IN THE SUPREME COURT OF FLORIDA
Case No. SC00-1998
Lower Case No. 5D98-3178

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 others similarly situated,
Petitioners,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Respondent

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO IN SUPPORT OF THE RESPONDENT

Mary Jill Hanson
HANSON, PERRY & JENSEN, P.A.
Local Counsel
International Association of Machinists and Aerospace Workers AFL-CIO
105 S. Narcissus Avenue, Suite 510
West Palm Beach, FL 33401

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FLORIDA CONSTITUTION

INTRODUCTION

The International Association Of Machinists And Aerospace Workers, AFL-CIO (the "Union") represents the workers of businesses located within the Everglades Agricultural Area ("EAA") and other south Florida agricultural areas. Its members and their families depend on the internal water distribution and retention systems within the Everglades and Lake Okeechobee, which are crucial for supplying south Florida agriculture with the water it needs. The members of the Union, as well as thousands of other non-union workers live and work within the EAA. These workers will suffer direct adverse effect through possible loss of jobs if the funding for the Everglades Restoration Project is disproportionately shifted from the Petitioners to others in the EAA. The Union believes that before such a decision is made, the necessary policy questions must be answered and studies completed to assess the possible long term effects on the Everglades Restoration Project and similarly the inevitable impact on labor interests in the region.

These workers pay the ad valorem tax challenged here; however, unlike the Petitioners, they fully realize and appreciate the importance of a program designed to improve water quality, create new recreational lands and improve water storage and allocation while preserving the vitality of agriculture in the region. Petitioners' short-sighted attack on this program puts all these benefits in jeopardy, and threatens the very future of Florida Agriculture.

This Court has already ruled on the issue of whether Legislative implementation is required before 1996 Constitutional Amendment 5 may be applied; Petitioners now seek a backdoor opportunity to re-litigate this issue. Faced with a tripartite scheme directed at improving water quality, creating new recreational lands and improving water storage and allocation, Petitioners seek a ruling that would cripple the entire project, freeing them of their duty to pay their share of the program costs, based on the incorrect assertion that the project does nothing but abate EAA "pollution".

Petitioners' requested relief would effectively sabotage the plan for Everglades -- a plan that has been extensively litigated, legislated, and agreed upon by interested players,

including the State and Federal governments, over the past decade. This challenge lacks any legal merit and should be rejected out of hand. Florida law is clear that Petitioners must await action by the Legislature so that the fundamental policy questions left open by Amendment 5 may be addressed prior to its implementation.

SUMMARY OF ARGUMENT

Petitioners' theory, if accepted, would absolve them of the responsibility to contribute to the costs of the Everglades Construction Project ("ECP"), based solely on their simplistic and incorrect assertions that they do not pollute and the EAA is the sole beneficiary of the project. A large portion of the water quality concerns affecting the Everglades relate to sources other than specific agricultural or industrial operations within the EAA. Presently a portion of the ECP costs are borne by the general public through the challenged tax. A large portion is also borne by the EAA growers. Petitioners ask the court to reallocate these costs, so that no ad valorem tax revenues (at least none raised from self-styled "non-polluters") are used for the ECP. To support this request they rely on the following syllogism:

1. Amendment 5 requires polluters in the EAA to pay for their pollution;

2. Petitioners are not EAA growers and are therefore not polluters;

3. The ECP is a program to abate EAA pollution.

4. Therefore, Petitioners should bear none of the costs of the ECP.

The flaws in Petitioners' logic are apparent. First, the argument begs the definition of the term "polluters." It also assumes that only EAA growers are polluters for purposes of Amendment 5. These questions obviously cannot be decided until implementing legislation is created to define who is a polluter and what is pollution under Amendment 5. Petitioners conveniently assume that one must have a large farm (as opposed to a small farm or garden, a lawn, a septic tank or any other domestic use) before one can be held responsible for any portion of the ECP costs. Additionally, the argument requires that the ECP be a program to solely abate pollution but, as all the facts indicate, it clearly serves a multitude of purposes.

Amendment 5 requires that those in the Everglades Agricultural Area who cause pollution be held primarily

responsible for paying the costs of the abatement of that pollution; it does not, as Petitioners apparently believe, absolve Petitioners of any general obligation to pay for abatement of pollution that cannot be allocated to a specific source, and it certainly does not absolve them of the obligation to pay for the abatement of pollution that they may cause. Moreover, Amendment 5 certainly does not prevent the use of tax revenues to partially fund a project designed to increase water storage and allocation and improve natural resources, matters outside the scope of the provision. Petitioners' requested relief would gut the restoration project, severely impede any advances made in pollution abatement and directly affect the interests of everyone who lives and works in the EAA.

ARGUMENT

I. THE DOCTRINE OF SEPARATION OF POWERS DICTATES THAT POLICY DETERMINATIONS WHICH WILL NECESSARILY BE MADE IN THIS CASE ARE PROPERLY LEFT TO THE LEGISLATURE.

A. Amendment 5 Is Not Self Executing.

As Petitioners concede in their Initial Brief (at 22) and this Court has already determined, Amendment 5 is not self-executing. Therefore, further legislation is necessary before Amendment 5 can be implemented -- that is, after all, what it means to have a provision that is not self-executing.

In Gray v. Bryant, 125 So. 2d 846 (Fla. 1960), this Court set forth the longstanding test for determining whether a provision is self-executing:

> *[t]he basic guide or test, in determining whether a constitutional provision should be construed to be self executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.*

Id. at 851. (Internal citations omitted; emphasis added).

Applying this test and passing on the precise issues that are now before it for a second time, this Court, in Advisory Opinion to the Governor -- 1996 Amendment 5 (Everglades), 706 So. 2d 278 (Fla. 1997), concluded 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 accomplishing its purpose. " Id., at 281 (citing Gray v. Bryant, supra).

This was not the empty, academic statement that Petitioners describe in their initial brief. It was a well-reasoned determination that Amendment 5 fails to provide sufficient detail for it to be implemented and, therefore, the voters intended for the legislature to enact implementing legislation. As this Court has noted, Amendment 5 leaves open a number of questions such as what constitutes "water pollution"; how will one be adjudged a polluter; how the cost of pollution will be assessed; and, by whom such a claim may be asserted. Advisory Opinion 706 So. 2d at 281. Each of these questions must be answered, by the Legislature, before Amendment 5 can have any application. To be sure, a court cannot, in a vacuum, determine that no tax dollars may be spent on Everglades restoration without first answering these questions.

B. Proceeding With This Case Will Require that This Court Make Policy Determinations Which As A Matter Of Law Are Properly Reserved For The Legislature.

This Court has always rejected the suggestion that it intrude upon the province of the Legislature. Nothing set forth in the pleadings below suggests that this time-honored rule of self-restraint should be abandoned in this case.

Amendment 5 provides that:

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

Art. II, 7(b), Fla. Const. In its Advisory Opinion, this Court specifically and unequivocally found that there were general policy determinations which remained to be made and which could not be made without the aid of implementing legislation:

> 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 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. Each of these questions deals with a fundamental issue of State policy, and is not a proper subject for judicial resolution.

(i) Definition of "Water Pollution"

There are various possible definitions which may be adopted for the term "water pollution." "Pollution" is defined in the dictionary as "contamination of the environment by a variety of sources including but not limited to hazardous substances, organic wastes and toxic chemicals."[1] See also id. at 282 (words in the constitution are to be given their obvious meaning unless text suggests that they be used in a technical sense). For purposes of the EFA however, the term "pollution" is assumed by Petitioners to include phosphorus that eventually reaches the ECP Stormwater Treatment Areas.

Choosing either of these two alternative definitions will lead to vastly differing outcomes regarding the respective levels of pollution and corresponding responsibility for pollution abatement. For example, under the first definition phosphorous might not be a pollutant at all, under the second,

[1] Black's Law Dictionary 1159(6th ed.1990); Webster's New Collegiate Dictionary 891 (1977).

it would. The relief Petitioners request necessarily requires that this Court construct a definition of "pollution" that would include only nutrients.[2] However the adoption of a definition of pollution for purposes of Amendment 5 is one properly left to the Legislature, not the judiciary.

(ii) Definition of "Polluter"

The definition of the term "polluter" will similarly reflect a specific policy determination and will follow the definition of "pollution" adopted for purposes of Amendment 5. Moreover, it is entirely unclear what level of responsibility one must have to be a "polluter". Many different sources contribute nutrients -- primarily phosphorous to the Everglades.[3] Some of these are discrete identifiable sources, such as EAA farms. Others are sources that make small individual contributions, with undeterminable cumulative effect, such as run-off from lawns, small farms, highways,

---

[2] It is very unlikely that nutrients are what the average voter would envision when asked to define "pollution."

[3] As this Court has recognized "no one person or entity is responsible for 100% of the pollution in the Everglades Agricultural Area (EAA) or the Everglades Protection Area (EPA)" and "causes of such pollution run the gamut from lawn run-off to pollution from cattle ranching and the growing of sugar cane." Advisory Opinion, 706 So. 2d 282-83, 283 n.11.

septic tanks and other sources outside the EAA. In fact, phosphorous -- "pollution" by Petitioners self-created definition -- is even contributed by Lake Okeechobee and by natural concentrations of phosphorous in rainfall. Creating an appropriate definition that takes such varied sources into account is a political question that cries out for Legislative resolution. See Advisory Opinion -- 1996 Amendment 5, 706 So.2d at 283 n. 12.

(iii) How the Costs of Pollution Abatement Are To be Determined

The percentages of phosphorous that can be attributed to the EAA range widely depending on such policy choices as whether to hold the EAA responsible for phosphorous that falls from the sky as rain or for phosphorous that flows into the EAA through Lake Okeechobee drainage canals.

The allocation theory initially adopted will thus significantly affect the ultimate conclusion. The various levels of phosphorous in the EPA originate from a combination of sources including rainfall, irrigation and surface run-off from points north of Lake Okeechobee and Lake Okeechobee itself. Yet, Petitioners seek to lay the responsibility for

100 percent of the "pollution" flowing through the EAA -- whether it originated there or not -- at the feet of those in the area. In this way they support their contrived theory that all the world's evils flow from the EAA. This is not a determination which is properly made by the Petitioners nor by this Court at Petitioners' instigation.

As this Court has specifically found, the "voters contemplated the phrase "primarily responsible" to be a recognition that no one person or entity is responsible for 100% of the pollution in the Everglades Agricultural Area (EAA) or the Everglades Protection Area (EPA). " See Advisory Opinion, 706 So. 2d at 282 (emphasis added). The costs of pollution abatement must be therefore shared by all those who contribute to it -- whether it be through lawn run-off, animal husbandry or sugar cane production. *See Id.* at 283, n. 11. Certainly, to the extent that project costs cannot be attributed to a specific source of pollution, or, are incurred to further a public goal other than pollution abatement (e.g.

water supply), then there is absolutely no impediment to part of these costs being borne by the general public.[4]

(iv) Decisions Regarding Who Might Bring Claims Relating to Pollution Abatement Are Policy Determinations Not Properly Made By This Court.

Finally, any determination regarding who may bring claims under Amendment 5, would necessarily flow directly from general policy determinations regarding the purposes intended to be accomplished by the amendment, the various rights and responsibilities available under the amendment and the means by which these purposes will be accomplished. Consequently any determinations made by this Court in an attempt to address these questions are premature and in derogation of the Legislature's powers to determine matters of general policy.

II. FORCING THE EAA TO BEAR A DISPROPORTIONATE SHARE OF THE ECP COSTS WOULD HAVE A DEVASTATING IMPACT ON LABOR INTERESTS IN THE SOUTH FLORIDA AGRICULTURAL INDUSTRY

As discussed, Petitioners seek to unfairly absolve themselves of any duty to contribute to the ECP by asking the

[4] Of course, the purpose of the ECP is not limited to pollution abatement and, therefore, imposing a portion of the cost on the general public even if responsibility for "pollution" could be adequately allocated.

trial court to address "loaded" policy questions that guarantee such a result. Presently the various businesses in the EAA employ approximately 750,000 workers who are represented by the Union and are scheduled to contribute $232 million or more to the ECP.

Petitioners claim that this is not enough, and use this argument as a means to avoid paying taxes properly levied for project costs. If they were granted such relief, the result would be to bring the ECP to a screeching halt and place the State in violation of its contractual commitments to the federal government.[5] Ultimately, the federal government may take over the project or may limit agriculture altogether in the EAA.

A carefully crafted and equitable solution has been developed that will guarantee the vitality of South Florida agriculture, provide adequate water resources and restore the Everglades to a natural state not seen in nearly a century.

[5] In 1993, Governor Lawton Chiles signed a Statement of Principles committing the state to the ECP. This was approved by the Legislature in the EFA, bringing an end to five years of litigation with the federal government. See § 373.4592(1)(g), Fla. Stat.

This court should not place the project in jeopardy through premature judicial intervention.

CONCLUSION

Petitioners' attempt to have the Court assume the role of Legislature and apply an admittedly self-executing constitutional provision runs contrary to this Court's adherence to principles of stare decisis, and its respect for the coordinate powers of other branches of government.

For the foregoing reasons, this Court should affirm the trial court's decision to grant the Respondent's Motion for Judgment on the Pleadings and dismiss the Petitioners Amended Complaint.

Respectfully submitted,

Mary Jill Hanson
HANSON, PERRY & JENSEN, P.A.
Local Counsel
International Association of
Machinists and Aerospace
Workers AFL-CIO
105 S. Narcissus Avenue, Suite 510
West Palm Beach, FL 33401

By:_____
Mary Jill Hanson

Case No. SC00-1998
Lower Case No. 5D98-3178

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned certifies that the type size and style used in this brief is Courier New 13-point font.

By: _____
Mary Jill Hanson