OA 12-5-96

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, 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

RESPONSE BRIEF FOR APPELLEES DEP

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

M. **B.** ADELSON IV,
ASSISTANT GENERAL COUNSEL
FLA. BAR NO. 0694215
ANDREW J. **BAUMANN,**
ASSISTANT GENERAL COUNSEL
FLA. BAR NO. 0070610
3900 Commonwealth Boulevard
Mail Station **35**
Tallahassee, Florida 32399-3000
(904) 488-9314; FAX (904) 487-4938

ATTORNEYS FOR APPELLEES DEP

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STATEMENT OF THE CASE AND FACTS

Appellee the Florida Department of Environmental Protection adopts and joins in the Statement of the Case and Facts in the brief filed by Appellees Lawton M. Chiles **and** Robert **A.** Butterworth. The Department generally accepts the statement of the case by Appellants but notes that this appeal is limited to issues of law arising from the *summary* judgment for the Defendants by the trial court, and thus, factual references are not material or relevant.

STATEMENT OF THE ISSUES

The **Appellants** contend that Article X, Section 16, Fla. Const., should be declared invalid for alledged noncompliance with Chapter 101, Florida Statutes, in the ballot *summary* that was presented to the Florida voters. See Advisory Opinion - Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993), which is dispositive of those issues. Appellants argue a variety of constitutional infirmities resting on equal protection, due process, and basic constitutional analysis. **As** discussed below, the applicable law and sound analysis requires that Article X, Section 16 of the Florida Constitution be upheld.

SUMMARY OF ARGUMENT

Appellee the Florida Department of Environmental Protection adopts and joins in the *Summary* of Argument in the briefs filed by Appellees Lawton M. Chiles and Robert **A.** Butterworth and Appellee/Intervenor Florida Conservation Association, and offers the following argument **as** supplemental to the brief filed by Appellees Chiles and Butterworth, and additionally emphasizes the presumption of correctness of the trial court's ruling, affirmance by standard constitutional analysis of this provision, and recognition of similar analysis on similar issues by other state and federal courts that reviewed similar fisheries regulations and upheld them in all cases.

The people of the State of Florida have exercised their lawful right to amend their constitution. Article X, Section 16, Florida Constitution was adopted by a wide majority of the voters during the November 1994 general election. The rational basis model for review must be applied in reviewing Article X, Section 16 for compliance with the State and Federal Constitutions. Nothing in the method of adoption warrants the application of any hightened standard of review in evaluating the validity of this Amendment. Similarly, Article X, Section 16 fails to meet any of the established threshhold requirements necessary to review the Amendment under the strict scrutiny model or any other standard of review other than the rational basis test.

Florida joins a growing number of states adopting this kind of fisheries regulation. Most notably, California, Texas, Indiana and Lousisana all have similar regulations prohibiting or restricting the type of fishing gear regulated by Article X, Section 16, Florida

Constitution. All constitutional challenges to these regulations, to date, have been unsuccessful and the regulations have been upheld on constitutional grounds.

Although the passage of Article X, Section 16 brought some economic hardship and required a fundamental change to a traditional way of life in a few communities, the democratic method of the initiative process which created the benefit obtained by the public at large results in an improvement and beterment of the natural resource for all of the citizens of Florida, and therefore should be respected.

I.
INTRODUCTION

The people of the State of Florida have reserved the right to amend their constitution. The people may act as their own legislature through the initiative process. Article XI, Section 3 of the Florida Constitution declares that "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people . . . " Art. XI, § 3, Fla. Const.. Pursuant to this source of reserved power, the people amended their constitution in the November general election of 1994 by adding Article X, Section 16, entitled "Limiting Marine Net Fishing" to the Florida Constitution. This Court has already reviewed this particular initiative matter in Advisory Opinion to the Attorney General - Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993), and held that the initiative met the requirements of law to be presented and considered by the citizenry.

In substance, Article X, Section 16 is not the original constitutional expression specifically regarding Florida's natural resources. The Constitution, as a fundamental statement of Florida's way of life, generally guarantees and addresses the importance of Florida's natural resources near the beginning of the document. Article II, Section 7, entitled "Natural Resources and Scenic Beauty" declares that "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty." Art. II, § 7, Fla. Const. The constitution provides for a Game and Fresh Water Fish Commission charged with the management, protection and conservation of wild animals and fresh water aquatic life. Art. IV, § 9, Fla. Const. Article X, Section 11 reaffirms Florida's strong interest in

safeguarding public natural resources entrusted to the state by the people. Article X, Section 11 embodies the public trust doctrine into the fundamental statement of constitutional purpose when considering the use of sovereignty submerged lands, and the water column above those lands. Those lands are held "in trust for all the people." Art. X, § 11, Fla. Const.

For many years, a sustainable saltwater fishery was attempted by statute, special legislative acts and administrative rule. In recent years, the fisheries resource has had a greater level of public interest and use for both commercial and recreational purposes. There was great public debate regarding the adequacy and effectiveness of the regulatory protections, and the condition and future of the resources. The condition and future use of the resource was publicly considered in the referendum process, and resulted in the adoption of Article X, Section 16, which as adopted, emphasizes that the saltwater fisheries resources will be "conserved and managed for the benefit of the state, its people, and future generations." Art. X, § 16(a), Fla. Const. Accomplishment of this conservational management rests in part on certain gear and harvest area restrictions that the people, by a substantial majority of those voting, declared to be necessary for their benefit and future generations. The validly proposed amendment was adopted through the lawful referendum process, and should be upheld.

II.
ARTICLE X, SECTION 16, FLORIDA CONSTITUTION MUST BE REVIEWED UNDER THE DEFERENTIAL "RATIONAL BASIS" TEST FOR VALIDITY AGAINST ALL OF APPELLANTS' CHALLENGES

A. The adoption of Article X, Section 16 through the initiative petition process does not warrant review under any form of heightened scrutiny

Deferential scrutiny, also referred to as the "rational basis" test, is the appropriate standard of review for all issues presented in this case. "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." Thomas M. Cooley, Constitutional Limitations, Ch. IV, "Construction of State Constitutions", Boston, 1868, p.59. Strict scrutiny, or any standard of review other than deferential review, is not appropriate in this case.

> A shift in emphasis to the Constitution itself suggests an alternative approach to legitimacy which, however old fashioned, may nonetheless be apt. If the Constitution is seen as substantive law, as a translation of certain values into rights, powers and duties, then it may be possible to justify constitutional adjudication not by its method but by its results. Decisions are legitimate, on this view, because they are right. This approach explains a certain paradox in recent constitutional history. For the critics, the two most dubious holdings of the Warren Era were Brown v. Board of Education, 347 U.S. 483 (1954), the school desegregation case, and Reynolds v. Sims, 377 U.S. 533 (1964), the one person - one vote decision. It now seems clear, however, that both decisions have been accepted by the political processes at large as fundamental aspects of our constitutional law. The legitimacy in fact of these decisions, then, cannot be a product of method - or at least of any method which the critics would accept as proper - but of outcome: the values these decisions invoked, notwithstanding the difficulty of their implementation, are values we truly hold.

Laurence H. Tribe, American Constitutional Law, New York, 1978, p.52.

Appellants assert that Article X, Section 16 should not receive deferential scrutiny by this Court precisely because of its enactment through the most democratic of processes. Appellants refer the Court to Fine v. Firestone, 448 So. 2d 984 (Fla. 1984), for the proposition that this Court, as a matter of course, denies the deferential scrutiny normally afforded to statutes and provisions of the constitution to the subject provision because it has been adopted by initiative petition. Appellants' claim that Article X, Section 16 should be afforded a different standard of review from that given to the remainder of the constitution, and this proposal is incorrect.

The decision in Fine v. Firestone, upon which Appellants rely, dealt specifically with the requirement that any such revision or amendment adopted by initiative petition "shall embrace but one subject matter directly connected therewith." Fine, 448 So. 2d at 988-99 quoting Art. XI, § 3, Fla. Const. The Fine decision did discern a distinction between normally adopted legislation and amendments adopted through initiative petitions. While both are limited by the "single subject matter" requirement, this Court determined that the single subject matter limitation on initiative petitions in Article XI was more narrow that the similar restriction placed on legislation in Article III; Article III requiring that the subjects be "properly" connected as to legislation, while Article XI required that the subjects be "directly" connected relative to initiative petitions amending the constitution. Id.

This Court has never held that constitutional amendments adopted by initiative petition should be stripped of judicial deference as a result of their enactment through the initiative process.

Although enacted independently of the legislative organ of the government, it is well settled that enactments passed via initiative or public referendum are treated as though passed by the legislative body itself. James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971). Such action represents the very essence of direct democracy. Id. The people are treated as a legislative equivalent, and those acts which pass by initiative or referendum are afforded the same judicial deference and respect as legislative enactments. Id. The United States Supreme Court decision in James v. Valtierra, supra, is precisely on point. In James, an amendment to the California Constitution adopted through initiative petition was challenged on several grounds, all of which were rejected by the Court using the same standard of review as for adoption of the amendment accomplished through legislation by elected representatives meeting in ordinary session.

B. Article X, Section 16 neither implicates any "fundamental" rights nor utilizes any "suspect" classifications warranting review under the strict scrutiny model

The circumstances under which a law will be subjected to strict scrutiny are extremely narrow. Ordinarily, enactments must rationally relate to a legitimate state purpose. Village of Belle Terre v. Boras, 416 U.S. 1, 97 S.Ct. 2513, 29 L.Ed.2d 797 (1974). However, enactments occasionally demand a higher level of scrutiny only where they infringe upon a fundamental right or draw a distinction between members of the public by means of a suspect classification. Miller v. Johnson, ___ U.S. ___, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); State v. Dodd, 561 So. 2d 263 (Fla. 1990). These are the cases that

were relied upon by the trial court as a correct interpretation of the appropriate standard of review to decide the instant case.

Article X, Section 16 does not create or utilize a suspect classification[1] or implicate a fundamental right.[2] Article X, Section 16 makes no distinction based upon any suspect classification. As presented in the trial court's decision, the law states that any disparate impact upon particular occupations, such as commercial fishing, does not constitute a suspect classification. See Department of Corrections v. Florida Nurses Association, 508 So. 2d 317 (Fla. 1987); see also Sisk v. Texas Parks & Wildlife Department, 644 F.2d 1056 (5th Cir. 1981) (commercial fishermen do not constitute a "suspect" classification, and disparate treatment of commercial and sport fishermen must merely have a rational basis to a legitimate state interest).

Similarly, no jurisdiction reviewing fisheries regulations has ever elevated the right to fish in state waters to the level of a "fundamental" right warranting strict scrutiny. Louisiana ex rel. Guste v. Verity, 853 F.2d 322, 333 (5th Cir. 1988) (holding that no fundamental right was implicated in requiring commercial fishermen to use Turtle Excluder Devices or "TEDs"); Sisk v. Texas Parks & Wildlife Department, 644 F.2d 1056, (5th Cir.

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[1] Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 837 (1954) (race is a "suspect" classification); Takahashi v. Fish & Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) (national origin is a "suspect" classification). The Supreme Court has expressed a profound reluctance to broadly apply these well defined "suspect" classification and has expressed similar reluctance in creating new ones. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

[2] Harper v. Virginia State Board, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d (1966) (voting is a fundamental right); NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 78 S.Ct. 1163, 1 L.Ed.2d 1488 (1958) (right of association is fundamental); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (right of access to the courts is fundamental).

1981) (the right to fish is not "fundamental"); Solis v. Miles, 524 F.Supp. 1072 (S.D. Tex. 1981); LaBauve v. Louisiana Wildlife & Fisheries Commission, 444 F.Supp. 1370, 1382 (E.D. La. 1978). Moreover, the United States Supreme Court has rejected any notion of a "fundamental" right to engage in a chosen occupation. Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

It is a long-held principle of law in Florida that, to the extent any individual retains a "right" to fish in state waters, such fishing activities remain subject to state regulation for the general welfare. Nash v. Vaughn, 182 So. 827 (Fla. 1938); Ex parte Powell, 70 So. 392, 397 (Fla. 1915). State regulations limiting the commercial exploitation of natural resources, such as the harvest of indigenous fish and wildlife, are a valid and legitimate exercise of the state's inherent police powers. Hughes v. Oklahoma, 441 U.S. 322, 325, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1970). Accordingly, state regulations limiting seasons, restricting permitted fishing gear and proscribing the use of certain gear in defined areas have invariably been upheld in Florida against these kinds of challenges. Skiriotes v. Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941) (upholding law prohibiting the use of diving gear to harvest marine sponges), rehearing denied 313 U.S. 599, 61 S.Ct. 1093, 85 L.Ed. 1552 (1941); State v. Perkins, 462 So. 2d 150 (Fla. 2d. DCA 1983) (upholding law prohibiting the use of seine nets or gill nets within fifty yards of a dock or pier); Fulford v. Graham, 418 So. 2d 1204 (Fla. 1st DCA 1982) (upholding a number of special acts regulating saltwater fish on a county by county basis).

Beyond the qualified right of anyone to fish in Florida waters, a portion of the population enjoys the added privilege of harvesting commercial quantities of the public resource pursuant to a valid Saltwater Products License issued by the State. This license, and the activity it authorizes is a privilege, not a right. Mayo v. Market Fruit Co. of Sanford, Inc., 40 So. 2d 555 (Fla. 1949) (holding that a license is merely a privilege to do business and is not a contract between the granting authority and the license holder, nor is it a property right, nor does it create a vested right). Holding a Saltwater Products License necessary to engage in commercial fishing is a privilege like any other license, and does not rise to the level of a vested right in the license.

There is also substantial difference between strict scrutiny, advanced by the Appellants pursuant to Article X, Section 16(e), and narrow or strict construction which is the proper standard of review of a criminal charge brought under this provision. A penal statute must be strictly construed in favor of the criminal defendant and should not be extended in its application by judicial interpretation. Allure Shoe Corp. v. Lymberis, 173 So. 2d 702 (Fla. 1965); Florida Industrial Commission v. Manpower, Inc., 91 So. 2d 197 (Fla. 1956). This rule of statutory construction is distinct from the well defined circumstances for exposing a provision of law to strict scrutiny in determining its compliance with provisions of the state and federal constitutions. The case before the Court is a pre-enforcement facial attack upon the amendment as a whole, and no criminal protections are implicated, nor do any of the Appellants appear before this Court as defendants to a criminal charge under this Act.

C. The summary judgment by the trial court comes to the Appellate Court with a presumption of correctness, and should not be disturbed without a clear showing of error or departure from law

In this review by deferential scrutiny, it should be remembered that it is well settled in Florida law that the ruling below comes before the Court with a presumption of correctness, and Appellants have the burden proving that an error or abuse of discretion was committed in reaching the result being reviewed. Applegate v. Barnett Bank, 377 So. 2d 1150 (Fla. 1979); Lynn v. City of Fort Lauderdale, 81 So. 2d 511 (Fla. 1955); Videon v. Hodge, 72 So. 2d 396 (Fla. 1954); Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). Appellants have not shown, nor can they show that the trial court departed from an appropriate analysis and determination upholding the efficacy and constitutionality of Article X, Section 16, Florida Constitution.

III.
THE EXPERIENCES OF OTHER STATES AFTER ADOPTING SIMILAR MEASURES FOR REGULATING STATE FISHERIES DEMONSTRATES THAT ARTICLE X, SECTION 16 IS CONSTITUTIONAL AND SHOULD BE UPHELD

Florida is not the only state to adopt this kind of law regulating fisheries in state waters. Several states, most notably California, Texas, Louisiana and Indiana, have adopted similar restrictions, and, in the case of California, such restrictions have been adopted into the state constitution through the initiative petition process. Invariably and to date, these fisheries restrictions have been upheld by state and federal courts against the types of legal challenges here leveled at Florida's provision.

A. The California Analysis

Of the other states, California's situation most closely mirrors that of Florida. On November 7, 1990, proposition 132 was adopted in the California general election, and the California Constitution was amended to include Article XB, entitled "Marine Resource Protection." Art. XB, Cal. Const.. The California Amendment established a Marine Resource Protection Zone, within which the use of gill or trammel nets (the two principle types of entangling nets) became illegal after January 1, 1994. The California Amendment was challenged by commercial fishermen using many of the same legal theories advanced by Appellants in this case. Specifically, the California fishermen asserted that Amendment (1) deprived them of equal protection, (2) deprived them of liberty and property without due process of law, (3) violated the single subject requirement of the California initiative process, (4) violated the constitutional guarantee of a republican form of government, and

(5) suffered from flaws in the ballot summary. The trial court rejected all of these challenges and granted summary judgment for the respondents, and the fishermen appealed to the Fourth District Court of Appeal. California Gillnetters Association v. Department of Fish & Game, 39 Cal.App.4th 1145, 46 Cal. Rptr. 2d 338 (Cal. Ct. App. 4th 1995) rev. den. (Jan. 29, 1996).

On appeal, the California Court of Appeal affirmed the judgment of the trial court, and rejected each of these challenges in turn. On the equal protection challenge, the California Court of Appeals held that Article XB failed to implicate a fundamental right or to utilize a suspect classification, and that the Amendment must be evaluated under the "rational basis" test. California Gillnetters, 39 Cal.App.4th at 1152-56 (holding that neither the right to fish or the right to work constitute a fundamental right necessary to invoke strict scrutiny, and the constitutional provision must be reviewed under the "rational basis" test). Accordingly, the Court held that the California Amendment rationally related to a legitimate state interest, and therefore should be upheld. Id. at 1156 relying on LaBauve v. Louisiana Wildlife & Fisheries Commission, 444 F.Supp. 1370 (E.D. La. 1978) (holding that a ban on gillnetting is rationally related to a legitimate government interest). The California Appeals Court also rejected claims based on substantive and procedural due process. In particular, the Appeals Court concluded that state laws regulating business and industrial conditions, even those which may severely restrict the pursuit of an occupation, and thus impinge upon protected property interests, must be tested under the rational basis standard. Id. at 1160-61 (holding that the power to regulate businesses is within the state's

police power). Again, the California Court found the Amendment rationally related to a legitimate government interest, and therefore, not violative of due process. Id. relying on Burns Harbor Fish Co., Inc. v. Ralston, 800 F.Supp. 722, 729-33 (S.D. Ind. 1992) (upholding a ban on gillnetting against due process claims as rationally relating to the legitimate state policy of conservation and resource allocation). The California fishermen's argument based on the denial of the constitutional guarantee of a republican form of government under Article IV, Section 4 of the U.S. Constitution was also rejected. Id. at 1163. The Appeals Court pointed out that these claims have been repeatedly rejected as nonjusticiable political questions.[3] The enforcement of this clause is committed to the Congress, not to the courts. Id. Finally, the California Appeals Court rejected the alleged flaws in the ballot summary and violation of the single subject requirement of the California initiative process. Id. at 1161-63 and 1164-66.

This case is closely analogous the present case in Florida. Like California, the people of Florida exercised their right to amend their constitution to place restrictions upon the type of fishing gear being used to harvest large quantities of public resources from state waters. The two amendments are similar, as are the legal challenges to both. The

[3] California Gillnetters Association v. Department of Fish & Game, 39 Cal.App.4th 1145, 1163, 46 Cal. Rptr. 2d (Cal. App. 4th 1995). An extensive body of case law cited by the California Court has established that an alleged denial of the constitutional guarantee of a republican form of government is a political question and is nonjusticiable. Baker v. Carr, 369 U.S. 186, 221-224, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); State of Ohio v. Akron Metropolitan Park District, 281 U.S. 74, 79-80, 50 S.Ct. 228, 74 L.Ed. 710 (1930); Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118, 149-51, 32 S.Ct. 224, 56 L.Ed. 377 (1912) (holding that assertion that initiative adopted by Oregon voters violated the guarantee to a republican form of government was a nonjusticiable political question and must be dismissed for lack of jurisdiction); Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991).

California Court's analysis is sound and provides a useful model for Florida's review of its similar fishing gear regulation.

B. The Indiana Analysis

In 1986, Indiana enacted a statute which banned the use of gill nets in the waters of Lake Michigan. Ind. Code Ann. §§ 14-2-7-11(d) and (e) (Burns 1987). This restriction also faced significant legal challenge, but was ultimately upheld. Burns Harbor Fish Co., Inc. v. Ralston, 800 F.Supp. 722 (S.D. Ind. 1992). Commercial fishermen challenged the Indiana law, alleging that the Act amounted to an uncompensated taking of property and a violation of their procedural and substantive due process rights. Id. at 725.

The Federal District Court, Southern District of Indiana, rejected the fishermen's takings claim on several grounds. The court initially acknowledged the fishermen's property interest in the gill nets, but pointed out that there has been no attempt to confiscate those nets. Id. at 726. The fishermen still maintained dominion and control over their gill nets, and could sell their nets, put them to other uses, or fish them outside Indiana waters. Id. Article X, Section 16, Florida Constitution provides for similar relief. Moreover, the Court concluded that when an individual or corporate entity purchases personal property (such as nets and other fishing gear) to engage in a commercial venture the purchaser is taking a risk that the government regulation will diminish the value of that property, or that a new regulation might even render his property worthless. Id. relying on Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). This is especially true where the property purchased invokes environmental concerns. Id. relying

on Andrus v. Allard, 444 U.S. 51, 66-68, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (no taking found where the Migratory Bird Treaty and the Eagle Protection Acts prohibited the sale of artifacts containing eagle feathers); Organized Fishermen of Florida v. Hodel, 775 F.2d 1544, 1547-48 (11th Cir. 1985) (holding that commercial fishermen could be prohibited from fishing in Everglades National Park despite an established practice of commercial fishing in that Park), cert. denied 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 978 (1986). The District Court also rejected the notion that the purchase of gill nets coupled with the purchase of fishing licenses gave the fishermen an investment-backed expectation that they could continue fishing in Indiana waters with gill nets. Burns Harbor, supra. at 727. The Court found any such expectations "patently unreasonable" given that commercial fishing activity under the license remained subject to state regulations and restrictions upon the fishery. Id. relying on Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1033 (3d Cir. 1987) (holding that investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest) cert. denied 482 U.S. 906, 107 S.Ct. 2482, 96 L.Ed.2d 375 (1987). Finally, the Federal Court pointed to abundant precedent holding that, by obtaining a license to conduct activities upon state owned land or waterways, an individual does not thereby acquire a vested property interest subject to the takings clause. Burns Harbor, supra. at 727-28 (holding that fishermen had no vested property right in their commercial fishing license subject to the takings clause of the Federal Constitution). United States v. Locke, 471 U.S. 84, 104-05, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) ("the United States, as owner of the underlying fee title to the public domain,

maintains broad powers over the terms and conditions upon which the public lands can be used, leased and acquired . . . [c]laimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests"); Marine One, Inc. v. Manatee County, 898 F.2d 1490, 1492-93 (11th Cir. 1990) ("both federal . . . and state cases stand for the proposition that permits to perform activities on public lands - whether the activity be building, grazing, prospecting, mining or traversing - are mere licenses whose revocation cannot rise to the level of a Fifth Amendment taking) (emphasis original); Acton v. United States, 401 F.2d 896, 899 (9th Cir. 1968) (holding that "a license does not constitute property for which the government is liable upon condemnation"), cert. denied 393 U.S. 1121, 89 S.Ct. 1003, 22 L.Ed.2d 128 (1969).

The Court in Burns Harbor also rejected the fishermen's procedural and substantive due process claims. As to due process, the fishermen did have a protected property interest in the license, but only to the extent that their licenses could not be revoked without cause. Burns Harbor, supra. at 730. As to the regulation's impact on the licensed activity, the Federal Court applied the rational basis test, holding that the ban on gill nets bore a reasonable relationship to a legitimate government purpose. Id. at 733.

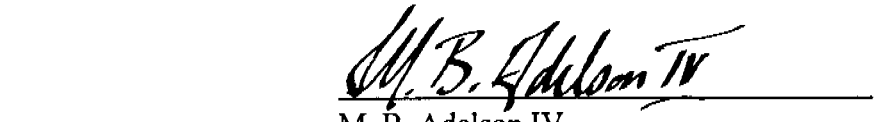
The Indiana litigation represents yet another example of the uniformity seen in the analysis of courts asked to review these types of regulations against the types of challenges raised here in Florida. Other states have passed similar initiatives, most notably Texas and Louisiana, and in every instance where these types of restrictions have been subject to these kinds of challenges, they have been upheld by state and federal courts pursuant to ordinary

principles of constitutional analysis. Appellants' urging for Florida to depart from this ordinary constitutional analysis encourages departure from the most fundamental precepts of law, and should not be done here. The experiences of these other states provide this Court with a sound model for upholding Article X, Section 16. The disposition of these legal challenges display a degree of uniformity and predictability not often demonstrable in the law, and offer a great deal of insight into how these questions have been dealt with in the past and how they should be dealt with in the future. The experiences of the other states, which precede Florida's, show that confirmation of the fishery gear initiatives is appropriate, correct and implements values truly held by the people at large.

CONCLUSION

New standards of constitutional analysis need not be created here. The familiar and reliable constitutional principles are part of the initiative process under review. No cause is shown to disturb them. The proper method to change, amend and mature resource regulations remains in the process of formulation, which includes the political process coupled with the reserved right of the people to address their own constitution. The petition before this court to place restrictions upon the adoption of constitutional amendments, which do not currently exist, is improper and unsupported. When the people speak for themselves, our democracy requires that their self-made decisions be respected. Article X, Section 16, Florida Constitution, should be upheld.

Respectfully submitted,



M. B. Adelson IV,
Assistant General Counsel
Fla. Bar No. 0694215
Andrew J. Baumann,
Assistant General Counsel
Fla. Bar No. 0070610
Florida Dept. of Environmental Protection
3900 Commonwealth Boulevard, M.S. 35
Tallahassee, Florida 32399-3000
Telephone: (904) 488-9314
Facsimile: (904) 487-4938

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Postal Service this 21st day of October, 1996, to the following:

Denis Dean, Assistant Attorney General
Jonathan Glogau, Assistant Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050

Terry L. McCollough
Florida Conservation Association
538 E. Washington St.
Orlando, FL 32801

David Guest
Florida Wildlife Federation, Inc.
Sierra Club Defense Fund
P. O. Box 1329
Tallahassee, FL 32302

Frank J. Santry, Esquire
Victoria E. Heuler, Esquire
2833 Remington Green Cir.
P. O. Box 14129
Tallahassee, FL 32317

M. B. Adelson IV, Assistant General Counsel
Andrew J. Baumann, Assistant General Counsel