, not a penal statute.

facial attack on the Amendment and is in reality a substantive due process claim. No fundamental rights or suspect classes are involved in this case and the test for substantive due process in the context of an economic regulation such as Article X, § 16, is the rational basis test. *Belk-James* Inc. v. *Nuzum*, 358 So. 2d 174, 175 (Fla. 1978).

When the people of the state exercise their sovereign right to amend their constitution, they may do so in any way they see fit, and this court should accord that action a high degree of deference. Appellants do not assert *any fundamental* liberty or property interest which overcomes this deference, and therefore, the Amendment can be found unconstitutional only for the most compelling reasons,

SUBJECT MATTER

Appellants assert that Article X, § 16, Fla. Const., is invalid because it contains improper subject matter for inclusion in the Florida Constitution. That this contention lacks any merit is clearly shown by the absolute lack of citation to any binding authority. Appellants cite to Justice McDonald's concurring opinion in *Advisory Opinion - Marine Net Fishing,* 620 So. 2d 997 (Fla. 1993). There, Justice McDonald discusses, as a matter of policy, that perhaps the Amendment process is subject to abuse because of the lack of limitations imposed. He recognizes that Florida's constitution is one of the most easily amended. *Id.* at 1000 n.2 However,

and this part the Appellants fail to recognize, Justice McDonald specifically states:

> At this juncture, rather than espouse any particular solution as to how to prevent such abuse, *I merely express my thought* that some issues are better suited as legislatively enacted statutes than as constitutional Amendments. ***It is my hope that the next Revision Commission will have the opportunity to establish some criteria regarding the subject matter of initiatives*** that will preserve the constitution as a document of fundamental laws, while preserving the popular power of the people.

Id. at 1000 (emphasis added). Clearly, this statement is a recognition that, save one, there are no substantive limitations on the subject matter of Amendments to the Florida Constitution, Such limitations would have to be found in the text of the Constitution itself where the *one existing* limitation is found, Art. XI, § 3, Fla. Const. Amendments to the Florida Constitution proposed by initiative must be limited to a single subject (with a newly added exception). Article XI, § 3, Fla. Const. Recognizing this lack of limitations, this court has stated:

> The people can by initiative amend any "portion or portions" of the Constitution *in any way that they see fit,* provided that the Amendment brought to vote by an initiative petition confines itself to a single subject matter.

Smathers v. Smith, 338 So. 2d 825, 827 (Fla. 1976)(emphasis added).

> [W]e are dealing with a constitutional democracy in which the sovereignty resides in the people. It is their constitution we are construing. They have a right to

> change, abrogate, or modify it *in any manner they see fit*, so long as they keep within the confines of the Federal Constitution.

Gray v. *Golden*, 89 So. 2d 785,790 (Fla. 1956)(emphasis added). There being no limitation on the subject matter of a constitutional Amendment in Florida other than the single subject rule, Appellants claim on this issue is meritless.

DUE PROCESS

Appellants have asserted that Article X, § 16, Fla. Const., has deprived them of due process and is invalid. They claim that they have been deprived of fundamental liberty and property interests and that property has been "taken." None of these allegations has merit,

Article X, § 16, Fla. Const., does not deprive Appellants of a protected liberty interest,

As previously stated, heightened scrutiny should not be exercised in this case. See Standard of Review discussion, *supra.* The applicable test is the rational relationship test, with the key inquiry being whether Article X, § 16, Fla. Const. is rationally related to a valid state objective. *See, Taylor v. Village of North Palm Beach, 659 So.* 2d 1167, 1170 (Fla. 4th DCA 1995). There can be no question that protection of the State's natural resources is a legitimate State objective. The undisputed record reveals that removal of nets from Florida's waters is related to that goal. [R. Vol. IV, pg. 588-96]

Appellants cite *Fraternal Order of Police v. Department of State, 392 So.* 2d 1296, 1301-02 (Fla. 1980) (limitation on a professional solicitor's fees to 25 percent of gross contributions upheld) and *State* v. Ives, 167 So. 394,399 (Fla. 1936), for the proposition that their right to engage in a lawful occupation free from unreasonable government interference is a constitutionally protected liberty interest.[3] This *Court,* in *Fraternal Order of Police,* held that that right may be limited by being:

> subject to the police power of the state to enact laws which advance the public health, safety, morals or general welfare. 'Limitations upon the exercise of these liberties are constitutional *if they rationally relate to a valid state objective.'*

Fraternal Order of Police, 392 So. 2d at 1302 (emphasis supplied). In *State v. Ives,* this court also continues beyond Appellants argument to explain that

> Individual rights to life, liberty, and property are in law acquired and enjoyed subject to the exercise of the regulating powers of government; and such rights are not protected by the Constitution from the due exercise of such governing powers. The purpose of constitutional government is to secure individual rights subject to valid regulations enacted in the interest of the public good.

167 So. at 400. Florida courts, as they did in *Fraternal Order of Police,* have

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[3] While the right to engage in a lawful occupation free from unreasonable government interference is a constitutionally protected liberty interest, it is not of such character to be classified as a fundamental right.

upheld acts where an occupation is merely limited or restricted rather than completely prohibited. This is precisely what Article X, § 16, Fla. Const., accomplishes; it *limits* the type and size of nets that can be fished in Florida waters.[4]

Appellants assert that Article X, § 16, Fla. Const., is analogous to the town ordinance in *Carter v. Town of Palm Beach,* 237 So. 2d 130 (Fla. 1970). In *Carter,* the town enacted a *complete ban* on surfing and skimboarding at beaches within the town's jurisdiction. Again in contrast, Article X, § 16, Fla. Const., does not completely ban fishing in Florida waters, but simply *limits* the fishing gear which can be employed in fishing within Florida waters.

Article X, § 16, Fla. Const., is an economic regulation, common in commercial arenas. To classify the right to engage in a lawful occupation free from unreasonable government interference as a fundamental right and requiring it to effect the Appellants in the least restrictive means would create the impossible situation where all economic regulations would have to pass strict scrutiny to be valid. This is clearly not the case as states can impose economic regulations subject to determination that there is a rational basis to do *so. Belk-James Inc. v. Nuzum, 358* So. 2d 174, 175 (Fla. 1978)

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[4] Courts have upheld similar regulations in other states as well. See, *Burns Harbor Fish Co. v. Ralston,* 800 F.Supp. 722 (S.D. Ind. 1992); *LaBauve v. Louisiana,* 444 F.Supp 1370 (E.D. La. 1978).

Article X, § 16, Fla. Const., has not prevented commercial fishermen from engaging in what is still the lawful occupation of commercial fishing. Appellants argue that Article X, § 16, Fla. Const., completely bans fishing within Florida waters effectively closing the mullet fishery. Gill and entangling nets are not the only commercially viable method for harvesting mullet in Florida. Cast nets have always been a traditional commercial gear used to harvest mullet in Florida. Through the use of this traditional gear and through innovation with other gear that remains legal under the Amendment, the mullet fishery has ***not*** been effectively closed. Commercial quantities of mullet and all other fish continue to be landed after the effective date of the Amendment. [R. Vol. IV, pg. 588-96]

Appellants assert that non-entangling nets cannot be configured to meet the size requirement of Article X, § 16, Fla. Const., and still remain functional, relying on a deposition by Russell Nelson. [R. Vol. II, pg. 286-97] Dr. Nelson's testimony was that purse ***seines*** of that size were not commercially useful. Other gear, including beach and haul seines and cast nets of 500 square feet, can and are being used for commercial purposes. [R. Vol. IV, pg. 588-96]

Article X, § 16, Fla. Const. does not deprive Appellants of a protected property interest.

The proper inquiry to determine whether Article X, § 16, Fla. Const., deprives Appellants of a protected property interest is to examine whether Article X, § 16, Fla. Const., is a valid exercise of the police power[5] and whether it deprives Appellants of all viable economic use of that property.[6] Florida courts have held that "if the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains." *See, Glisson v. Alachua County,* 558 *So.* 2d 1030 (Fla. 1st DCA 1990) (quoting *Agins v. City of Tiburon, 447* U.S. 255,260 (1980)).

Appellants assert that Article X, § 16, Fla. Const., violates due process because it is unreasonable, arbitrary, and oppressive. This is a substantive due process claim. In support of this argument, Appellants rely on *In re Forfeiture of 1969 Piper Navajo,* 592 So. 2d 233 (Fla. 1992). In *Piper Navajo,* the county sheriff sought to forfeit an aircraft because it had surplus fuel tanks that did not conform with Federal Aviation Administration regulations. *Piper Navajo, 592 So.* 2d at 234.

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[5] *See, Taylor v. Village of North Palm Beach,* 659 So. 2d 1167, 1170 (Fla. 4th DCA 1995)

[6] *See, Taylor, 659 So.* 2d at 1170 *and Connor v. Reed Bros., Inc., 567 So.* 2d 515, 516 (Fla. 2nd DCA 1990) (denying all market value of citrus seedlings).

This court found that the purpose behind the statute providing for the forfeiture was the prevention of illegal drug trafficking. *Id.* at 236. The Court held that the statute violated due process because it was *not rationally related to the legislative objective.* The court found that, without evidence of actual use for drug trafficking, the relationship between excess fuel capacity and illegal drug use was not rational. *Id.* This was an application of the "rational basis test." Applying that test here, Article X, § 16, Fla. Const., ***is*** rationally related to the objective of natural resource conservation, an objective specifically within the police power of the state. *Moorman* v. *DCA*, 626 So. 2d 1108, 1110 (Fla. 3d DCA 1993)(protection of the environment); *State v. Leavins, 599* So. 2d 1326, 1336 (Fla. 1 st DCA 1992)(protection of marine resources); *State* v. *Hodges,* 506 So. 2d 437,441 (Fla. 1st DCA 1987)(regulation of fishing).

Appellants also rely on *Piper Navajo* to assert that Article X, § 16, Fla. Const., fails "to limit the means employed by the state to the least restrictive way of achieving its permissible ends." *Id.* at 236. Reliance upon such a rule, when examining Article X, § 16, Fla. Const., is unfounded. The *Court* in *Piper Navaho* was faced with a challenge to the validity of § 330.40, Fla. Stat. Violation of that section was punishable as a third degree felony and forfeiture of the plane *without any proof of involvement with illegal drug trafficking.* This is a felony statute

which also provides for the forfeiture of property; the standards for testing the validity of that statute are not applicable to a regulatory measure like Art. X, § 16, Fla. Const.

In addition, § 330.40, Fla. Stat., allowed for ***aphysical taking,*** an actual confiscation of personal property. The instant case involves an economic regulation which, allegedly, diminishes the value of certain property. Article X, § 16, Fla. Const., does not allow for a physical invasion and actual confiscation of property. It is an economic regulation which simply *limits* the areas within which the subject nets may be used by individuals fishing within Florida territorial waters. For this reason also, the *Piper Navaho* standards are inapplicable here.[7]

Appellants assert that Article X, § 16, Fla. Const., is arbitrary because it does not fully protect saltwater fish and marine animals from all aspects of waste, especially waste exclusively from recreational fisherman. This assertion is irrelevant. Courts have consistently held that regulations do not have to resolve every phase of a legitimate concern at once, but may invoke a "step by step approach" to rendering a complete solution, *State v. Leicht, 402 So.* 2d 1153, 1154

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[7] To subject economic regulations to such a standard when the regulation does not involve a fundamental right would result in all economic regulations being subject to strict scrutiny, a result which is clearly erroneous. See, *supra,* Discussion of fundamental liberty and property interest.

(Fla. 1981). *See, McDonald v. Board of Election Comm'rs of Chicago, 394 U.S.* 802, 809 (1969) (finding that a legislature is "allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"' quoting *Williamson v. Lee Optical of Oklahoma, Inc., 348* U.S. *483,489 (1955)) and Railway Express Agency, Inc. v. People of State of New York,* 336 U.S. 106, 110 (1949). Although part of the problem may be the recreational harvest or development or pollution, continued use of the restricted nets poses a problem which will be alleviated by the Amendment. The Amendment can validly address this part of the problem and leave the remaining problems for the future.

Appellants rely on *State* v. *Leone,* 118 So. 2d 78 1 (Fla. 1960), for the proposition that the government can act only in the way that will "infringe the least on the rights of the individual." *Id.* at 785. Even a cursory review of the holding of that case would show that it stands for no such general proposition. The quote, taken out of context at page 3 of Appellants' brief, is related to a discussion of the "inclusion of innocent acts doctrine." That doctrine:

> allows the inclusion of innocent acts within the regulations or prohibitions of an act passed in the exercise of the police power . . . where the public interest may require the regulation or prohibition of innocent acts in order to reach or secure enforcement of law against evil acts.

Id. at 784. That doctrine has no application in this case, and the statement of this court cannot be broadened to a general proposition as Appellants attempt to do. The same can be said of Appellants' citation to *Leone* at page 22 of their brief.

Appellants rely on *Joint Ventures Inc. v. Dept. of Transportation, 563 So.* 2d 622 (Fla. 1990), to argue that Article X, § 16, Fla. Const., is a *per* se taking because it deprives them of all economically viable use of their property and does not provide an adequate remedy, thereby depriving them of due process. In *Joint Ventures,* the Department of Transportation (hereinafter "the Department") recorded a map of reservation prohibiting any development on land which the Department sought to acquire in the future. 563 So. 2d at 623. The court found that this constituted an exercise of the power of eminent domain and that the State had to pay. 563 So. 2d at 625. Because it was an exercise of the power of *eminent domain,* rather than an unlawful exercise of the *police power,* the court found that the remedy of inverse condemnation was insufficient to protect the Plaintiffs due process rights. *Id.* at 626. In this discussion, the court explicitly recognized that the state can take property through two distinct powers - eminent domain and police power. The holding in *Joint Ventures* was dependant on the court's finding that the statute under attack there was an exercise of the power of eminent domain. In this case, the Amendment is an exercise of the police power, making the holding of *Joint Ventures* inapplicable.

Contrary to Appellants' argument here, the holding in *Joint Ventures* was not that the statute worked a per se taking, but rather that the exercise of the power of eminent domain required compensation and therefore the state's attempt to circumvent that requirement made the statute unconstitutional under due process. *See Tampa-Hi&borough Expressway* v. *A. G.W.S.*, 640 So. 2d 54, 57 (Fla. 1994) (expressly holding that *Joint Ventures* did not stand for the principle that every filing of a map of reservation was a taking *per* se, but rather that the affected parties still had to file an inverse condemnation claim and prove that there was a taking).

In this case, the Appellants are arguing a regulatory taking through an exercise of the police power, for which the only remedy is inverse condemnation proceedings [8]. Thus, Appellants have confused the power of eminent domain and the exercise of the police power which results in a taking, because in arguing a due process challenge under *Joint Ventures,* one would have to be arguing facts involving the power of the state to exercise its power of eminent domain. This is not the case here.

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[8] If we were to implement Appellants theory that regulations violated due process unless they provided an adequate compensation remedy in place, in order for DEP to deny a dredge and fill permit, the agency would have to institute eminent domain proceedings. Clearly this is not the case; the universally recognized remedy for such alleged regulatory takings is inverse condemnation.

Appellants contend that Article X, § 16, Fla. Const., deprives them of all economically viable use of their nets.[9] These assertions are claims of "as applied" regulatory takings which are not encompassed within their complaint. Appellants seek injunctive relief based on the facial invalidity of Art. X, § 16, not just compensation for the taking of any particular property. *Eide v. Sarasota County*, 908 F. 2d 716 (1 lth Cir. 1990).

Article X, § 16, Fla. Const., Does Not Constitute A Taking of Appellants Property

Article X, § 16, Fla. Const., does not deprive Appellants of all viable economic use of their nets. For a facial challenge, Appellants must show that the regulation does not "leave open the possibility of reasonable *use."* *Schillingburg*, 659 So. 2d at 1179. Appellants' non-entangling nets are still commercially viable in Florida waters beyond three miles in the Gulf of Mexico and beyond one mile in the Atlantic. Further, all of Appellants' nets are commercially viable for use in Federal waters or the waters of other states. [R. Vol. IV, pg. 588-96] "If the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains." *Schillingburg, 659 So.* 2d at 1179; *Glisson v.*

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[9] In the trial court, certain other items of property used by the Plaintiffs in their businesses were claimed to be taken. That claim appears to have been abandoned.

Alachua County, 558 So. 2d 1030, 1035 (Fla. 1st DCA 1990). The remaining use does not have to be the use preferred by Plaintiff, it only must be reasonable.

This is especially true in this case where an individual is involved in a heavily regulated industry, such as commercial fishing. The purchaser of such personal property is taking an accepted risk that valid regulations might diminish the value of that property. *See, Burns Harbor Fish Co,, Inc. v. Ralston, 800* F.Supp. 722,726 (S.D.Ind. 1992) (holding that while fishermen had a property interest in gill nets, valid regulation which prohibited their use in Lake Michigan was not a taking, but merely a cost of doing business). Investment backed expectations are "reasonable *only if they take into account the power of the state to regulate in the public interest."* Id. at 727 (emphasis supplied) (citing *Pace Resources, Inc. v. Shrewsbury Township, 808* F.2d 1023, 1033 (3rd Cir. 1987)). Therefore, the expectation that personal property described by the plaintiff would eternally be commercially useful in the fishing industry was unreasonable.

The test applicable to "as applied" just compensation takings claims, which were not pled in this case, is that found in *Graham v. Estuary Properties, Inc., 399* So. 2d 1374, 1381 (Fla. 1981). This court developed a seven part test to determine

if a valid exercise of the states police power amounted to a taking. *Id.* [10] The Court developed the following considerations:

1. Whether there is *aphysical invasion* of the property.
2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes *all economically reasonable* use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.

Id. at 1380-8 1 (emphasis added).

Even if this court applies this test to this case, Article X, § 16, Fla. Const., passes easily. There is no physical invasion of property. While in some cases Appellants' nets will not be able to be used in the same manner as before, they certainly have not lost *all* economically reasonable use. Article X, § 16, Fla. Const. prevents a public harm by preventing damage to the natural resource of the State, a valid use of the police power. The Amendment is not arbitrarily and capriciously

[10] In order for Appellants to claim that an exercise of the police power amounted to a taking in this context, they must acquiesce in the propriety of the government's action before bringing a taking claim. Key *Haven v. Board of Trustees,* 427 So. 2d 153 (Fla. 1982); *Bowen* v. *DER,* 448 So. 2d 566 (Fla. 2nd DCA 1984) (Applicant can file for inverse condemnation only after completing the administrative process or allowing permit denial to ripen to a final decision.)

applied; it applies to all individuals fishing within Florida waters and it is rationally related to a legitimate state objective. And finally, Article X, § 16, Fla. Const., does not unreasonably curtail investment-backed expectations. As discussed earlier, Appellants' expectations must be tempered by the knowledge that they operate in a highly regulated industry.

Article X, § 16, Fla. Const., does not violate Plaintiffs' substantive due process rights. It is an exercise of the State's police power that is rationally related to a legitimate state objective, not the power of eminent domain. The Amendment also does not deprive Appellants of all economically viable use of their property. Their nets can be used in other ways or in other places and retain value. Article X, § 16 does not deny Appellants due process of any kind.

EQUAL PROTECTION

Appellants claim that Article X, § 16, Fla. Const., violates the Equal Protection Clause by creating unconstitutional distinctions between commercial and recreational fishermen, and between east and west coast fishermen. Appellants also argue that the court should apply strict scrutiny to these allegations relying on *DeAyala v. Florida Farm Bureau Casualty Insurance Co., 543 So.* 2d 204 (Fla. 1989). In *DeAyala*, the basis for this court's discussion of strict or heightened scrutiny for the subject statute was that, "the classifier contained in section

440.16(7) involves alienage, one of the traditional suspect classes." Id. at 207. No such suspect class is involved in this case and, as set forth *supra*, there are also no *fundamental* rights involved. No case has been cited, including *DeAyala*, which classifies the right to be rewarded for industry as fundamental.

As set forth above, no fundamental liberty or property interests are effected by the Amendment, so the court should apply the rational basis test where the equal protection question is validly raised. Article X, § 16, is an economic regulation, and the rational basis test

> is a standard that has been consistently applied to state legislation restricting the availability of employment opportunities.

Dandridge v. Williams, 397 U.S. 471,485 (1970). *E.g, Louisiana v. Verity, 853* F. 2d 322,333 (5th Cir. 1988)(rational basis test applied to regulations requiring TEDs in shrimp nets); *Sisk v. Texas Parks and Wildlife, 644* F. 2d 1056, 1058 n.5 (5th Cir. 198 1)(Texas distinction in treatment between commercial and recreational fishermen should be tested by the rational basis test.); *Commercial Fisheries Entry Commission v. Apokedak,* 606 P. 2d 1255, 1263 (Alaska 1980)(limited entry Act tested by rational basis test).

Commercial v. Recreational Fishermen

On its face, the Amendment bans the use of certain types and sizes of nets. There is *no* distinction made between or among any class of individuals, the distinction made is between allowable and prohibited types of gear. E.g., *Barker v. State Fish Commission,* 152 P. 537, 538 (Wa. 1915). All of the people of Florida, or anyone else fishing in Florida waters, are equally restricted by the Amendment. In New *York City Transit Authority v. Beazer, 440* U.S. 568,587 (1979), the Supreme Court held:

> The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle.

See also, Skiriotes v. Florida, 3 13 U.S. 69 (194 1), where the Supreme Court, addressing a fishing gear restriction imposed by the State of Florida, held:

> Nor is there any repugnance in the provisions of the statute to the equal protection clause of the Fourteenth Amendment. The statute applies equally to all persons within the jurisdiction of the State.

Id. at *75.* At issue in *Skiriotes* was a ban on the use of diving equipment in the commercial sponge fishery. There, as here, the ban had a greater effect on the people using the banned equipment than on those not using it. That did not raise

the equal protection question in 194 1, and it does not raise it here; [11] all persons within the jurisdiction of the State of Florida are equally restricted by the Amendment.

If the court reaches the equal protection question on this issue, then it should apply the rational basis test. If the state purpose is legitimate, an equal protection challenge cannot prevail so long as the rational relationship is at least debatable. *Metropolitan Life Ins. v. Ward,* 263 U.S. 545 (1924). The State objective is undeniably legitimate and the rational relationship is at least debatable.

The Supreme Court of Missouri has recognized that:

> Statutes and regulation designed to conserve wildlife are distinguishable from most other regulatory measures; no fishing regulation could be so framed as to operate equally on all persons[], and so some discrimination in fish and game laws is permissible and constitutional if based on some reasonable ground or on some difference which bears a just relation to the attempted classification.

Missouri v. Terrell, 303 S.W. 2d 26, 28 (MO. 1957)(prohibition on taking fish from certain area upheld). Clearly there is a rational basis for restricting the commercial use of nets for catching fish. Commercial use of nets accounts for a majority of the

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[11] As Dr. Nelson's affidavit shows, the Florida Administrative Code allowed the use of certain of the now banned gear for recreational use. [R. Vol. IV, pg. 588-96] Therefore, Appellants' unsupported assertion that "only commercial fishermen used the banned gear" is false and cannot serve to raise an equal protection question.

catch of the six species of fish reported to be overfished at this time. [R. Vol. IV, pg. 588-96] This overfished condition is in spite of years of attempts by the State of Florida to recover those populations through the use of other types of regulations.

Appellants assert that the depleted condition of the fish populations is caused by other factors in addition to commercial fishing with nets. The fact that there may be other contributing causes to the condition of these fisheries does not mean that there is an equal protection violation in the application of Art. X, § 16. The Equal protection clause:

> does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.

Dandridge, 397 U.S. at *486-87. See also, Williamson v. Lee Optical, 348* U.S. 483, 489 (1955)("Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *Morgan v. Texas,* 470 S.W. 2d 877, 880 (Tx. App. 1971) Appellants' assertions that there are other contributing causes for the overfished condition of certain fisheries is irrelevant in the face of the rational relationship between the use of nets and damage to fish populations.

Fisheries regulations, both in Florida and in other states, are often challenged by commercial fishermen making the same equal protection claim as is made here. That claim is always unsuccessful; Appellants have cited no authority where such a claim was sustained. On the other hand, the following is a partial list of those cases rejecting such a claim: *Louisiana v. Verity,* 853 F. 2d at 333 (TED regulations upheld); *Martinet v. Dept. of Fish and Game,* 250 Cal.Rptr. 7 (Cal. App. 4th Dist. 1988)(different treatment between new entrants and previous permit holders upheld); *Weikal v. Washington Dept. of Fisheries, 679* P. 2d 956 (Wash. App. 1984)(limitation on crab license upheld); *Morgan, 470* S.W. 2d at 880 (limitation of nets to 20 feet in length upheld); *Barker v. State Fish Commission,* 152 P. 537, 538 (Wa. 19 15)(Statute limiting net mesh size and length upheld; classification of methods of taking fish, making certain methods lawful and other methods unlawful, held not to discriminate in violation of any constitutional right.); *Washington Kelpers Assn v. State, 502* P. 2d 1170, 1177 (Wa. 1972)(Statute prohibiting use of sports gear in commercial salmon fishery upheld; classification of commercial fishermen "reasonable in light of its purpose.); *Apokedak, 606* P. 2d at 1264 (Limited Entry Act upheld). If there is perceived to be a distinction made between commercial and recreational fishermen, then there is a rational basis for it and there is no equal protection violation.

East Coast v. West Coast

Appellants also attack the Amendment on the basis that there is a discrimination between east and west coast fishermen, to the disadvantage of the west coast fishermen, which violates the Equal Protection Clause. As set forth above, the test for this allegation is the rational basis test.

In subsection (b)(2) of Article X, § 16, the Amendment restricts the use of nets other than gill and entangling nets to 500 square feet. This restriction applies in the nearshore and inshore waters of Florida, defined as within one mile of the shoreline on the east coast and within three miles of the shoreline on the west coast. Viewed narrowly as a restriction by the number of miles, there appears to be a difference. However, both distances make up one third of the State of Florida's territorial waters on each coast.[12] In that context, both coasts are treated identically, raising no equal protection question.

Treating the 500 square foot net restriction as creating a distinction between east and west coasts, there is a rational relation to the objectives of the Amendment. The bathymetry of the east and west coasts are different. The depth of water on the east coast increases more rapidly than the depths on the west coast. The depths of

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[12] The territorial boundary of Florida in the Gulf of Mexico is three marine leagues or nine nautical miles. The boundary in the Atlantic Ocean is three nautical miles. Art. II, § l(a), Fla. Const.

the waters one mile out in the Atlantic are similar to the depths of waters three miles out in the Gulf of Mexico. Targeted fish species, as well as benthic plant and animal communities upon which they depend, react to water depth. Therefore, the fishing conditions one mile out in the Atlantic will approximate those three miles out in the Gulf of Mexico.[13] [R Vol. IV, pg. 588-96] The purpose of the Amendment (with respect to the 500 square foot net limitation) is to protect the state's fisheries stocks by keeping large nets out of the shallow waters close to shore. Therefore, the distinction between coasts bears a rational relation to the Amendment's objectives and is valid.

Neither of Appellants' equal protection claims has merit under the rational basis test.

BALLOT SUMMARY

As a preliminary matter, Appellants should be barred from bringing the procedural defects of the adoption of Art. X, § 16, Fla.. Const., to this court at this time. This court has already considered the procedural aspects of Appellants' challenge, and rejected them. *Advisory Opinion to the Attorney General - Limited Marine Net Fishing,* 620 So. 2d 997 (Fla. 1993). As shown by the UP1 press

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[13] Although this distinction may not be perfectly accurate, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams, 397* U.S. 471,485 (1970).

release, [R. Vol. IV, pg 5 15-78, App. A] the pendency of the case before this court was publicized, affording Appellants the opportunity to participate; they *chose* not to appear.

Furthermore, Appellants cannot claim that they were unaware of the proposed Amendment and its ballot language prior to the vote in November, 1994. There was vigorous public debate on this issue as evidenced by a sampling of editorials from local newspapers. [R. Vol. IV, pg 5 15-78, App. B] Appellants admitted in their depositions that they all knew of the Amendment and its ballot language prior to the election. [R. Vol. IV, pg.620-21 (Russell); Vol. V, pg. 639 (Davis), 662-64 (Destin), 705-06 (Lane), 724-26 (Brown)] This court has held that:

> [An] aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election.
>
> [T]he neglect to follow [a mandatory] procedure was fatal if raised *before* the election, yet the defect was *cured by the election* itself.

Pearson v. *Taylor*, 32 So. 2d 826 (Fla. 1947)(emphasis added). See *also, Sylvester v. Tyndall*, 18 So. 2d 892, 899 (Fla. 1944); *State ex rel Landis v. Thompson*, 163 So. 270, 277-78 (Fla. 1935) ("[A]ll objections as to the form of ballots employed have now become obviated by the popular voice as the paramount act, and are

consequently no longer available to be judicially urged by those who failed to seek correction of such alleged errors in the form of ballots prior to the casting by the people of the alleged irregular tickets furnished to them for voting purposes by the State.)[14] "Renewed litigation will be entertained only in truly extraordinary cases[.]" *Florida League of Cities v. Smith, 607 So.* 2d 397,399 (Fla. 1992). The circumstances in this case are not extraordinary. Appellants could have participated but didn't."

Even if Plaintiffs are correct and they did not receive sufficient notice to be bound by the advisory opinion, they waived any standing to object to the ballot language by choosing *again* to forego the opportunity to seek invalidation of it prior to the election.[16] Courts are, and should be, reluctant to invalidate the actions of the

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[14] *Contra, Wadhams v. Sarasota* County, 567 So. 2d 414 (Fla. 1990). In *Wadhams*, the court found that failure to include any summary pursuant to § 10 1.16 1, Fla. Stat., was fatal to charter Amendment even after election. The court does not discuss the availability of a pre-election remedy. It is not clear that Plaintiffs knew of the ballot defect prior to the election.

[15] In *Adviso y Opinion - Stop early Release of Prisoners, 642 So.* 2d 724 (Fla. 1994), no briefs were filed by any party regarding the compliance of the initiative ballot. The Court determined that it had a constitutional duty to examine the proposal "pursuant to our own independent research." *Id.* at 725. Interested parties were deemed to have waived their opportunity to advise the court. We must assume the court undertook the same thoughtful analysis in this case even in the absence of Appellants herein.

[16] "Petition for mandamus is an appropriate method for challenging an allegedly defective proposed Amendment to the Constitution." *Florida League of*

electorate in the exercise of its inherent and reserved sovereignty in the initiative process. "There is a strong public policy against courts interfering in the democratic processes of elections. *Florida League of Cities, 607 So.* 2d at 400. It is especially true when, as here, Appellants voluntarily *chose* not to participate either before this court or in another forum available prior to the election. This court should consider only the substantive constitutional issues raised by Appellants.

Appellants assert that the ballot summary for Article X, § 16, Fla. Const., was defective because it failed to inform the voters of six issues. They rely heavily on a public opinion poll to show that if the voters had been informed on these issues, the outcome of the election would have been different. Neither the poll nor any of these six alleged "deficiencies" makes the ballot summary invalid.

Section 10 1.16 1, Fla. Stat., provides:

> The substance of such Amendment or other public measure shall be printed in clear and unambiguous language on the ballot. . . . The substance of the Amendment or other public measure shall be an explanatory statement . . . of the *chiefpurpose* of the measure. (emphasis added)

This standard requires that the voters not be misled. The ballot must give the voter

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Cities, 607 So. 2d at 399.

fair notice of the decision he or she must make. *Askew v. Firestone,* 421 So. 2d 15 1, 155 (Fla. 1982). This court has declined in the past, and should decline here, to interfere with the right of the people to vote upon a proposed Amendment absent a showing that the proposal is "clearly and conclusively defective." *Weber v. Smathers*, 338 So. 2d 8 19, 821 (Fla. 1976). S*ee also, Florida League of Cities v. Smith, 607 So.* 2d at *399; Fine v. Firestone,* 448 So. 2d 984,993 (Fla. 1984). Most recently, this court found its responsibility to be "to determine whether the language as written misleads the public." *Advisory Opinion Re Casino Authorization, Taxation and Regulation,* 656 So. 2d 466 (Fla. 1995)

The ballot summary in the instant case does not mislead the public; it clearly sets forth the chief purpose of the Amendment. The summary states:

> Limits the use of nets for catching saltwater finfish, shellfish, or other marine animals by prohibiting the use of gill or other entangling nets in all Florida waters, and prohibiting the use of other nets larger than 500 square feet in mesh area in nearshore and inshore waters. Provides definitions, administrative and criminal penalties, and exceptions for scientific or governmental purposes.

This summary, on its face, and as a matter of law, sets forth the chief purpose of the Amendment. It bans certain nets! It is not misleading; it does not conceal a conflict

with an existing provision; [17] it does not lure someone into voting to achieve a result which is the opposite of that achieved by the Amendment, it does not fly under false colors;'* it does not give the appearance of creating new rights or protections when the actual effect is to reduce or eliminate rights or protections already in existence.[19] The Amendment simply bans certain nets where they were not banned before; that is what the summary says,

Public Opinion Poll

Appellants rely throughout their argument on a public opinion poll in an effort to show that the voters would have voted differently and the Amendment would have been defeated if the six issues set forth below were disclosed to them in the ballot summary. This contention is meritless for two reasons: 1) the question of the sufficiency of the ballot summery is one of law for the court to determine by examining the language of the summary in light of the chief purposes of the Amendment; and 2) Appellants' poll is unreliable.

The question of the sufficiency of the ballot summary for all constitutional Amendments is presented to the supreme court prior to the proposition being placed

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[17] *Limited Political Terms, 592 So.* 2d at 228.

[18] *Askew,* 421 So. 2d at 156-57.

[19] *Florida League of Cities, 607 So.* 2d at 399.

on the ballot. This review is accomplished as a matter of law with no record before the court. The issue for the court is not whether any number of voters know exactly what they are voting on and whether knowledge of certain facts would change their vote.[20] It is a novel proposition that an election is invalid if the voters are not completely informed as to what they are voting for. As the court below stated:

> Certainly, the vote of the people as expressed in a general election cannot be impeached by a public opinion poll. If that were the case there would be no end to the election process.

Maybe it is a sad commentary on the electorate in this nation, but probably no elections would be valid if this was a necessary predicate. A clear example of this can be seen in the poll submitted by Appellants. Fully 27% of those polled did not know that the Amendment prohibits fishermen from using gill and entangling nets. This is in spite of the language of the ballot summary which states:

> Limits the use of nets for catching saltwater finfish, shellfish, or other marine animals by ***prohibiting the use of gill or other entangling nets in all Florida waters.***

The job of this court is to examine the language of the Amendment and the language of the ballot summary to determine if the summary is misleading or fails

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[20] As set forth below, many of the "facts" presented to the voters in the survey are not "facts" but disputed issues which are properly placed before the voters in the public discussions on the wisdom of voting for the Amendment.

to set forth the chief purpose of the Amendment. Only the chief *legal*[21] ramifications need be summarized; a public opinion poll is irrelevant to this inquiry.

The particular poll presented by Appellants should be disregarded by the *court.* In *Zippo Manufacturing v. Rogers Imports,* 216 F.Supp. 670, 68 1 (S.D. N.Y. 1963), the court stated:

> [I]t is well settled that the weight to be given a survey, assuming it is admissible, depends on the procedures by which the survey was created and conducted. [ ]

(citations omitted), Appellants' survey suffers from numerous deficiencies which make its conclusions unreliable and therefore not admissible as hearsay. *Id.* at 68 1-86 (It is the reliability of *aproperly conducted* survey that allows it to overcome a hearsay objection.) Among the problems with Appellants' survey are failure to report refusal and termination rates which affect the confidence level and margin of error, thereby making a margin of error rate of 2.9% unsubstantiated, and, because of a probable high refusal rate, invalid. There are indications that the sample was not random, it included more Republicans than Democrats, the sample was too young and non-Hispanic, it had a voting rate of 87% which is way too high, and the sample was profiled against a national norm rather than a Florida norm which should have been used since this is a Florida issue. [R. Vol. IV, pg. 602-10]

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[21] *Evans v. Firestone, 457 So.* 2d 1351, 1355 (Fla. 1984).

Questions in the survey itself suffered from serious ordering effects tending to bias the results. Respondents were brow beaten into giving negative responses about the net ban and were provided only with negative one-sided information about the Amendment, thereby inducing them to acquiesce to the perceived bias of the interviewer. Questions tended to reduce the self-esteem of the voter, reminding them that they did not have information and were in no position to dispute the factual statements of the interviewer. Those negative cues would again induce the respondent to acquiesce in the bias of the interviewer. The survey generally suffers from acquiescence "response set" or "response bias," i.e., all the cues of the survey hint at the "correct" answer and then ask for agreement with that central bias. [R. Vol. IV, pg. 602-10] Because of these deficiencies, the survey did not provide either "clear and convincing proof' that the ballot summary was deficient or any justification for reexamination of the results of the November, 1994 election adopting Article X, § 16, Florida Constitution.

Examining the six issues raised by the Appellants, none of those "facts" are the type which must be included in the ballot summary. They mostly constitute argument concerning the special impact of the Amendment on certain groups. This court held in *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) that:

> [T]he ballot summary is no place for subjective

> evaluation of special impact. The ballot summary should tell the voter the *legal effect* of the Amendment, and no more. (emphasis added)

The ballot summary "is not required to explain every detail or ramification of the proposed Amendment." *Smith v. American Airlines, 606* So. 2d 6 18, 620 (Fla. *1992); Advisory Opinion - Limited Political Terms in Certain Elective Offices, 592* So. 2d 225,228 (Fla. 1991). It is the legal effect of the Amendment that must be set forth in the summary. In *American Airlines,* the summary was invalid because it did not advise voters of a difference in tax treatment which was a legal effect and the chief purpose of the Amendment. 606 So. 2d at 620-21. In *Florida League of Cities v. Smith,* this court stated that it would have found the summary invalid if the Amendment had triggered the repeal of the homestead exemption without disclosing that in the summary. However, because the court found the repeal was not triggered, the summary was sufficient. 607 So. 2d at 399.[22] Again, a legal ramification of the Amendment was the focus of the court's attention, not a disputed practical result of its passage. The contentions of Appellants in this case fall mostly in the latter category and are not valid reasons for finding the ballot summary invalid.

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[22] The mere possibility of a trigger was not enough. The same is true here; the mere possibility of there being a taking or of the legislature providing relief to fishermen as a mater of legislative grace need not, and should not, have been included in the ballot summary.

The six deficiencies alleged by the Appellants herein are:

1. *Failure to inform the voters of existing statutes and rules regulating commercial fishing.*

Appellants rely on three cases to assert that the failure to inform voters of the existence of statutes and rules already regulating marine fisheries makes the ballot summary insufficient. They cite *Askew v. Firestone* and *Advisory Opinion - Casino Authorization, Taxation and Regulation* and *Wadhams v. Sarasota County, 567 So.* 2d 414 (Fla. 1990). None of these cases stands for the general proposition that the existence of a regulatory statute in these circumstances must be disclosed in the ballot summary.

In *Askew,* the supreme court analyzed an Amendment to the previously adopted "Sunshine Amendment." The existing provision contained a "complete two year ban on lobbying before one's agency." The proposed Amendment had the "chief effect [] to abolish the present two year total prohibition." *Askew,* 421 So. 2d at 155. The court held:

> Although the summary indicates that the Amendment is a restriction on one's lobbying activities, the Amendment actually gives incumbent office holders, upon filing a financial disclosure statement, a right to immediately commence lobbying before their former agencies, which is presently precluded.

Id. at 155-156. It was not simply that the summary failed to inform voters that there

was an existing provision, but that the failure made the Amendment appear to do the opposite of that which it really accomplished, which caused the court to find the summary insufficient. The failure impermissibly misled the public.

Similarly, in *Advisory Opinion - Casino Authorization, Taxation and Regulation,* the supreme court struck the proposal from the ballot because the summary misled the public. The court found that

> [T]he summary creates the false impression that casinos are now allowed in Florida. It fails to inform the voter that most types of casino gaming are currently prohibited by statute.

656 So. 2d at 469. Again, the summary gave the impression that it was accomplishing the exact opposite of its chief purpose. It said the Amendment "prohibited casinos" when they already were prohibited and the Amendment actually would have allowed them for the first time.

Finally, in *Wadhams*, the charter Amendment language by itself (no summary was provided) appeared to allow for meetings of the Charter Commission. However, in reality, the proposed Amendment would have *limited* the already existing authority of the Commission to meet. As in the previous two cases, the language presented to the voters accomplished exactly the opposite of what it appeared to do on the surface.

These three cases are not applicable in this case. The voters were not misled. Although nets were already regulated, the nets banned by the Amendment were not previously banned. The ballot summary stated that certain nets would be banned and that clearly was the chief purpose of the Amendment.

2. Failure to Inform the Voters that the Amendment would ban the use of purse seines in the nearshore and inshore waters of Florida

Appellants assert that failure to inform voters that Article X, § 16, Fla. Const., would effectively prohibit the use of purse seines in the nearshore and inshore waters of the state is a fatal flaw of the ballot summary and should result in invalidation of Article X, § 16, Fla. Const. For this argument, Appellants rely exclusively on the holding in *Dept. of Environmental Protection v. Millender, 666* So. 2d 882 (Fla. 1996). *Millender* does not dictate such an outcome.

In *Millender,* the court examined the issue of which measurement formula was appropriate when measuring a shrimp trawl pursuant to the size restrictions imposed by Article X, § 16, Fla. Const. *Millender, 666 So.* 2d at 883. The court discussed the various measuring techniques and analyzed them according to the purpose of the Amendment. Finding that the Amendment's purpose was to limit shrimp trawling, any interpretation of the constitutional language which would wipe

out the industry could not be accepted. *Id.* at 887. The issue of the ballot summary was never an issue in that case and was not addressed by this court.

The 500 square foot restriction on non-entangling nets imposed by Article X, § 16, Fla. Const., is not subject to differing interpretations. At least, no problem in interpretation is raised in this case. The question in *Millender* was what size net the people voted for; that question, while difficult for a shrimp trawl, is easily answered here.

As to the question of whether 500 square foot purse seines are useable, Appellants cannot be heard to argue here that they are not. In *OFF v. MFC*, DOAH case no. 95-0269RP, Organized Fishermen of Florida and Southeastern Fisheries, organizations which represent all of the Appellants herein, and three of the Appellants themselves, argued that a MFC rule banning all purse seines from the nearshore and inshore waters precisely because there was no commercial use, was invalid. The hearing officer held that the rule was an invalid exercise of delegated legislative authority because the rule was more restrictive than the constitution. Clearly, Appellants successfully argued there that some use could be made of the subject nets. There would seem to be no other explanation of why Petitioners would argue and the hearing officer would agree that a rule that banned those nets was invalid. This inconsistent position should be estopped in this case.

Even if it is true that there is no commercial use of 500 square foot purse seines, a purse seine is only one method of catching bait fish. Other types of nets can be used. Furthermore, the fish can be caught in purse seines unaffected by the 500 square foot limitation outside the nearshore and inshore waters of Florida. [R. Vol. IV, pg. 588-96] Therefore, the inability to use purse seines in the nearshore and inshore waters of Florida will not close down the entire bait fish industry. With regards to the bait fish industry, Article X, § 16, Fla. Const., does exactly what the ballot summary says it does. It limits the types of nets that can be used to catch bait fish in some Florida waters, it *does not close the entire bait fish industry!* The failure to address the usefulness of 500 square foot purse seines did not mislead the public and the summary was valid.

3. Failure to inform voters that the Florida commercial mullet fishery would virtually be eliminated

Appellants assert that the voters should have been informed that the Amendment would eliminate the commercial mullet fishery. This is exactly the type of subjective evaluation of special impact that this court indicated has no place in a ballot summary. *Evans v. Firestone,* 457 So. 2d at 1355. This is not a legal effect of the Amendment, but merely a disputed practical effect of the Amendment on a limited group of commercial fishermen. This is clearly the type of dispute

which should have been brought to the voters in the public debate on the wisdom of passing such an amendment. That this is not a necessary legal effect of the Amendment can be seen by the fact that the commercial mullet fishery has not been destroyed. Landings of mullet since the Amendment's effective date are down, but there are commercial quantities of mullet being landed in Florida. [R. Vol. IV, pg. 588-96]

4. *Failure to inform voters of difference in treatment between east and west coast net fishermen*

Appellants assert that the ballot summary is deficient because it fails to inform voters that fishermen on the east and west coasts are treated differently with respect to the 500 square foot limitation on nets other than entangling nets. The Amendment limits nets to 500 square feet in the nearshore and inshore waters of Florida. Those waters are defined as within one mile of the coastline on the east coast and within three miles of the coastline on the west coast. As set forth *infra*, this limitation treats fishermen on both coasts equally; they get to use nets greater than 500 square feet in two-thirds of the state's waters (6 of the 9 miles off the west coast and 2 of the 3 miles off the east coast) and they are treated equally with respect to availability of fish.

Even in the event the court determines there is a difference in treatment, the ballot summary did not need to contain this information. The difference in treatment is not a *chiefpurpose* of the Amendment. Every ramification does not have to be included, only the chief ones. *Limited Political Terms, 592 So.* 2d at 228. Lack of inclusion of this "fact" did not mislead the public.

The ballot summary contained the terms "nearshore and inshore waters." The definition of these terms in the Amendment contains the different treatment on its face. While the ballot summary must be accurate and informative, "voters are expected to inform themselves about the details of a proposed Amendment." *Advisory Opinion - Restricts Laws Related to Discrimination, 632 So.* 2d 10 18,102 **1** (Fla. *1994); Smith v. American Airlines,* 606 So. 2d 6 18, 62 1 (Fla. 1992). Anyone interested could have found this difference in the Amendment itself and satisfied himself about this minor detail of the proposal. This lack of notice was not misleading and is not fatal to the ballot summary and the Amendment.

5. *Failure to inform the voters that a regulato y "taking" would occur.*

Appellants assert that the effect of the Amendment is to take certain of their property requiring full or just compensation under the constitution and that this "fact" should have been included in the ballot summary. As set forth in the Due

Process section, *infra*, no such taking has occurred. Takings claims require individualized enquiry into the facts of each situation. *Pennel v. City of San Jose, 485* U.S. 1, 19 (1988); *Taylor v. Village of North Palm Beach, 659 So.* 2d 1167, 117 1 n. 1 (Fla. 4th DCA 1995). There is no way that a general statement could be made at the ballot stage that takings would result from the passage of the Amendment. As set forth *infra*, if there is a facial substantive due process problem with the Amendment, then it is invalid for that reason and this claim is moot. If there is no taking, then this claim fails like the claim about the triggering of the repeal of the homestead exemption in *Florida League of Cities v. Smith, supra.*

Appellants also assert that the possibility that the legislature might pass a bill granting compensation of some sort to affected fishermen thereby requiring the expenditure of public funds should have been disclosed in the ballot summary. The mere possibility that the legislature, by its grace, might grant some relief to affected fishermen is not a legal ramification necessarily disclosed in the ballot summary. No one could have predicted with any certainty whether, or to what extent, the legislature would grant relief to fishermen. The eventual passage of § 370.0805, Fla. Stat., was a matter of legislative grace, just like the provision for business damages in § 73.07 1, Fla. Stat. *Jamesson v. Downtown Development Authority,* 322 So. 2d 510, 511 (Fla. 1975). The compensation granted in § 370.0805, Fla.

Stat., was not constitutionally required. Since it was uncertain and not a necessary legal ramification of passage of the Amendment, it was not required in the ballot summary. Not every ramification must be included and its absence did not mislead the public as to the chief purpose of the Amendment.

6. Failure to inform voters that the Amendment would only harm licensed commercial fishermen, not sport fishermen

Appellants finally assert that the ballot summary is insufficient because it fails to inform voters that the Amendment only "harms" commercial fishermen, but not sports fishermen. The Amendment is designed to protect the state's marine life. As fish stocks increase, commercial fishermen will be benefitted as well as sport fishermen. The only commercial fishermen who will be "harmed" by the Amendment are those using the banned nets. It is clear that only those using the banned gear will be harmed by the Amendment's prohibitions. This is simple common sense; can we not expect the voters to at least make this simple connection?

In addition to the fact that the effects of the Amendment are clear on its face, the statement is simply not true. On the date of the passage of the Amendment, recreational use of entangling nets and cast nets in excess of 500 square feet was permitted. [R. Vol. IV, pg. 588-96] These uses were banned by the Amendment.

In conclusion, the "facts" that Plaintiff asserts should have been included in the ballot summary are either not the necessary legal consequences of the passage of the Amendment, are not true, or are not a "chief purpose" of the Amendment. In any event, none of the alleged deficiencies misled the public. For these reasons, Plaintiff has not shown "clearly and conclusively" that the ballot summary is deficient. None of Appellants assertions can meet the legal standard for invalidating the Amendment and Defendants are entitled to summary judgment on this claim.

CONCLUSION

The court below applied the correct standards of review for analysis of Plaintiff /Appellants' claims and properly found them to be without merit. Summary judgment in favor of Defendants/Appellees finding that Art. X, § 16, Fla. Const., is valid in all respects should be AFFIRMED.