OA 12-5-96 047

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,

- AGAINST -

LAWTON M. CHILES, as Governor of the State of Florida; ROBERT A. BUTTERWORTH, as 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

INITIAL BRIEF FOR APPELLANTS

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final summary judgment of the circuit court upholding the constitutionality of article X, section 16, Florida Constitution.

In November 1994, article X, section 16 was adopted through an initiative constitutional amendment petition. Prior to the amendment's effective date, the Appellants, five individuals engaged in the business of commercial net fishing, filed suit for a declaration that article X, section 16, Florida Constitution, is unconstitutional on a variety of grounds, and void because of violations of statutory ballot summary requirements. Appellants requested, but were denied, temporary injunctive relief to stay implementation of the amendment prior to its July 1, 1995 effective date. On May 28, 1996, the trial court denied Appellants' motion for summary judgment on the complaint for permanent injunction and declaratory relief and issued summary judgment for the state, finding that the amendment was constitutional and did not violate ballot summary requirements.

On a timely notice of appeal to the First District Court of Appeal, with a suggestion for certification directly to this Court for resolution of issues of great public importance in need of immediate resolution, the district court directly certified the judgment of the trial court, and on September 9, 1996, this Court accepted jurisdiction.

The parties stipulated to many facts, see R. Vol. V, pp. 755-761, and any other facts in the record are either not in dispute or are not material. The instant appeal presents only

issues of law, namely: whether article X, section 16, Florida Constitution should be invalidated because it violates Appellants' right to due process of law and equal protection, and whether it should be invalidated for failure to comply with ballot summary requirements.

SUMMARY OF ARGUMENT

The court has previously indicated that a constitutional amendment adopted by initiative should not receive deferential scrutiny because it has not proceeded through the checks and balances of review by the legislative and executive branches of government. Fine v. Firestone, 448 So. 2d 984 (Fla. 1984).

The content of the Net Ban amendment is legislative, does not govern the conduct of government, as do other constitutional provisions, and is not in harmony with the fundamental nature of the constitution as a document of lasting principles. Instead, it governs the conduct of a distinct occupational minority of private citizens, commercial fishermen. The judicial branch is the only branch of government which will have any opportunity to protect the minority rights addressed in the amendment and heightened judicial scrutiny is required. In fact, if the courts are unwilling to protect the legislative interests of a minority victimized by the manipulation of the initiative constitutional amendment process, there will be no institutional bar to the tyranny of the majority.

The amendment violates the due process rights of the Appellants. The Florida constitution accords protection to both liberty and property rights taken without due process of law.

Art. I, § 2, and Art. I, § 9, Fla. Const. These rights are also protected by the fifth and fourteenth amendments to the United States Constitution.

TO justify interference with personal rights and liberties, a penal statute must confine itself to that which is expedient for the protection of public health, safety, and welfare. Interference with private rights must be justified as a necessary means of accomplishing the state's objective, and the government act must bear a reasonable and substantial relationship to the purpose to be attained. The government must use means that are the least restrictive on the exercise of personal rights.

> If there is a choice of ways in which government can reasonably attain a valid goal necessary to the public interest, it must elect that course which will infringe the least on the rights of the individual.

State v. Leone, 118 So. 2d 781, 784-85 (Fla. 1960).

Pursuit of a lawful business or occupation is constitutionally protected and may not be prohibited unless justified by exceptional circumstances. Only reasonable regulations on a business or occupation may be imposed in order to protect the public welfare. Article X, section 16 is not narrowly tailored and unreasonably curtails Appellants' occupations as commercial net fishermen. The amendment's ban on the use of gill and entangling nets, and the size restriction as to all other nets, destroys occupations.

Individuals engaged in the commercial mullet fishery have been hardest hit because they relied almost exclusively on the use of gill and entangling nets for their trade. R. Vol. V, p. 759; R. Vol. II, p. 296. Additionally, purse seine fishermen have seen the

elimination of their trade because the amendment effectively bans purse seines in nearshore fisheries. R. Vol. II, p. 292.

Article X, section 16 is further overreaching and intrusive because it regulates the conduct of a select group of private citizens in a legislative way; yet, it is immutable. Even if current conditions could be viewed as requiring a ban on certain nets, the amendment cannot be amended or repealed in the future if conditions warrant a loosening of restrictions. The only way to loosen restrictions to meet future conditions will be another constitutional amendment which repeals article X, section 16.

Property is said to have been taken if the owner is deprived of the economically viable use of it by government restriction. Article X, section 16 is unconstitutional because it deprives Appellants of the economically viable use of their property, yet provides no mechanism for just compensation. The prohibition on the use of gill and entangling nets, and the effective prohibition on the use of purse seines,[1] renders these nets useless. R. Vol. II, p. 292. It is a violation of due process for the state to circumvent eminent domain proceedings by regulating private property to the point of economic uselessness unless the state has provided a fair mechanism for pre-deprivation compensation.

Under the Florida Constitution, an act of the legislature which deprives a person of equal protection and impinges on

[1] Purse seines are designed for inshore fishing and cannot be used in deeper waters, R. Vol. V, p. 650, and state statutes prevent the use of purse seines to capture food fish. § 370.08(3), Florida Statutes (1995).

fundamental constitutional rights flowing either from the federal or Florida Constitution is invalid. The constitutional right to be rewarded for industry is such a fundamental right. The inalienable right to enjoy and defend life and liberty, to pursue happiness, and to acquire, possess and protect property are entitled to no less protection.

The amendment does not equally burden recreational and commercial saltwater fishermen because prior to the amendment only individuals who held a commercial saltwater fishing license were legally permitted to use the nets affected by the amendment. See Section 370.06, Florida Statutes; Rule 46-4.0085, F.A.C. (1995). The amendment also unfairly divides commercial fishermen into two classes: those that work on the east coast and those that work on the west coast.

Section 101.161(1), Florida Statutes, mandates that every constitutional amendment submitted to popular vote "be printed in clear and unambiguous language . . . [with] an explanatory statement . . . of the chief purpose of the measure." The ballot title and summary must "give the voter fair notice of the decision he must make." Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982).

This Court reviewed article X, section 16, Florida Constitution, pursuant to a request from the Attorney General, for violations of ballot summary requirements under section 101.161(1). Advisory Opinion to the Attorney General - Limited Marine Net Fishing, 620 So. 2d 997. The Court's opinion was only advisory and is not binding precedent. See Fla. Leaque of Cities v. Smith, 607

So. 2d 397, 399 n.3 (Fla. 1992). The only notification to affected parties of the Court's review of this amendment's ballot summary was that provided by the Attorney General to the initiative petition's proponents and the Secretary of State. § 16.061, Fla. Stat. The only notice to the public of the Court's review was a small notice in the Florida Bar News. R. Vol. I, p. 76.

Appellants and other commercial fishermen were substantially affected parties who were known to the state because they held state licenses which enabled them to use nets affected by the amendment. Appellants and their advocates were unaware that they could file briefs on the issues and appear before the Court. In the interest of fairness, Appellants should not now be precluded from presenting this Court with evidence of serious deficiencies in the ballot summary.

Ballot summary deficiencies are ripe for challenge even after a proposed measure is adopted because an affirmative vote does not cure the failure of the ballot summary to fully and fairly inform voters. Wadhams v. Bd, of County Commissioners, 567 So. 2d 414, 416 (Fla. 1990).

It is critical to a fair vote on an initiative proposal that a ballot summary not omit information which would inform voters of the full sweep of an amendment. The ballot summary for article X, section 16, Florida Constitution omitted information necessary to adequately inform voters and was seriously deficient in six ways: it did not inform voters that pervasive regulations governing fishing nets already existed; it did not inform voters that the so-called limitation on non-entangling nets constituted a ban on the

use of purse seines; it did not inform voters that the commercial mullet fishery would be eliminated; it did not inform voters that fishermen on the east coast of Florida would be treated differently than fishermen on the west coast; it did not inform voters that commercial fishing property would be taken, requiring public compensation; and it did not inform voters that the amendment regulated only currently licensed commercial fishermen, yet benefited private fishermen.

I.
ARTICLE X, SECTION 16, FLORIDA CONSTITUTION, IS AN IMPROPER MEANS OF REGULATING THE BEBAVIOR OF A MINORITY OF CITIZENS

The passage of article X, section 16, Florida Constitution, commonly referred to as the "net ban," marks a pivotal point for all Florida citizens: will we live by a constitution that protects individual freedoms, and protects us all against majority tyranny, or will we live by a document that is a tool for the manipulation of special interests to tyrannize the minority? The passage of article X, section 16 marks the first time since Florida's adoption of the constitutional initiative[2] that the constitution has become the handmaiden of a special interest to legislate the behavior of a minority of private citizens.

The inclusion in the constitution of a measure which directs the behavior, not of government, but of a select group of private citizens, is a measure which deserves serious scrutiny by the Court.

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[2] Article XI, section 3, Florida Constitution.

In the past, the Court has expressed concern that a proposal by initiative requires very careful, if not strict, scrutiny. In Fine v. Firestone, 448 So. 2d 984 (Fla. 1984), the Court reviewed an initiative proposal to determine whether it violated the single subject requirement of article XI, section 3, Florida Constitution. The Court had previously viewed the single subject requirement for constitutional initiatives under the same deferential scrutiny provided for review of the single subject requirement for legislative acts (article III, section 6, Florida Constitution).[3] In Fine the Court receded from its prior decisions and held that constitutional initiatives deserve greater scrutiny than legislative acts when being reviewed for single subject violations.[4] 448 So. 2d at 988, 989. The Court stated that it

> should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative.

Id. at 989.

The same principles of judicial review should apply to the review of article X, section 16. In fact, the legislative nature of article X, section 16 and its regulation of a discreet group

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[3] See Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978).

[4] In a concurring opinion, Justice McDonald asserted his belief that initiative petitions deserved strict scrutiny. 448 So. 2d at 995.

of individuals should mandate even higher scrutiny than was used in Fine.

Justice Shaw articulated the reason for heightened scrutiny of constitutional initiatives in his concurrence in Fine, saying that "the citizens' 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 [of amending the constitution]." 448 So. 2d at 999.

Had the content of article X, section 16 gone through the normal legislative process, there would have been a myriad of checks and balances to protect the interests of commercial fishermen. All three branches of government would have been involved. See Art. III, Fla. Const. (requiring public sessions; publication of a journal of proceedings; public committee meetings; compulsory attendance of witnesses, production of documents, and other investigative tools; majority vote in each legislative house prior to bill passage; and presentment of bill to the Governor for adoption or veto). Even the other three methods of amending the Florida Constitution have various checks and balances which must precede a proposal's preparation and submission for vote.[5] None of these protections are afforded

[5] See Article XI, section 1 (amendment may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature); Article XI, section 2 (amendments and revisions can be proposed every ten years by a constitutional revision commission composed of members of all three branches of government in conjunction with public hearings); and Article XI, section 4 (constitutional convention can be convened to revise the entire constitution, which convention shall include a representative from every district to consider and propose revisions).

affected groups prior to an initiative constitutional amendment being adopted. See Art. XI, § 3, Fla. Const. Here, only one branch of the equal branches of government may serve to protect minority interests.

The only safeguards provided prior to the adoption of an initiative in Florida are that the initiative not embrace more than one subject and matter directly connected therewith, id., and that the ballot summary and title for the proposal fairly inform voters of the proposal's purpose and ramifications, section 101.161(1), Florida Statutes. Several supreme court justices have expressed their belief that these "technical" checks are inadequate to prevent abuse of the initiative process. Advisory Op. To Attorney General - Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993)(McDonald, J., Barkett, C.J., and Overton and Kogan, JJ., concurring). It is precisely the lack of adequate checks and balances on initiative proposals that justify a very careful post-adoption review of this amendment by the court .

It is the Court's right and duty to heavily scrutinize article X, section 16. When reviewing a statute, the Court shows due deference because the statute is proposed, considered and adopted by one or more of the equal branches of government, and only the legislature has specific constitutional authority to legislate.[6] The Court has a measure of reassurance based on the

[6] Article III, section 1, Florida Constitution. See also Fraternal Order of Police v. Dept. of State, 392 So. 2d 1296 (Fla. 1980)(refusing to apply rigorous standard of review for fear of usurping legislative prerogative to establish policy).

multiple safeguards attendant to legislation which are not attendant to proposals by initiative. See e.g. David B. Magleby, Direct Legislation: Voting On Ballot Propositions in the United States, 186-188 (1984)(acts of legislatures are subject to multiple reviews, committee analyses, and lobbying, and the legislative process is generally flexible and adaptive, whereas initiatives are typically the result of snap judgments based on emotional appeals through television broadcasts).

Article X, section 16 also deserves heightened scrutiny because it exercises a power specifically granted to the legislature: the power to make, amend and repeal laws. Art. III, § 1, Fla. Const. Although the people have the right under article XI, section 3, Florida Constitution, to propose amendments to the constitution, no specific grant of authority to propose legislation by initiative is provided. Moreover, implicit in the right to amend the constitution is the basic requirement that an amendment conform to the purpose and function of the constitution. See e.g. Advisory Op. to Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1022 (Fla. 1994)(Kogan, J., concurring)("[t]he 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."). This requires that amendments be in harmony with, and not in opposition to, the fundamental nature of the constitution as a document of lasting principles.

Legislation is not congruous with the function or purpose of the state constitution and is an inappropriate addition to the

constitution. See Limited Marine Net Fishing, 620 So. 2d at 1000 (McDonald, J., Barkett, C.J., Overton and Kogan, JJ., concurring)(the constitution should transcend time and social mores for the protection of all individuals, whereas statutes provide a specific set of legal rules for how individuals ought to behave, are easier to amend, and are adaptable to society's political, economic, and social changes). See also Talbot D'Alemberte, The Florida State Constitution, A Reference Guide, 12; 17 (G. Alan Tarr, series ed. 1991)(the purpose of the Constitution is to limit the power of government over individuals, and it is generally agreed that the state constitution is an inappropriate forum for legislation)(emphasis added).[7]

Unwanted and lasting consequences will result from judicial acceptance of special interest legislation as additions to the state constitution without subject matter scrutiny. Without the intervention of the courts, the only branch of government with a role in the constitutional initiative process, where does special interest legislating by constitutional initiative stop?

Suppose the broadcast media proposed and funded a constitutional amendment initiative campaign to prohibit any publication from being distributed in Florida on more than 600 square inches of paper a day. This meets a rational basis police power test because it protects the state's timber resources. It does not represent a restraint on media content and thus is not

[7] And see, The Senate Committee on Governmental Reform and Oversight, A Review of the Citizen Initiative Method of Proposing Amendments to the Florida Constitution, 11 (1995).

violative of the first amendment. Tampa Times Co. v. City of Tampa, 29 So. 2d 368 (Fla.), appeal dismissed, 332 U.S. 749 (1947). It does not burden a race, nationality, ethnic group or gender in a disproportionate way. It does not "take" printing presses and newspaper vending machines.

All it does is put every daily newspaper in Florida out of business and render its property commercially worthless because none can survive economically on a one page per day basis. could it happen? Journalists usually enjoy a public approval rating roughly equal to lawyers, politicians and used car salesmen. Few public minded citizens would be unmoved at the sight on the proponent's television ad of forests daily being cut down to feed the hungry maw of newsprint consumption. Would the amendment meet state constitutional muster? It would, if the state is correct that only single subject and ballot summary issues are within the purview of any branch of government regarding its obligations to protect an occupational minority.

Nothing in the constitution mandates that this Court permit the constitutional initiative to be used by one group to control the behavior of another. The ability to amend the constitution by initiative is an important safeguard to the people to regulate the power of government over individuals. This function is diminished if the initiative provision is permitted to be as a method for circumventing the legislative process. Magleby, supra. at 189-90. The initiative will no longer provide safeguards against government and majority tyranny, but will instead be used as a method for special interests to create their own idea of private right and

license within the very document that is supposed to protect individuals against tyranny. In our system of government,[8] this cannot be tolerated.

II.

ARTICLE X, SECTION 16 VIOLATES APPELLANTS' RIGHT TO DUE PROCESS OF LAW

Article X, section 16, Florida Constitution, unlawfully interferes with Appellants' right under both the Florida and United States Constitutions to enjoy liberty, and to possess, acquire and protect personal property.

A. Article X, section 16 unconstitutionally interferes with Appellants' protected liberty and property rights.

Two provisions in the Florida Constitution, predating the recent passage of article X, section 16, specifically protect individuals from unlawful interference with personal liberty and the enjoyment of property. Article I, section 2, Florida Constitution grants every person the basic right to enjoy life and liberty, to be rewarded for industry, and to acquire, possess and protect property. Article I, section 9, Florida Constitution, also protects every person from having the right to enjoy liberty and property taken away without due process of law.

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[8] The federal and state governments are based on a form of representative democracy developed to balance minority and civil rights against tyranny by popular rule, The Senate Committee On Governmental Reform and Oversight, A Review of the Citizen Initiative Method of Proposing Amendments to the Florida Constitution 9 (1995). Representative government, versus direct government by the people, was adopted to "define and enlarge public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country . . ." Id. at 10 (citing Florida Advisory Council on Intergovernmental Relations, Initiatives and Referenda: Issues in Citizen Lawmaking, p. 1., January 1986).

Appellants also have protected liberty and property interests under the fifth and fourteenth amendments to the United States Constitution.

In Florida, liberty and property interests have been jealously guarded by Florida courts.[3] Laws which interfere with the enjoyment of these rights have been subject to careful scrutiny because the rights are "woven into the fabric of Florida history." In re Forfeiture of 1969 Piper Navajo, 592 So. 2d 233, 235 (Fla. 1992)(quoting Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64, 67 (Fla. 1990). Under substantive due process, in order to justify interference with personal rights and liberties, a penal statute[10] must confine itself to that which is expedient for the protection of public health, safety, and welfare. 592 So. 2d at 235. Interference with private rights must be justified as a necessary means of accomplishing the state's objective. Delmonico v. State, 155 So. 2d 368 (Fla. 1963)(emphasis original). The government act must bear a reasonable and substantial relationship to the purpose to be attained, and more importantly, it must use means that are

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[3] The right to practice a profession is a valuable property right protected by the due process clause, State Bd. Of Medical Examiners v. Rogers, 387 so. 2d 937, 939 (Fla. 1980). See also State ex rel. Fulton v. Ives, 167 So. 394 (Fla. 1936)(right to make contracts for personal employment is protected property and liberty right).

[10] Article X, section 16, Florida Constitution, provides for the imposition of criminal penalties under section 370.021(2)(a),(b),(c)5. And 7., and (e), Florida Statutes, unless the legislature enacts more stringent penalties, for violations of the amendment.

narrowly tailored and least restrictive on the exercise of personal rights. Piper, 592 So. 2d at 235-36.

The Court in Piper Navajo emphasized that although legitimate government action could place reasonable restrictions on the use of personal property,

> "[i]f there is a choice of ways in which government can reasonably attain a valid goal necessary to the public interest, it must elect that course which will infringe the least on the rights of the individual."

Id. at 236 (quoting State v. Leone, 118 So. 2d 781, 784-85 (Fla. 1960). The state in Piper Navajo was using violations of Federal Aviation Administration rules to justify confiscation and forfeiture of an airplane which possessed fuel tanks in violation of those rules. The Court held that confiscation and forfeiture were too harsh for the goal of ensuring compliance with FAA regulations and that, if the airplane was being used for criminal purposes, the forfeiture statute already permitted sanctions upon proper proof. Id. at 236. It was unfair under the Florida Constitution to allow confiscation and forfeiture of personal property under the ruse of FAA violations just so the state could get around the tougher requirements of the criminal forfeiture statute. Id.

Article X, section 16, Florida Constitution, is an unreasonable and unfair act which does not substantially relate to the purported purpose,[11] and is not narrowly tailored to infringe the least on Appellants* individual rights.

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[11] The amendment states in subsection (a) that the purpose of the measure is to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste by limiting the use of fishing nets. (emphasis provided).

1. Unlawful interference with liberty rights.

Pursuit of a lawful business or occupation is constitutionally protected and may not be interfered with unless the curtailment of this right is justified by "exceptional circumstances." State ex rel. Fulton v. Ives, 167 So. 394 (Fla. 1936). The constitutional right to due process encompasses the right to contract for employment, a property right; and the right to engage in a lawful occupation, a liberty right. Id. at 399. Although the right to contract for employment and pursue a lawful occupation are subject to the use of state police power, the police power may only impose reasonable regulations on a business or occupation - those that go only as far as necessary for the public welfare. Id. at 400, 402.

In Ives, the Court examined regulations imposed on Florida barbers to determine whether the regulations were reasonable and necessary in light of the purported need. Id. at 399. The Court believed that a regulation which "has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business or trade" is unreasonable under principles of due process. Id. at 402. The state had imposed a minimum price structure on all barbers for the purpose of ensuring that all barbers would make enough money to provide a subsistence for themselves and their families; would have enough money to maintain sanitary conditions; and would not be demoralized by cutthroat competition. Id. at 398.

Agreeing that the State had a right to regulate barbers for the public welfare, the Court would not condone the State's

excessive interference with a barber's right to engage in his trade. Id. at 403-404. The minimum pricing structure was unreasonable because it regulated the profession to the extent that many barbers could not obtain business and were unable to continue their occupations. Id. at 404 (Brown, J. concurring). Although the economy was in depression, the Court could find no exceptional circumstances which justified the price structure and elimination of an occupation for many barbers, saying that the legislation was not regulation, but was control and dictation. Id. at 403.

The principles established in Ives are applicable to the unreasonable restraints on liberty imposed by article X, section 16, Florida Constitution. It is undisputed that the state may use the police power to regulate the business of commercial fishing, as it has done for years. See Chapter 370, Florida Statutes and Rules of the Marine Fisheries Commission, Chapter 46, F.A.C. The state has not overstepped what it may regulate, but it has overstepped how it may regulate commercial fishermen in the interest of public welfare. As the principles in Ives and Piper Navaio dictate, the police power may only be used to curtail the engagement in an occupation, or the use of personal property, if protecting the public welfare demands such extensive interference with personal liberty and property rights. There is no justification in this case for the extent of interference with Appellants* protected liberty and property interests wrought by article X, section 16.

This Court has held in the past that a statute which imposes restrictions on the manner in which an occupation may be exercised, but which does not restrict the occupation to the point of virtual

elimination, does not offend the constitution if that regulation is necessary to protect the public welfare. See Fraternal Order of Police v. Dept. of State, 392 So. 2d 1296, 1298 (Fla. 1980)(no due process violation where statute sought to regulate, not prohibit, the business of soliciting for a fraternal organization by limiting the amount of a solicitor's fee to 25% of gross contributions, and limiting the amount an organization could spend on fundraising to 25% of gross contributions). Regulating an occupation to the point of prohibition is unconstitutional unless justified by exceptional circumstances, Ives, 167 So. At 402-404, which circumstances do not exist in the instant case.

Article X, section 16 unreasonably bans the use of gill and entangling nets in Florida, and reduces the permissible size of all other nets to 500 square feet in mesh area or less in nearshore and inshore waters. Art. X, § 16, Fla. Const. Those engaged in the commercial mullet fishery have been hardest hit because they relied almost exclusively on the use of gill and entangling nets for their trade and that trade has all but been eliminated due to the statewide ban. R. Vol. V, p. 759; R. Vol. II, p. 296. Commercial fishermen who previously used purse seines to capture nearshore and inshore fish, such as bait fish, have also seen the elimination of their trade because purse seines are limited so severely by the amendment that they cannot be constructed in compliance with the amendment and retain function in nearshore fisheries. R. Vol. II, p. 292.

Prior to the adoption of article X, section 16, Florida Constitution, regulations of the Florida Marine Fisheries

Commission had been successful in reducing the mortality of striped mullet - the primary species caught by gill and entangling nets. R. Vol. V, p. 757. The effectiveness of these rules in increasing the striped mullet population indicates a lack of need to completely prohibit gill and entangling nets and eliminate the commercial mullet fishery.

The excessiveness of the ban is further evidenced by the fact that almost all mullet (90%) were previously caught on the west coast of Florida, and of that 90%, the majority of mullet was captured in only four coastal counties - Lee, Manatee, Charlotte and Pinellas. R. Vol. V, p. 759. Even if the state could show a " need" to eliminate the use of gill net fishing to protect mullet, the least intrusive means of fulfilling the need would have been to target only the main areas where mullet fishing occurred.

Similar to the unnecessary prohibition against the use of gill and entangling nets, the amendment also unnecessarily prohibits the use of purse seines.[12] As the Director of the Marine Fisheries Commission testified, the amendment renders purse seines useless in the fisheries in which they were previously utilized. R. Vol. II, p. 292. Although the amendment claims to "limit" the use of these nets, purse seines have, in reality, been prohibited. However, Dr. Nelson testified in an affidavit filed in the trial court that only six species of inshore and nearshore fish in Florida were

[12] Purse seines are nets governed by section (b)(2) of the amendment, which section limits the size of applicable nets to 500 square feet or less in mesh area in nearshore and inshore state waters. Purse seines are not within the category of nets explicitly banned under section (b)(l) of the amendment. See also 46-4.002(8)(b), F.A.C. (1995)(defining purse seine); 46-4.002(2), F.A.C. (1995)(defining gill net).

considered by him to be overfished. R. Vol. IV, p. 592. None of the six species were the type regularly caught with purse seines in nearshore and inshore waters. R. Vol. V, pp. 649-50. Marine Fisheries Commission regulations had been successful, prior to the amendment, in decreasing mortality rates of bait fish, R. Vol. V, p. 757, many of which were previously caught with purse seines. R. Vol. V, pp. 649-650. A ban on the use of purse seines in nearshore and inshore waters was not justified, and the public was not informed of this effect by the amendment.[13]

Article X, section 16 is so sweeping and detrimental to the rights of all commercial fishermen that it lacks purpose and definition. Its broad sweep is like cleaning a whole house when only a few rooms are dirty. This overuse of the police power is not permissible when measured against the individual rights which must be sacrificed. As the Court has previously noted, "[t]he central concern of substantive due process is to limit the means employed by the state to the least restrictive way of achieving its permissible ends." Piper Navajo, 592 So. 2d at 236. (emphasis added).

2. Unlawful interference with property rights.

The amendment also deprives Appellants of their right to possess and enjoy private property, namely fishing nets. Whether the regulation deprives an individual of the right to engage in a lawful occupation, or deprives the individual of the rights

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[13] The lack of notice to voters regarding the effective ban on purse seines is analyzed more fully in arguments pertaining to ballot summary deficiencies.

attendant to use and ownership of property (both of which are implicated in this case), even under the most deferential standard the state may not go further than necessary to protect the public. See R.H. Burritt v. Harris, 172 So. 2d 820 (Fla. 1965)(zoning restriction declared unconstitutional because it exceeded the bounds of necessity for the public welfare); Carter v. Town of Palm Beach, 237 So. 2d 130 (Fla. 1970)(ordinance banning use of surfboards or skimboards along all town beaches went too far and constituted unreasonable exercise of police power); City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. 4th DCA 1979)(Downey, C.J., Anstead, J. and Silvertooth, A.J. concurring)(regulation which excessively restricted use of property without a corresponding necessity for the public welfare was unreasonable and arbitrary), cert. denied, 381 So. 2d 765 (Fla.), cert. denied, 449 U.S. 824 (1980).

The constitution exists for the very purpose of prohibiting government from trampling over individuals in the name of expedience or ease. See e.g. State v. Leone, 118 so. 2d 781 (Fla. 1960)(interference with private rights can never be justified to make it easier or more convenient for the state if there are less intrusive ways to meet a valid goal). Certainly, it is easier for the state to ban gill nets, and restrict the use of other nets so that they become infeasible to use. There is no question that banning nets will increase fish populations. However, this Court has not condoned state action which sacrifices the protected rights of individuals when the state has

gone further than necessary to accomplish even the most laudable goal. See Fulton, 167 So. 394; Piper, 592 So. 2d 233.

Article X, section 16 is strikingly overreaching and intrusive because not only does this constitutional amendment improperly regulate the conduct of a select group of private citizens, it also is incapable of amendment or repeal to meet changing conditions. Therefore, even if current conditions could be viewed as requiring a ban on certain nets, the amendment cannot be amended or repealed in the future if conditions warrant a loosening of the restrictions. Appellants and other fishermen are required for all time to give up their property and liberty rights for a public need that may not exist in the near future. The only way to loosen restrictions to meet future conditions will be another constitutional amendment which repeals article X, section 16.[14]

Less restrictive alternatives exist to regulate the use of fishing gear and protect marine resources, balancing the needs of humans with the need for resource management. Statutes and rules have long existed which control the use of commercial fishing gear and protect saltwater populations, and regulations have even been used intermittently to ban certain fishing. For example, from November 1986 through February 1987, May 1987 through October 1987, and January 1988 through December 1988, the Florida Marine Fisheries Commission prohibited all fishing for Red Drum.

[14] The possibility of tit-for-tat amendments depending on the whim of the proponents and voters is why the constitution is an inappropriate place for legislation. Multiple amendments on single subjects will destroy the continuity and stability of the Florida Constitution.

R. Vol. V, pp. 757-58. The Commission's authority pursuant to section 370.027, Florida Statutes (1993) permitted drastic measures when necessary, yet provided latitude to lift those closures when the conditions improved.[15]

Even if the state could show a substantial or compelling need to enact stricter measures to protect saltwater marine species, it cannot justify an outright ban on gill and entangling nets, and an effective ban on purse seines, when less restrictive rule-making and statutory alternatives existed. The over-intrusive use of the police power is exacerbated by the use of an immutable constitutional amendment as the means to manage saltwater fisheries.

B. Article X, section 16 goes too far and takes Appellants' property without a remedy for iust compensation.

When the police power goes "too far" in its regulation of personal property, like article X, section 16, Florida Constitution, property is said to have been taken if the owner is deprived of the economically viable use of his or her property. Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990), review denied, 570 So. 2d 1304 (Fla. 1990). Article X, section 16 is unconstitutional because it deprives Appellants of all the economically viable use of their property, yet provides no mechanism for just compensation.

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[15] Commission rules were also used successfully to prevent waste. Purse seine catches were regulated by rule such than no catch could contain more than 2% of fish categorized as "food fish," which was considered by-catch. Rule 46-3.028, F.A.C.

Personal property, such as commercial fishing nets, is protected by the state and federal constitutions against police power abuse. In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So. 2d 261, 263 (Fla. 1990)(real and personal property protected by due process and eminent domain clauses of both constitutions); Conner v. Reed Bros., Inc., 567 So. 2d 515 (Fla. 2d DCA 1990)(unconstitutional taking of citrus seedlings).

The police power can be used to take personal property if the public need justifies such taking,[16] but a regulation is invalid if it works a taking of all economic uses of the property without a mechanism for compensation. Joint Ventures v. Dept. of Transp., 563 So. 2d 622 (Fla. 1990). Appellants' commercial fishing nets have been appropriated by the state for the public welfare without just compensation, or even a mechanism for just compensation, in violation of procedural and substantive due process.[17]

Article X, section 16, Florida Constitution, regulates the use of gill and entangling nets, and purse seines to the extent that they have no economically beneficial use in this state. Gill and entangling nets are explicitly prohibited, and purse

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[16] As previously discussed herein, article X, section 16, Florida Constitution is not a reasonable regulation under principles of substantive due process.

[17] Although legislation was passed after the amendment's adoption which appropriated some money to buy back commercial fishing nets, the act specifically provided that compensation for nets was on a first-come, first-served basis, see section 370.0805(3)(b), Florida Statutes (1995), and that compensation would be in non-negotiable amounts not intended to reflect the actual value of the nets, see section 370.0805(5)(a), Florida Statutes (1995).

seines are effectively prohibited.[18] See Art. X, § 16(b)(1) and (2), Fla. Const; R. Vol. II, p. 292. The amendment's prohibitions on the use of commercial fishing nets deprives Appellants and other commercial fishermen of the economically viable use of their property. See Joint Ventures, 563 So. 2d at 624 n.6 (substantial interference with private property which destroys or lessens its value is a taking).

Arguably, Appellants could sue the state in inverse condemnation to recover compensation for the taking of their property. However, this Court held in Joint Ventures that a regulation which goes so far as to take private property without a mechanism in place for just compensation is unconstitutional. 563 So. 2d at 627. The Court held that the after-the-fact remedy of inverse condemnation was an inadequate substitute for the eminent domain protections provided by chapters 73 and 74 of the Florida Statutes. Id. If property is taken in compliance with the eminent domain protections of article X, section 6, Florida Constitution, and the fifth amendment to the United States Constitution, the state would have to institute condemnation proceedings prior to a restraint on the property. See generally Chapter 73, Florida Statutes. It is a violation of due process for the state to circumvent eminent domain proceedings by regulating private property to the point of economic uselessness

[18] Additionally, purse seines are designed for inshore fishing and cannot be used in deeper waters, R. Vol. V, p. 650, and state statutes prevent the use of purse seines to capture food fish. § 370.08(3), Florida Statutes (1995).

unless the state has provided a fair mechanism for pre-deprivation compensation. Joint Ventures, 563 So. 2d at 627.

Neither article X, section 16 nor any statute provides a pre-deprivation remedy for the taking of gill and entangling nets and purse seines, yet the amendment deprives Appellants and thousands of other commercial fishermen of the beneficial use of these nets. In effect, Appellants and other commercial fishermen have had to unfairly shoulder the burden of a regulation which is allegedly necessary for all the public; this is unfair and unconstitutional. See Id. at 624 n.7 (eminent domain protections exist to prevent the state from forcing only some people to bear the burdens which should be borne by the entire public)(citing to Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 3147 n.4, 97 L.Ed.2d 677 (1987).

III.

ARTICLE X, SECTION 16 IS AN UNCONSTITUTIONAL DEPRIVATION OF EQUAL PROTECTION UNDER ARTICLE I, SECTION 2, FLORIDA CONSTITUTION

Under the Florida Constitution, an act of the legislature which is alleged to deprive a petitioner of equal protection and which does not involve a suspect class or fundamental right is analyzed to determine whether the legislation is rationally and reasonably related to a legitimate legislative purpose, and whether the act is arbitrarily or capriciously imposed. United Yacht Brokers, Inc. v. Gillespie, 377 So. 2d 668, 670-71 (Fla. 1979). However, the level of scrutiny is elevated when an act impinges "too greatly on fundamental constitutional rights flowing either

from the federal or Florida Constitutions . . . ." DeAyala v. Fla. Farm Bureau Casualty Ins. Co., 543 So. 2d 204, 206 (Fla. 1989).

In DeAyala, the Court applied a strict scrutiny analysis and found a worker's compensation statute unconstitutional for two reasons: first, it treated non-resident alien survivors living in Canada better than non-resident alien survivors living elsewhere, and second, it deprived the deceased and his dependents of the constitutional right to be rewarded for industry. 543 So. 2d at 206-207. The Court held that

> "[t]he classifier contained in section 440.16(7) involves alienage, one of the traditional suspect classes. Moreover, it involves the right to be rewarded for industry. Art. I, § 2, Fla. Const. It therefore is subject to strict judicial scrutiny under either the fourteenth amendment's equal protection clause, or under article I, section 2 of the Florida Constitution."

Id. at 207. (citations omitted). In addition to the right to be rewarded for industry, article I, section 2, Florida Constitution grants every person the inalienable right to enjoy and defend life and liberty, to pursue happiness, and to acquire, possess and protect property. The rights attendant to liberty and property deserve no less judicial scrutiny than that provided in DeAyala.

There is no compelling, or even substantial, need in this case for the harsh sanctions imposed against only licensed saltwater commercial fishermen. Article X, section 16 unfairly imposes the burden of protecting Florida's natural resources on one set of saltwater fishermen, those engaged in net fishing as a livelihood. Although all saltwater fishing, whether for commercial or recreational purposes, causes some declines in fish populations and incidental loss of other marine life [such as where recreational

hook and line fishing caused dramatic decline in Spotted Sea Trout population, see R. Vol. V, p. 758], the amendment places the burden of protecting marine resources only on saltwater fishermen licensed to catch commercial quantities.

The amendment is unfair and unreasonable because it singles out commercial fishermen and invades only their constitutional rights. There is no even-handed burden placed, for example, on development as a cause of marine habitat destruction.[19] The harshness of the amendment, in light of the lack of substantial need to place the burden of species protection only on commercial net fishermen, denies Appellants equal protection of the law.

Article X, section 16 purportedly affects all saltwater fishermen equally and prevents any person from fishing with a gill or entangling net in Florida, or fishing with any other type of net over 500 square feet in mesh area when that net is used in nearshore or inshore waters. But, the amendment does not equally burden recreational and commercial saltwater fishermen because prior to the amendment only individuals who held a commercial saltwater fishing license were legally permitted to use the nets affected by the amendment. See Section 370.06, Florida Statutes (saltwater products licenses); Rule 46-4.0085, F.A.C. (1995)(prohibiting any person licensed for noncommercial fishing from harvesting any marine fish with a gill or trammel net).

Prior to the amendment, the state's policy was to ensure a balance between the need for commercial fishermen to earn a living

[19] See R. Vol. V, p. 759 (substantial causes of marine species destruction are pollution and over-development).

and supply people with seafood, and the need to ensure that fish and marine populations are protected. See Section 370.025(2)(c) and (g), Fla. Stat. This policy was carried out through Chapter 370, Florida Statutes, and rules of the Florida Marine Fisheries Commission.*' The Marine Fisheries Commission has been successful in controlling and maintaining most types of fish and marine populations, R. Vol. V, pp. 757-58, and the data do not suggest a need to eliminate or severely curtail all net fishing and tip the scales almost entirely on the side of recreational use or even conservation. The amendment has repealed the legislature's policy that the needs of fishermen are to be balanced with the need to sustain fish populations.

In addition to treating commercial fishermen unfairly among the population of all fishermen, the amendment also unfairly divides commercial fishermen into two classes: those that work on the east coast and those that work on the west coast. Article X, section 16(5), Florida Constitution, requires that west coast

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[20] The Florida Marine Fisheries Commission has substantial regulatory powers pursuant to Chapter 370, Florida Statutes, over commercial fishing nets and has used these powers to maintain a balance between commercial fishing interests and resource conservation. See F.A.C. Chapters 46-3, 46-4, 46-5, 46-12, 46-14, 46-16, 46-21, 46-22, 46-23, 46-29, 46-30, 46-31, 46-33, 46-34, 46-35, 46-36, 46-37, 46-38, 46-39, 46-40, 46-41, 46-42, 46-43, 46-44 and 46-45 (containing a total of more than 200 sections of rules governing saltwater harvesting, and gear restrictions and limitations).

Especially in the case of gill and entangling nets, the Commission promulgated rules specifically designed to manipulate the size of the net mesh area and the seasons when the nets could be used such that exact regulation over the type and size of fish caught could be accomplished. See e.g. Chapter 46-39 F.A.C. (had it not been superseded by the amendment, this rule would have directly resulted in an increase in mullet populations).

commercial fishermen travel three miles from the coastline before using nets larger than 500 square feet in mesh area. However, the amendment only requires that east coast fishermen travel one mile from the coastline before being able to use the same nets. Art. X, sec. 16(5), Fla. Const. There is no compelling justification for the state to create a greater barrier for west coast fishermen than for east coast fishermen when using the same types of nets.

The amendment's disparate treatment is not justified by any compelling or rational reason. The amendment impinges too greatly on the fundamental rights of Appellants without a showing of need commensurate with the harsh treatment invoked. The amendment places the burden of "protecting the public" on Appellants and others similarly situated without adequate justification for the burden to be shouldered only by licensed saltwater commercial fishermen. The amendment violates fundamental notions of equal protection and should be invalidated. See Atlantic Coast Line R. Co. v. Ivey, 5 So. 2d 244, 247 (Fla. 1941)(Court invalidated a statute under equal protection which placed greater burdens for protecting the public safety on railroad companies than on other motor carriers).

IV.

ARTICLE X, SECTION 16 SHOULD BE DECLARED VOID BECAUSE ITS BALLOT SUMMARY FAILED TO ADEQUATELY INFORM VOTERS OF TEE MEASURE'S FULL RAMIFICATIONS

Section 101.161(1), Florida Statutes, mandates that every constitutional amendment submitted to popular vote "be printed in clear and unambiguous language . . . [with] an explanatory statement . . . of the chief purpose of the measure." This means

the ballot title and summary must "give the voter fair notice of the decision he must make." Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982). The electorate must be "advised of the true meaning, and ramifications, of an amendment." Id. at 156. The ballot summary for article X, section 16 read as follows:

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

The Florida Supreme Court is required to review an initiative proposal prior to submission to the electorate to determine whether the title and ballot summary sufficiently and fairly inform the public, and whether the proposed amendment complies with the single subject requirement of article XI, section 3, Florida Constitution. § 101.161(1), Fla. Stat. The Court's opinion regarding the ballot summary and single subject compliance is advisory only. Fla. League of Cities v. Smith, 607 So. 2d 397, 399 n.3 (Fla. 1992).

A. Fairness requires reconsideration of ballot summary issues.

Pursuant to a request from the Attorney General under section 101.161(1), Florida Statutes, the Florida Supreme Court reviewed article X, section 16 in an advisory opinion rendered June 17, 1993. Advisory Opinion to the Attorney General - Limited Marine Net Fishing, 620 So. 2d 997. The only notification to interested parties required by law is that provided by the Florida Attorney General pursuant to section 16.061, Florida Statutes. This

provision requires that the Attorney General notify only the initiative petition's proponents and the Secretary of State. The Attorney General is not required to notify even individuals most obviously affected by the measure.

The only other public notice given prior to the review of this amendment was a small notice in the Florida Bar News. R. Vol. I, p. 76. Although Appellants and other commercial fishermen were substantially affected parties and were known to the state because they held state licenses which enabled them to use nets affected by the amendment, no one notified Appellants or other licensees of the pending supreme court review. This resulted in the Appellants and their advocates not being made aware that they could file briefs on the issues or appear for oral argument.

In the interest of fairness and a full opportunity for the improprieties of the amendment's ballot summary to be considered, Appellants should not now be precluded from presenting this Court with evidence of serious deficiencies in the ballot summary which Appellants had no opportunity to present prior to this Court's advisory opinion.

B. The ballot summary was insufficient as a matter of law.

Ballot summaries which fail to give voters fair notice of the decision they must make by advising them of the true meaning and ramifications of an amendment are legally insufficient. Askew, 421 So. 2d at 156. When presented with full information on the deficiencies of a ballot summary (as opposed to the instant case where the only information supplied to the Court was by the measure's proponents), the Court has been strident in striking from

the ballot amendments whose summaries fail to adequately inform voters.

For example, in Askew, the Court struck from the ballot a proposed amendment which would have required legislators to wait two years after leaving office before lobbying a government agency unless the legislator first filed a public disclosure of his or her financial interests. 421 So. 2d at 153. The ballot summary failed to tell voters that a statute already existed which prohibited legislators from lobbying within two years of leaving office. Id, at 155. The ballot summary for article X, section 16 also failed to inform voters that statutes and regulations existed which already placed strict constraints on the use of commercial saltwater fishing nets. This and other deficiencies of the ballot summary are discussed below.

It is critical to a fair vote on an initiative proposal that a ballot summary not omit information which would inform voters of the full sweep of an amendment. The omission of material information was why the Court in Wadhams v. Bd. of County Commissioners, 567 So. 2d 414, 416 (Fla. 1990) invalidated an initiative amendment to a county charter, even after the amendment had been adopted. The charter amendment's purpose was to curtail the Charter Review Board's right to meet, but no ballot summary had been prepared to explain the proposal. The court held that without a ballot summary to explain that no restrictions currently existed on the board's right to meet, the proposal should not have been submitted to the voters. Id. at 416-17. See also Smith v. American Airlines, Inc., 606 So. 2d 618 (Fla. 1992)(Court struck

proposed taxation amendment from ballot because it failed to inform voters that pre-1968 holders of government leases would be assessed a lower tax rate than post-1968 holders of government leases, failing to give voters "sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots.")

Ballot summary deficiencies are ripe for challenge even after a proposed measure is adopted. Wadhams, 567 So. 2d at 417. In the Court's words:

> [I]t is untenable to state that the defect was cured because a majority of the voters voted in the affirmative on a proposed amendment when the defect is that the ballot did not adequately inform the electorate of the purpose and effect of the measure upon which they were casting their votes. No one can say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth, as mandated by the statute, and had been told 'the chief purpose of the measure.'

Id. (emphasis original). Appellants deserve fair consideration of the ballot summary's deficiencies in the instant case in order for this Court to fully evaluate whether the public was given the whole truth.

The ballot summary for article X, section 16 was legally deficient for six reasons:

1. Lack of notice that regulations governing fishing nets already existed;

2. Lack of notice that the so-called limitation on non-entangling nets constituted a ban on the use of purse seines (a type of net);

3. Lack of notice that commercial mullet fishery would be virtually eliminated;

4. Lack of notice that fishermen on the east coast of Florida would be treated differently than fishermen on the west coast;

5. Lack of notice that commercial fishing property would be taken, requiring public compensation; and

6. Lack of notice that amendment regulated only currently licensed commercial fishermen, yet benefited private fishermen.

Each deficiency will be taken up separately.

1. The amendment failed to notify voters that regulations governing fishing nets already existed.

No notice or indication was given in the ballot summary that pervasive statutes and rules existed which controlled the size and use of commercial saltwater fishing nets. Particularly where voters were being asked to amend the fundamental nature of the constitution by including a regulation against private citizens, voters had a right to be informed that laws and rules existed which had been successfully used to accomplish the very goals the amendment purported to accomplish.[21] If voters had been given some indication through the ballot summary or the amendment that statutes and rules already regulated the use of commercial saltwater fishing nets, they would have been able to make an informed choice about whether an amendment to the constitution was necessary.

The problems with the summary for this amendment are similar to those for the proposal in Askew where the Court struck the initiative for failing to inform voters of existing statutory

[21] While it is true that voters have a duty to educate themselves about a measure before voting on it, the Court has firmly held that the "burden of informing the public should not fall only on the press and opponents of the measure -- the ballot title and summary must do this." Askew, 421 So. 2d at 156; Wadhams, 567 So. 2d at 417; Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992).

provisions. In Askew, the initiative's proponents wanted voters to adopt a constitutional amendment which would provide an exception to an existing statutory prohibition against lobbying. 421 So. 2d at 155. Voters were not put on notice through that ballot summary that a ban on lobbying already existed and that a vote for the amendment would not impose a ban, but would permit an exemption from the ban. Id. It was what the ballot summary did not say that made the summary misleading. Id. at 156. In a concurring opinion, three Justices even remarked that if the ballot summary had contained the words "'and deletes from the Constitution the absolute ban against such representation during such two-year period,'" or similar language, the ballot summary would have complied with section 101.161, Florida Statutes and would not have been misleading. 421 So. 2d at 158 (Ehrlich, J., Alderman, C.J. and McDonald, J. concurring).[22]

The ballot summary for article X, section 16 similarly failed to inform voters of existing regulations over commercial net fishing. If the ballot summary requirement provides any protection to constitutional amendment initiative proposals it is that the summary must advise the voter sufficiently to enable him or her to intelligently cast a ballot. Askew, 421 So. 2d at 155. The omission from the ballot summary for article X, section 16 that commercial saltwater fishing was already heavily regulated prevented voters from being sufficiently informed in a manner which

[22] Although section 101.161(1), Florida Statutes, allows a summary to be up to 75 words in length, the ballot summary for article X, section 16 only utilized 62 of the possible 75 words, leaving room for thirteen more words to explain the measure.

would enable each voter to weigh the need for a constitutional amendment. It is no different, in that regard, from the attempted amendment in Askew which failed to sufficiently inform voters how the proposed amendment would affect existing statutory provisions. In the instant case, voters were misled about existing saltwater fishing limitations and may have voted for the amendment because they erroneously believed commercial fishermen were permitted to pursue their trade without regulatory restraint.

Because the amendment in this case has been adopted and is in effect, anecdotal information regarding public perception of the amendment's scope and effect is informative. In June 1995, a survey was conducted which indicated that voters did not have sufficient information necessary to vote intelligently on the amendment.[23] Of those people who voted on article X, section 16, 50% said they read the ballot summary prior to voting. R. Vol. II, pp. 151; 178. Out of the people surveyed who said they voted on the amendment, 63% said they voted for the amendment, and 29% said they voted against it. R. Vol. II, p. 179. These results mirrored the actual election results where 71% of voters adopted the amendment, and 28% of voters rejected it. R. Vol. II, pp. 150; 171.

[23] The survey was conducted by The Research Network, a non-partisan research group headed by Marc Gertz, Ph.D., which conducts research, and public polling and analysis. Dr. Gertz and his associates interviewed 1,150 residents, a statistically significant number, about the vote on article X, section 16. The results of the survey mirrored the actual election result regarding how people voted and revealed very important information regarding voters' knowledge of the amendment's effects. R. Vol. II, pp. 149-229.

What is striking about the survey is that a full 65% of voters surveyed said they had no knowledge prior to voting that the Legislature and the Marine Fisheries Commission regulated every aspect of commercial saltwater fishing in Florida. R. Vol. II, p. 199. When asked whether they would vote for or against the amendment after being informed of existing regulations, of the 63% who said they had voted for the amendment, almost half of those who originally voted yes (29%) said they would vote "no" after being advised of existing regulations. R. Vol. II, pp. 172-73. Only 47% said they would still vote yes after knowing the information. R. Vol. II, p. 173. These results, along with other indicators", indicate that Florida voters did not have all the information they needed in order to make an informed decision about the proposed amendment.

Based on the survey results, it is evident that many voters relied on the ballot summary prior to voting and that the summary failed to contain information sufficient to advise most voters of the effects of the amendment. R. Vol. II, pp. 171-73. The omission of information necessary to fully inform voters made the ballot summary insufficient. See Wadhams, 567 So. 2d 414; Advisory Opinion to the Attorney General - Casino Authorization, Taxation and Regulation, 656 So. 2d 466 (Fla. 1995)(ballot summary for proposed amendment to prohibit casinos was insufficient because the

[24] According to survey responses, voters were very uninformed about the effects of this amendment. 37% of respondents did not know how gill nets function, R. Vol. II, p. 202; 40% did not know what types of fish gill nets were used to catch, R. Vol. II, p. 203; and 48% did not know whether there were alternatives to gill nets, R. Vol. II, p. 205.

summary created the false impression that casinos were allowed, but were going to be prohibited by the amendment).

2. The amendment failed to notify voters that the "limitations'* on non-entangling nets would prohibit the use of purse seines.

Purse seines are a type of net used to capture bait fish.[25] Purse seines are defined as a "seine that is pulled into a circle around fish with rings attached to the lower margin below the lead line to allow a purse line to be drawn to close the bottom of the seine." 46-4.002(8)(b), F.A.C. The definition of a seine in general is "a small-meshed net suspended vertically in the water, with floats along the top margin and weights along the bottom margin, which encloses and concentrates fish, and does not usually entangle them in the meshes." 46-4.002(8), F.A.C. As these definitions indicate, seines operate by concentrating fish to a point where the fish can be dipped from the water, as compared with a gill or entangling net which ensnares fish by the gills.[26]

Article X, section 16 "limits" the use of all non-entangling nets used in nearshore and inshore Florida waters by prohibiting their use if they are over 500 square feet in mesh area. This so-called "limitation" is actually a prohibition against the use of purse seines, as testified to by Russell Nelson, Ph.D., the Director of the Florida Marine Fisheries Commission. Dr. Nelson, a

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[25] That is, as opposed to catching food fish, which purse seines are prohibited by law from catching. See 370.08(3), Florida Statutes (1993).

[26] The definition of gill net is "a wall of netting suspended vertically in the water, with floats across the upper margin and weights along the bottom margin, which captures fish by entangling them in the meshes, usually by the gills." 46-4.002(2), F.A.C.

marine biologist, testified in deposition that "it would not be possible to configure a purse seine meeting the 500 square foot requirement [of article X, section 16] that would have any function or utility in any of the fisheries which purse seines have been used in the state," R. Vol. II, p. 292. If purse seines cannot be constructed to meet the amendment's size restrictions and retain their function, then purse seines have been prohibited rather than limited.

The Court recently held that a net's commercial viability is relevant to whether the ballot summary for article X, section 16 adequately informed voters. Dept. of Environmental Protection v. Millender, 666 So. 2d 882 (Fla. 1996). In reviewing article X, section 16 to determine the proper method of measuring a net in order for the net to comply with the 500 square foot limitation, the Court stated that voters must be provided "fair notice" of the content of the proposed amendment in order to cast an intelligent and informed ballot. 666 So. 2d at 886. It was relevant to the Court's determination of the proper method of measuring nets under the size restriction whether shrimp nets would be commercially viable if measured according to mathematical methods proposed by the State and sport fishing interests. Id. at 887. After determining that the amendment's purpose was to limit rather than prohibit all non-entangling nets, the Court held that neither the State's nor the sports fishermen's method of measuring could be applied because to do so would render the nets commercially infeasible and prohibit their use. Id. This prohibition was a

result, said the Court, that voters could not have understood through the ballot summary. Id.

As the director of the Marine Fisheries Commission himself testified, no purse seine can be constructed to meet the amendment's 500 square foot "limitation" and still maintain any commercial viability. Nothing in the ballot summary or the amendment itself put voters on notice that purse seines would be prohibited as a result of the amendment's size restriction. If the amendment's effect is to prohibit purse seines in nearshore and inshore waters,[27] then the public lacked the information necessary to decide whether they wanted to vote for a ban on purse seines.

3. The amendment failed to notify voters that Florida's commercial mullet fishery would be eliminated.

The Gulf Coast region produces about 93% of all mullet for consumption in the United States, and Florida has historically harvested more mullet than any other Gulf Coast state, including Texas, Mississippi, Louisiana and Alabama. R. Vol. V, p. 759. Prior to the amendment, gill nets were the most common gear type used for catching mullet, id., and were very efficient because the net's mesh size could be modified in small increments during different seasons to prevent the capture of less mature fish. R. Vol. II, p. 295. Virtually all mullet were caught in state, not federal, waters. R. Vol. V, p. 759.

Voters were not put on notice that a prohibition against the use of gill nets in Florida would end the State's commercial mullet

[27] Purse seines are designed for inshore and nearshore use and have no viability outside of the one-mile and three-mile zones created by the amendment. R. Vol. V, p. 650.

fishery.[28] The amendment not only eliminates Florida's multimillion dollar mullet industry, but also takes away a substantial source of mullet for the entire country. Nothing in the ballot summary informed voters that gill nets were the primary commercial source of mullet and that the amendment would severely restrict, if not eliminate, the commercial mullet fishery in Florida.[29] Before voting on the amendment, voters had a right to be advised that this significant source of income and employment for the people of this state was going to be destroyed.[30] As the public opinion poll shows, there is a good chance voters were sorely misinformed about the effect of the ban on gill nets and the continuation of the mullet fishery. R. Vol. II, pp. 195; 202-205.

4. The amendment failed to notify voters that fishermen on the east coast of Florida would receive more favorable treatment than fishermen on the west coast.

Article X, section 16(c)(5), Florida Constitution, defines nearshore and inshore Florida waters as "all Florida waters inside a line three miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along

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[28] It is estimated by marine researchers that the ban on gill nets will increase the mullet population by at least 80%. R. Vol. II, p. 276.

[29] For instance, the hook and line method is very inefficient for catching mullet, although it is used by subsistence fishermen. R. Vol. V, p. 759.

[30] Florida's commercial fishermen, compared with other Gulf states, have the greatest history of relying on mullet fishing as a way of life. Florida's nearshore commercial mullet fisheries have been family-based and were transgenerational, and because most Florida fishermen did not finish high school, opportunities for non-fishing jobs are limited. About 85% of the mullet caught in Florida was by full-time fishermen. R. Vol. V, p. 759.

the Atlantic Ocean." As a result, fishermen on the west coast must go out three miles from the coastline of Florida before they can use non-entangling nets over 500 square feet in mesh area, but fishermen on the east coast only have to travel one mile from the coast before being able to use the same nets.

Apparently, a significant number of voters had no idea that east coast fishermen would be treated differently than west coast fishermen. In the public opinion poll, 48% of respondents stated that they were not at all aware that the amendment would apply a different standard depending on whether fishing was done from the east coast versus the west coast. R. Vol. II, p. 196.

5. The amendment failed to notify voters that commercial fishing property would be taken to serve a public purpose and would require public compensation.

Although the ballot summary included a capsulation of the language of the entire amendment, the summary did not explain the amendment's likely effects. Nothing in the summary indicated to voters that the regulation of private property for a public use would require the use of public funds to compensate the many commercial fishermen for the taking of their fishing property.[31] The public opinion poll revealed that more than half of people who voted on the amendment, 58%, said they were not at all aware that the amendment could require taxpayers to compensate fishermen for the taking of their property. R. Vol. II, p. 193, The fact that

[31] Under Joint Ventures v. Dept. of Transportation, 622 So. 2d 563 (Fla. 1990) and other cases involving regulatory takings, Appellants' property has been unconstitutionally taken by the amendment. An analysis of this issue is provided herein under the analysis of due process violations.

the amendment completely prohibits the use of gill and entangling nets, and limits the use of other nets to the extent that they, too, no longer have any economical or beneficial use[32] put the proponents on notice that commercial fishermen would have to be compensated for the taking of their property; however, this knowledge was never shared with the voters.

It is no longer speculation that public funds will be used to compensate commercial fishermen for the taking of their fishing gear. In the summer of 1995, the Florida legislature passed a law to include net fishermen in the State's unemployment compensation system and buy a limited amount of nets on a first-come, first-served basis in an effort to ameliorate the impact of the ban. See Section 370.0805, Florida Statutes (1995). Before running out of funds, the State spent in excess of $16 million in tax-based revenue to buy nets rendered worthless as a result of the amendment. R. Vol. V, p. 759.

6. The amendment failed to notify voters that the amendment would negatively impact only licensed commercial fishermen and would actually benefit sport and recreational fishermen.

It can be argued that the amendment treats every saltwater fisherman equally - no person is allowed to use gill or entangling nets, and no person may use nets of greater than 500 square feet in mesh area in nearshore and inshore waters. However, what was unknown to voters is that the only individuals who are directly negatively impacted by the amendment are commercial fishermen, i.e. those holding valid saltwater products licenses. See 370.06(2) and

[32] See Testimony of Dr. Nelson, R. Vol. II, p. 292.

370.0605, Florida Statutes. Sport/recreational fishermen could not have used commercial fishing nets for saltwater fishing if they had wanted to because existing regulations prohibited any person fishing pursuant to a saltwater fishing license (noncommercial), or fishing recreationally pursuant to a license exemption, from using gill nets, or beach or haul seines of more than 400 square feet. Rule 46-4.0085, F.A.C.

The ballot summary gives the false impression that commercial and recreational fishermen are equally burdened by the amendment. This misperception is even more insipid because the amendment specifically and purposefully benefits recreational and sport fishermen who will no longer have to compete with commercial fishermen for saltwater resources.

The supreme court has been firm that a ballot summary which has the potential to mislead voters is inadequate. The fact that voters adopted article X, section 16 does not cure a ballot summary which failed to provide voters information necessary to adequately inform them. See Wadhams, 567 So. 2d at 417 (Fla. 1990).

The ballot summary for article X, section 16 failed in many regards to put voters on notice as to what they were being asked to decide. Perhaps section 101.161, Florida Statutes, was not designed to handle the types of omissions and misrepresentations presented by the instant amendment. The type of information withheld from voters was essential to their ability to assess whether a constitutional amendment was necessary. The ballot summary's deficiencies cannot be ignored and require that article X, section 16, Florida Constitution, be declared void,

CONCLUSION

For the reasons set forth herein, Appellants respectfully request this Court declare article X, section 16, Florida Constitution, unconstitutional and a violation of Appellants' basic rights, and declare the amendment void for failure to comply with the statutory requirement that a ballot summary provide voters with sufficient information from which to make an intelligent and informed decision.

Respectfully submitted,

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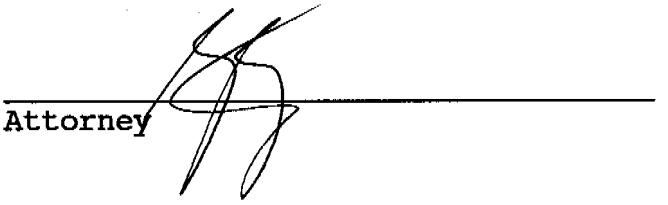
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by HAND DELIVERY to Denis Dean, Assistant Attorney General, and Jonathan Glogau, Assistant Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050; and M.B. Adelson, Florida Department of Environmental Protection, 3900 Commonwealth Blvd., Rm. 628, Tallahassee, FL 32399-3000; AND BY U.S. MAIL to Terry L. McCollough, Florida Conservation Association, 538 E. Washington St., Orlando, FL 32801; and David Guest, Florida

Wildlife Federation, Inc., Sierra Club Legal Defense Fund, P. 0. Box 1329, Tallahassee, FL 32302, on September 30, 1996.



Attorney