IN THE SUPREME COURT OF FLORIDA

MARY BARLEY, as Personal Representative of the estate of GEORGE M. BARLEY, JR., SHEILA MULLINS, BENJAMIN WERMEIL, and NATHANIEL PRYOR REED, both Individually and on behalf of all others similarly situated,	)	
Petitioners,	)	Case No. SC 00-1998
v.	)	
SOUTH FLORIDA WATER MANAGEMENT DISTRICT,	)	
Respondent.	)	

On Petition to Review a Decision of
The District Court of Appeal, Fifth District

BRIEF OF AMICUS CURIAE, MONROE COUNTY, FLORIDA, IN SUPPORT OF RESPONDENT

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TABLE OF ABBREVIATIONS USED IN THIS BRIEF

"Advisory Opinion" means this Court's decision in *Advisory Opinion to the Governor -- 1996 Amendment 5 (Everglades)*, 706 So. 2d 278 (Fla. 1997).

"Amendment 5" means 1996 Amendment 5, Article II § 7(b) of the Florida Constitution.

"County" refers to Amicus Curiae, Monroe County, Florida.

"EAA" means the Everglades Agricultural Area as defined in Section 373.4592, Florida Statutes.

"EFA" means the Everglades Forever Act of 1994, Section 373.4592, Florida Statues, as amended.

"Everglades Program" means the program of Everglades restoration and water supply development established pursuant to the EFA.

"Plaintiffs" or "Petitioners" means the Petitioners, Plaintiffs below.

"SFWMD" means Respondent, Defendant below, the South Florida Water Management District.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned certifies that the type size and style used in this brief is Arial 14-Point proportionately spaced.

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INTRODUCTION

Under the pretext of attempting to protect themselves from a tax they claim should be levied against others, Plaintiffs below seek to collapse a comprehensive legislative scheme designed to provide South Florida with a much-needed water supply, to create new recreation areas, and to improve water quality in the region. These issues and concerns are critically important to Monroe County, thus its urgency to be heard by the Court.

Plaintiffs grossly mischaracterize the nature of the Everglades Program -- which as even a cursory review of section 373.4592, Florida Statutes, demonstrates -- provides far-ranging benefits to the water supply and environment of South Florida. Any tampering with this statutory scheme will imperil water quality, flow, and quantity not only within the Everglades, but in the environmentally-fragile and threatened Florida Bay ecosystem, thus directly threatening Monroe County's interests. In urging their tunnel-visioned view of the Everglades Program, plaintiffs simply ignore this Court's determination that the constitutional amendment they invoke leaves open critical questions for legislative resolution, and urge a judicial construction that will emasculate the Legislature's role in deciding how best to preserve the Everglades.

This Court should not be distracted by Plaintiffs' sleight-of-hand. The Court has already held, quite correctly, that Amendment 5 is neither self-executing nor inconsistent with the Everglades Program funding mechanism under attack. Fundamental principles of separation of powers require dismissal of Plaintiffs' claims. The decisions of the trial court and the Fifth District Court of Appeal should therefore be affirmed.

SUMMARY OF THE ARGUMENT

Monroe County has a longstanding interest in issues related to the Everglades. Literally, nothing good or bad happens in the Everglades without its impact being felt within Monroe County's protected Everglades lands, its miles of coast which border the northern, eastern, and southern shorelines of Florida Bay, and its bay waters and bottom. The Plaintiffs' irresponsible attack threatens an Everglades Program designed to provide substantial benefits to Monroe County by increasing the quantity and improving the quality of water flowing into Florida Bay, addressing long-standing water supply problems, improving hydroperiod management, and creating new natural recreation areas that will increase tourism throughout South Florida, including Monroe County. The project is of critical public importance, and this Court should be loathe to sanction judicial interference with the Legislature's clear and pervasive interest and action in this area.

Notwithstanding Plaintiffs' protestations, the Everglades Program is not a "one trick pony" directed to cessation of water pollution by a limited sector of Everglades residents. To the contrary, as the Legislature has made clear, the Program will put into place

> plans and programs for improving water quantity reaching the Everglades, correcting longstanding hydroperiod problems, increasing the total quantity of water flowing through the system, providing water supply for the Everglades National Park, urban and agricultural areas, and Florida Bay, and replacing water previously available from the Coastal Ridge in areas of Southern Dade County.

§ 373.4592(1)(f), Fla. Stat.

The Everglades Program will thus provide numerous public benefits unrelated to pollution abatement. Those features of the Program more than justify the portion of the project cost raised through ad valorem taxation. Moreover, it is elementary that the question of balancing the benefits of a project versus its costs is fundamentally a political, not a judicial or justiciable, one.

Plaintiffs conveniently ignore the fact that the Legislature sought to further goals other than pollution abatement in approving and enacting the Everglades Program. They also fail to recognize the obvious implications of this Court's decision in *Advisory Opinion to the Governor -- 1996 Amendment*

5 (Everglades), 706 So. 2d 278, 279-80 (Fla. 1997) ("Advisory Opinion"). This Court easily understood the meaning of "divid[ing] the burden of the costs of pollution abatement on the public by the 0.1 mill tax and the agricultural users by the privilege tax of $ 24.89 per acre," when the late Governor Lawton Chiles specifically asked about the constitutionality of this funding allocation. In response to this specific question, the Court had no trouble concluding that there existed no inconsistency between the funding mechanism and Amendment 5. The constitutional provision therefore imposes no impediment to the challenged tax.

As this Court has also held, Amendment 5 is not self-executing and has no force or effect on the funding of the Everglades Program, which is completely consistent with the amendment. The Court did not come to this decision lightly; it was dictated by fundamental, well-established, and long-articulated separation of powers principles.

According to this Court's longstanding and uniform precedents, a constitutional provision, such as Amendment 5, that does not set forth a sufficient rule for accomplishing its purpose has no application independent of implementing legislation. *Advisory Opinion*, 706 So. 2d at 281; *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). To hold otherwise would require the trial courts to create law out of whole cloth and exercise the previously

exclusive powers of the Legislature. The well-established principles of separation of powers, comity, and judicial restraint, that this Court so rigidly enforces do not allow such a result.

ARGUMENT

I. MONROE COUNTY HAS A UNIQUE AND LONGSTANDING INTEREST IN MATTERS AFFECTING THE EVERGLADES AND FLORIDA BAY

Monroe County has long taken an active role in the resolution of issues relating to the Everglades. It has also routinely participated at all levels of government on matters related to protection of marine life and preservation of natural resources. Located partially within and to the South of the Everglades, Monroe County is critically affected by both the quantity and quality of water flowing through the Everglades. Moreover, a large portion of Florida Bay in northern Monroe County is located within the Everglades National Park, and improving the water flow through the Park and Florida Bay is one of the primary goals of the Everglades Program. *See* § 373.4592(1)(f), Fla. Stat. (2000). The restoration of natural water flow through the Everglades will significantly improve the quality of the reefs and fisheries in Florida Bay

and the upper Keys, areas that are of obvious deep concern to the citizens of Monroe County.[1]

Additionally, Monroe County's economy is primarily tourism-based. Millions visit South Florida and the Florida Keys every year to enjoy our unique natural environment. Monroe County therefore has a strong interest in seeing that both Florida Bay and the Everglades are protected and their natural functions enhanced. The increased recreational opportunities and environmental enhancement that will occur throughout South Florida as a result of the Everglades Program will greatly benefit the County.

Finally, all of South Florida is currently undergoing a series of ever more serious water shortages. Ironically, at the same time, almost two billion gallons of fresh water are diverted to the sea every day.[2] The Everglades Program will correct this anomaly and provide the water supply desperately needed to sustain South Florida's growing population. Without the project, Miami-Dade and Monroe Counties may soon find themselves without sufficient water to meet their ever-increasing needs.

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[1] *See Comprehensive Everglades Restoration Plan -- Benefits,* <http://www.evergladesplan.org/the_plan/p10.htm> (visited March 22, 2001).

[2] *See Comprehensive Everglades Restoration Plan -- Benefits,* <http://www.evergladesplan.org/the_plan/p6.htm> (visited March 22, 2001).

II. THE RELIEF SOUGHT BELOW WOULD DERAIL THE EVERGLADES PROGRAM TO THE DETRIMENT OF ALL OF SOUTH FLORIDA

Based on their specious claims that they are "not polluters" and that all the problems in the Everglades can be attributed to the EAA, Plaintiffs seek to have the courts invalidate a key source of funding for the Everglades Program. The underlying problems, however, are far more complex than the Plaintiffs paint them.

Twisting the legislative language to their own ends in an attempt to concoct a claim under Amendment 5, Plaintiffs characterize the Everglades Program as the mere abatement of pollution from the EAA. This completely ignores the Legislature's specific findings that the project is critical to:

> improving water quantity reaching the Everglades, correcting long-standing hydroperiod problems, increasing the total quantity of water flowing through the system, providing water supply for the Everglades National Park, urban and agricultural areas, and Florida Bay, and replacing water previously available from the coastal ridge in areas of southern Dade County.[3]

§ 373.4592(1)(f), Fla. Stat.

[3] These issues of water quantity and hydroperiod management addressed by the Everglades Program are crucial to the long term vitality of Florida Bay. *Id.*

The Everglades Program was developed in 1993 when, after five years of litigation, the State of Florida and the federal government, in conjunction with various interested parties, agreed to a plan for restoring the Everglades. § 373.4592(1)(c), Fla. Stat. This was memorialized in a Statement of Principles signed by the late Governor Chiles in July 1993 (the "Statement of Principles") and specifically approved by the Florida Legislature in the EFA during the following legislative session. *Id.* The state portion of the plan is being implemented pursuant to the EFA, which mandates that the SFWMD undertake the vast restoration efforts needed to comply with the Statement of Principles. § 373.4592(1)(a), Fla. Stat.

The Legislature approved the Statement of Principles and enacted the EFA based on its finding that "[t]he Everglades ecological system is endangered as a result of adverse changes in water quality, and the quantity, distribution and timing of [water] flows, and therefore, must be restored…" § 373.4592(1)(a), Fla. Stat. (emphasis added). As is clear on the face of the statute, the Legislature's intent was not simply to abate pollution from a discrete source. In enacting the EFA, the Legislature specifically intended to "pursue comprehensive and innovative solutions to issues of water quality, water quantity, hydro period, and invasion of exotic species." § 373.4592(1)(g), Fla. Stat.

The Legislature recognized that there is no one cause of the underlying problems of water quality, water quantity and hydro period management faced by the Everglades Program. *See* § 373.4592(1)(g), Fla. Stat. Moreover, many different parties -- including the public at large -- will benefit both from the improvements in water supply and from the creation of new recreation areas contemplated under the Everglades Program. Accordingly, the Legislature determined that the State's portion of the project's cost should be paid from a variety of sources that include two separate agricultural privilege taxes, tolls on alligator alley, wetland mitigation contributions from Florida Power & Light Company and the 0.1 mill ad valorem tax challenged here.[4] §§ 373.4592(4)(a), (6), and (7) Fla. Stat.

The challenged ad valorem tax is a crucial component of the comprehensive Everglades strategy developed by the state and federal governments. Without this source of funding, the project cannot and, indeed, will not go forward as designed. Moreover, the failure to implement the project on schedule would place the State in violation of the Statement of

[4] Part of the cost will also be borne by special assessments on real property that derives a special benefit from the project. § 373.4592(8)(a), Fla. Stat.

Principles and likely precipitate legal action by the federal government to enforce that agreement.

As noted, the enactment of the EFA put an end to over five years of costly and protracted litigation over the restoration of the Everglades. § 373.4592(1)(c), Fla. Stat. The Plaintiffs' requested relief would cast the Everglades restoration efforts back into that abyss, potentially resulting in years or even decades of further delay on a much-needed and long-overdue public works project. Additionally, there would be millions of taxpayer dollars wasted on needless litigation. And there would be a significant risk of destruction by dehydration of irreplaceable natural resources caused by the resulting delay. There is no need for this to occur as this Court has already determined that the funding mechanism is consistent with Amendment 5.

III. AMENDMENT 5 IS NOT SELF-EXECUTING AND CANNOT BE APPLIED IN THE MANNER PLAINTIFFS SEEK

Plaintiffs concede that Amendment 5 is not self-executing. That concession alone should end this litigation. Nevertheless Plaintiffs asked the trial court below to act in a manner that would have ignored the obvious implications of that concession. The reason that this Court found Amendment 5 not to be self-executing is that the provision left open several critical policy questions for legislative resolution. It is settled law that a court must look at

whether a constitutional provision "lays down a sufficient rule" in determining whether it may be applied without Legislative enactment. *Gray v. Bryant*, 125 So. 2d at 851. Applying this principle, this Court correctly found that:

> Amendment 5 is not self-executing and cannot be implemented without the aid of legislative enactment because it fails to lay down a sufficient rule for its purpose. . . . [T]oo many policy determinations remain unanswered. . . such as the various rights and responsibilities, the purposes intended to be accomplished and the means by which the purposes may be accomplished. Amendment 5 raises a number of questions such as what constitutes "water pollution"; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted.

Advisory Opinion, 706 So. 2d at 281 (emphasis added). In so holding, the Court expressly disagreed with an opinion of the Florida Attorney General that argued, as do Plaintiffs, that the SFWMD was required to apply Amendment 5 in its implementation of the Everglades Program. *Id.* at 281 n. 4 (abrogating Op. Att'y Gen. Fla. 96-92). Thus, the Court has already expressly rejected the very argument raised by Plaintiffs.

Moreover, turning to the question of whether the funding provision is in conflict with this provision, the Court specifically found no such inconsistency. *Id.* at 282. For this reason, the Court held that the EFA and in particular, the

funding provisions that were the subject of Governor Chiles' questions should continue in force and effect until modified or repealed by the Legislature.

Plaintiffs do not contend that this decision was wrong; they simply blow by it under a number of tenuous theories.

First, Plaintiffs ignore the fact that unanswered policy questions exist which this Court has held can only be answered by the Legislature. Undaunted, Plaintiffs simply provide the answers themselves through transparently-biased policy statements that permeate and color the allegations in their complaint. For example, while this Court has held that the Legislature must define the term "pollution" for purposes of Amendment 5, Plaintiffs relieve the Legislature of this burden by baldly concluding that they do not cause any "pollution" and that all "pollution" in the Everglades is attributable to the EAA.

Second, Plaintiffs argue that the Court should ignore the Advisory Opinion because that decision involved the "facial" constitutionality of the EFA, while this case is an "as-applied" challenge. This argument conveniently ignores the fact that the precise issues raised in this case were before the

Court when it issued the Advisory Opinion, as is evident from the questions posed by Governor Chiles.[5]

Finally, apparently recognizing -- contrary to their arguments to this Court -- that Amendment 5 cannot be implemented without further legislation, Plaintiffs asked the trial court below to set a schedule for the enactment of implementing legislation, in essence asking that court to completely cast aside the doctrines of separation of powers and comity among coordinate branches of government.[6] (R. 203-05) This Court has recently confirmed that it is completely improper for a court to grant such relief and order action by the legislative branch. *Florida Senate v. Florida Public Works Employees Council*, Case Nos. SC01-765 and SC01-766, Slip. Op. (filed April 18, 2000).

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[5] The sole question asked was whether the funding mechanism Plaintiffs challenge is consistent with Amendment 5. And, that is the only issue Plaintiffs present here. There is nothing to factually distinguish the Advisory Opinion from the present case.

[6] Plaintiffs have apparently disavowed this aspect of their complaint, and now forcefully argue that they do not seek implementing legislation. (Initial Brief 39-40). Nonetheless a motion for judgment on the pleadings stands or falls on the allegations of the complaint and the positions taken by the parties before the trial court. *American Mut. Ins. Co. v. Bender*, 513 So. 2d 669 (Fla. 1st DCA 1987). The positions taken by Plaintiffs in their complaint below therefore continue to be relevant.

A. Serious Policy Questions Must be Answered by the Legislature Before Amendment 5 Can be Applied.

Plaintiffs attempt to portray this case as a run-of-the-mill tax challenge, in which the trial court can simply take evidence and decide whether or not to invalidate the challenged tax based on an accepted framework. But, nothing could be further from the truth. The Plaintiffs path is a thinly-disguised slippery slope which inevitably leads to a direct clash with the Legislature.

As a starting point, one must "divine" as a matter of law that the EAA contributes phosphorus to the Everglades, and that the phosphorous is "pollution". But, that question is not one for the courts. It is the Legislature's duty and province to determine what constitutes Amendment 5 pollution. Thus, it is an understatement to say that these claims are not ripe for adjudication at this time.

Moreover, even assuming for the sake of argument that (i) phosphorous from the EAA constitutes "pollution" under Amendment 5 and (ii) the Everglades program has as one if its purposes the abatement of this "pollution" -- two assumptions that a court is not empowered to make -- the Plaintiffs' argument nevertheless collapses.

The businesses in the EAA are partially funding the Everglades Program through an Agricultural Privilege Tax. Thus, the question is whether they are

paying and doing enough, and whether, given the project's multifaceted purposes, any portion of the project cost may be imposed on the general public.[7] That is precisely the type of political question that a court, any court, is ill-equipped to answer, particularly when there is no established statutory framework under which to allocate responsibility for pollution or even to determine what portion of the Everglades Program costs are attributable to pollution abatement in the first instance.

Phosphorus flowing out of the EAA comes from many sources. These include phosphorus in rainfall, water flows from Lake Okeechobee that reach the EAA through irrigation canals, water from lakes and rivers as far north as Orlando that flow into Lake Okeechobee, and water flows from urban areas (lawns, septic tanks, etc.) that pass through the EAA, all of which ends up in the Everglades. Given the multiplicity of sources, how is a trial court to determine to what extent the EAA is to be held responsible for nutrients from these sources without any legislatively-established allocation method? The

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[7] It is important to keep in mind that funding through ad valorem taxation is an all-or-nothing proposition. The SFWMD, like Monroe County, cannot discriminate among its taxpayers. Any ad valorem tax must be imposed on all property within the jurisdiction based solely on taxable value. *See Archer v. Marshall*, 355 So. 2d 781 (Fla. 1978) (the Legislature cannot favor one group of taxpayers over another).

obvious point, of course, is that it is for the Legislature to define "pollution" and to determine the precise methodology by which to allocate responsibility for any such pollution entering the Everglades. Any attempt by the courts to do so in the Legislature's place would be directly contrary to this Court's longstanding policy against resolving political questions or interfering with the functions of coordinate branches of government. *See Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles,* 680 So. 2d 400, 407 (Fla. 1996) (the "judiciary must defer to the wisdom of those who have carefully evaluated and studied the social, economic, and political ramifications of this complex issue -- the legislature.").

Additionally, the Everglades Program will do far more than address what Plaintiffs label EAA "pollution," although Plaintiffs cynically attempt to paint it as nothing more. The project will put in place much needed water quantity and hydro period management measures that will improve the flow of water to the Everglades and Florida Bay. It will also create vast water storage areas

to provide reliable water supply for South Florida's rapidly growing needs.[8] And, the artificial wetlands-to-come will also function as public recreation areas. Should this case proceed to trial, the court below would therefore be improperly faced with the purely political question of whether the immeasurable public benefits from increased water supply and new recreation areas (not to mention the resulting improved habitat for a variety of protected species of wildlife and marine life) justify the portion of the cost imposed on the general public through ad valorem taxation.

These types questions cannot be answered without making significant determinations of state policy. This Court recognized as much in its Advisory Opinion:

> As you [Governor Chiles] suggest in you letter, "too many policy determinations remain unanswered . . . [such as the various] rights and responsibilities, the purposes intended to be accomplished, and the means by which the purposes may be accomplished." Amendment 5 raises a number of questions such as what constitutes "water pollution"; how one will be adjudged a polluter; how will the cost of pollution

[8] Obviously the region cannot continue to grow and prosper while suffering under crippling water use controls. Given the current water shortages throughout South Florida, the Legislature could quite reasonably have found that the moderate cost of the ad valorem tax, which amounts to about $12.50 per year for a $150,000 home with homestead exemption, is more than justified by the need for reliable water supply alone.

> abatement be assessed; and by whom such a claim may be asserted.

Advisory Opinion, 706 So. 2d at 281. Moreover, the Court recently noted the complexity of environmental regulation in general and Everglades restoration in particular:

> Specifically, the scheme now in force [the state's various environmental statutes, including the EFA] extensively controls pollutant discharge, requires comprehensive permitting, establishes air and water quality standards, and sets forth a detailed plan for the restoration of the Everglades through the Everglades Forever Act and then Everglades Construction Project. This legislative scheme is implemented by numerous volumes of regulations containing extensively detailed, scientific criteria and is enforced by agencies having the required experience and expertise, such as the DEP. These are not simple, routine matters which may be easily understood by trial judges and juries.

Kirk v. U.S. Sugar, Case Nos. SC95044 and SC95045, Slip Op. at 21 (filed March 29, 2001) (not yet final). This Court has clearly recognized that the types of complex questions of state policy implicated in this case must be answered in the first instance by the Legislature. *Advisory Opinion*, 706 So. 2d at 281.

The complaint below fails to acknowledge that these important questions remain open for legislative determination. Plaintiffs instead anoint themselves with the powers of the Legislature and attempt to provide the

answers, not surprisingly, in a manner that strongly favors the result they seek.[9] Plaintiffs further assume that they are the proper parties to bring a claim under Amendment 5, and that the circuit court is the forum with primary jurisdiction, even though this Court has specifically stated that the Legislature must decide how, where, and by whom a claim under Amendment 5 may be brought. *Id.*

Plaintiffs strenuously argue that the allegations in their complaint must be taken as true in the context of a motion for judgment on the pleadings. However, this in no way prevents a court from recognizing that the issues raised in the complaint involve fundamental policy questions that can be

[9] For example, the complaint alleges both that Plaintiffs are not polluters and that the costs of the Everglades Program are specifically attributable to pollution from the EAA (R. 186), even though, as this Court has recognized, it is up to the Legislature to determine "what constitutes 'water pollution'; how one will be adjudged a polluter; [and] how will the cost of pollution abatement be assessed." *Advisory Opinion*, 706 So. 2d at 281.

answered only by the Legislature.[10] This is a pure issue of law and judicial policy and was properly disposed of on the pleadings below.

B. Plaintiffs may not, under the guise of an as-applied challenge, bypass this Court's clear and well-reasoned holding in the Advisory Opinion.

The constitutionality of the funding mechanism at issue here was directly before this Court in the Advisory Opinion. Shortly after the 1996 election, Governor Chiles forwarded the following question to the Court:

> The Everglades Forever Act established two funding sources for pollution abatement in the Everglades Agricultural Area (EAA); that is, the Everglades agricultural privilege tax, and the levy of a 0.1 mill ad valorem tax on property within the Okeechobee Basin. § 373.4592(6) and (4)(a). ***Therefore, the law in effect at the time of the adoption of Amendment 5 was designed to divide the burden of the costs of pollution abatement on the public by the 0.1 mill tax and the agricultural users by the privilege tax of $ 24.89 per acre.***
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[10] Moreover, Florida law is clear that a complaint must state ultimate facts, not mere legal conclusions. The allegations in Plaintiffs' complaint not only presume to answer the policy questions left open by Amendment 5 (in a manner favorable to the Plaintiffs) but also fail to set forth any supporting facts. A long line of cases indicates that courts need not defer to such bare legal conclusions when passing on a motion to dismiss or motion for judgment on the pleadings. *See, e.g., Kislak v. Kreedian*, 95 So. 2d 510, 514 (Fla. 1957); *Barret v. City of Margate*, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999); *Brandon v. County of Pinellas*, 141 So. 2d 278, 279 (Fla. 2d DCA 1969); *Ginsberg v. Lennar Florida Holdings, Inc.,* 645 So. 2d 490 (Fla. 3d DCA 1994); *Beckler v. Hoffman,* 550 So. 2d 68 (Fla. 5th DCA 1989).

Due to the uncertainty created by the unclear language of Amendment 5, the South Florida Water Management District and the Department of Environmental Protection, the governmental entities charged with enforcing the Everglades pollution abatement initiatives, are unable to move forward to enforce this amendment without a clear interpretation as to its meaning and effect. . .

Several divergent interpretations have been suggested by interested parties as to the meaning of "primarily responsible." Some government agencies believe that "primarily responsible" could mean something in excess of fifty percent. Therefore, polluters within the EAA are chiefly, but not totally, responsible for the costs of abatement. They also believe that whether these costs are to be apportioned according to the amount of pollution contributed, and whether and to what extent other entities not described in Amendment 5 are responsible for pollution abatement costs, is not clear from the text of Amendment 5 and is subject to clarification.

Proponents of Amendment 5 have opined that the amendment imposes the entire cost of abatement on polluters within the EAA. Only upon failure of the primarily responsible parties to satisfy the costs of abatement would a secondarily responsible party (the public) be called upon to satisfy the obligation.

* * *

The consequences of these determinations are substantial and of immense importance to the well-being of the state and of the future of the Florida Everglades. Years of litigation have transpired, which has delayed implementation of the necessary steps to clean up this international treasure. The lack of clarity in Amendment 5 promises to engender further litigation absent an expeditious resolution of the questions I am posing.

> For the foregoing reasons, I respectfully request the opinion of the Justices of the Supreme Court on the following questions . . . :
>
> 1. Is the 1996 Amendment 5 to the Florida Constitution self-executing, not requiring any legislative action considering the existing Everglades Forever Act? Or is the Legislature required to enact implementing legislation in order to determine how to carry out its intended purposes and defining any rights intended to be determined, enjoyed, or protected?
>
> 2. What does the term "primarily responsible" as used in 1996 Amendment 5 to the Florida Constitution, mean? Does it mean responsible for more than half of the costs of abatement, or responsible for a substantial part of the costs of abatement, or responsible for the entire costs of the abatement, or does it mean something different not suggested here?

Advisory Opinion 706 So. 2d at 279 (emphasis added).

As is clear from the Governor Chiles' request, this Court was directly asked to review the funding mechanism of the EFA; *i.e.*, to determine the constitutionality of "divid[ing] the burden of the costs of pollution abatement on the public by the 0.1 mill tax and the agricultural users by the privilege tax of $24.89 per acre." *Id.* That is the precise question this Court undertook to answer when it found the EFA to be consistent with Amendment 5. It is also the precise question raised in the present case.

Invoking the mantra of an "as applied" challenge, the Plaintiffs ask this Court to ignore the Advisory Opinion.[11] But what is different or new about the

[11] The contention that this is an as applied challenge is untenable. By Plaintiffs' theory the general public is *per se* not a "polluter" and cannot be

question presented here? Nothing. The same funding mechanism is under consideration, and the question raised is still whether "dividing the burden" of Everglades Program costs is constitutional. No amount of fact-finding can help answer this question, which the Court has already determined requires legislative guidance to be addressed.

Plaintiffs' repeated references to the "as applied" nature of their case provide no basis for ignoring an advisory opinion that the Plaintiffs concede was correctly decided. A trial court cannot determine, as Plaintiffs suggest, that the general public bears no responsibility for the Everglades Program or that all pollution can be attributed to a specific source. There is simply no policy framework under which a trial judge can make those types of determinations, no way to define pollution or to allocate the costs to various pollution sources, and no way to know what portion of the project even relates to pollution or if those costs are severable. As this Court has correctly held,

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charged any portion of the Everglades Program cost, which they claim relates solely to abatement of pollution from the EAA. Logically, under this theory, there would be no way that the ad valorem tax provision could ever be constitutionally applied; *i.e*., it would never be proper to "divide the burden" as Governor Chiles put it. A claim that a law has no permissible field of application is the very definition of a facial challenge to the constitutionality of legislation. *See Clean-Up '84 v. Heirich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (*citing Los Angeles v. Tax Payers for Vincent, 466 U.S. 789 (1984)*).

under Florida's strict separation of powers only the Legislature can address these issues.

C. Allowing the case to go forward below would place the trial court in the position of exercising the exclusive powers of the Legislature.

This Court determined in the Advisory Opinion that, although the EFA is perfectly consistent with Amendment 5, the voters presumably must have intended some change in enacting the constitutional provision. However, as this Court also recognized, it is within the exclusive province of the Legislature to determine what that change should be. *Advisory Opinion,* 706 So. 2d at 282 ("the voters expected the legislature to enact supplementary legislation to make [Amendment 5] effective, to carry out its intended purpose, and to define any rights intended to be determined, enjoyed or protected."). Plaintiffs now ask the Court to abandon that decision and imbue a trial judge with the Legislature's duty and power under Amendment 5 to determine how best to bring about the unspecified change envisioned by the voters. Plaintiffs would obviously prefer to see the courts rather than the political branches make those policy decisions, without the benefit of further study. However, this Court's long-standing precedents do not allow such a result.

Coalition for Adequacy in School Funding v. Chiles, 680 So. 2d 400 (Fla. 1996) is instructive. In that case, suit was filed against the state pursuant to

the Constitution's mandate that a uniform system of free public schools be established. The crux of the complaint was that the state had allocated insufficient funds to provide students with an "adequate" education. Although it found that the complaint properly alleged a claim for declaratory relief, this Court never reached the merits. As a jurisdictional matter, it found that allowing such a case to go forward, based on a constitutional provision that has no standards for its implementation, would impermissibly encroach on the powers of the Legislature and therefore the complaint raised a non-justiciable political question.

The problem in *Coalition*, as in the present case, was that the constitutional language lacked sufficient detail to create a private cause of action absent implementing legislation. For the Court to allow the claim to go forward it would have had to, in effect, create the necessary implementing rules by judicial fiat. This Court properly held in *Coalition,* as it must here, that such an approach would encroach on powers that rightfully and exclusively belong to the legislative branch of state government.

In its *Coalition* opinion, this Court adopted a test first created by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), to determine whether a nonjusticiable political question exists. This test looks for the presence of the following indicators:

> (1) a textually demonstrable commitment of the issue to a coordinate political department;
> (2) a lack of judicially discoverable and manageable standards for resolving it;
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
> (5) an unusual need for unquestioning adherence to a political decision already made; and lastly,
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Coalition for Adequacy in School Funding, 680 So. 2d at 408. The existence of one or more of these factors indicates that a case is not justiciable. Finding the second factor to be present, this Court refused to address the merits of the claims presented in *Coalition*. *Id.*

As is evident from examining the *Baker v. Carr* factors, the present case presents a political question similar to the one in *Coalition.* Indeed, not only are there no "judicially discoverable and manageable standards" for addressing Plaintiffs' request to reallocate Everglades Program funding, but, as discussed, the case requires "an initial policy determination of a kind clearly for nonjudicial discretion" *i.e*., answering the policy questions left open by the voters for legislative resolution. Additionally, granting Plaintiffs the relief they request would necessarily lead to an order "expressing lack of the respect due coordinate branches of government," and would upset the

political decisions already made for funding the Everglades Program, which have already been found by this Court to be perfectly consistent with Amendment 5.

CONCLUSION

Allowing this case to proceed would not only cast aside long-standing notions of separation of powers and comity and completely ignore a recent and indistinguishable opinion of this Court, it would completely ignore the true purposes of the Everglades Program. Plaintiffs have cobbled together a tenuous legal theory based on a selective and skewed reading of Amendment 5 and the EFA. They then apply that theory in a manner that utterly ignores the policy questions this Court has found were left open by Amendment 5.

This Court's Advisory Opinion was correctly decided, as Plaintiffs repeatedly concede. There is no cause to retreat from that decision in this case. The decisions of the trial court and Fifth District Court of Appeal -- both of which correctly applied the Advisory Opinion -- should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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