IN THE SUPREME COURT OF FLORIDA

No. SC00-1998

MARY BARLEY, as Personal Representative of the Estate of GEORGE M. BARLEY, JR., SHEILA MULLINS, BENJAMIN WERMEIL, and NATHANIEL PRYOR REED,

Petitioners,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Respondent.

BRIEF OF AMICUS CURIAE UNITED STATES SUGAR CORPORATION IN SUPPORT OF THE POSITION OF RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

On Review of a Decision of the District Court of Appeal of Florida, Fifth District

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REFERENCES

For brevity and clarity, the following references are used throughout this brief:

Amicus Curiae United States Sugar Corporation is referred to as "U.S. Sugar."

Petitioners, Plaintiffs below, Mary Barley, et al., are referred to as "Petitioners."

Respondent, Defendant below, South Florida Water Management District is referred to as "the District."

The Everglades Forever Act, Section 373.4592, Florida Statutes, is referred to as "the EFA."

Article II, Section 7(b), Florida Constitution, is referred to as "Amendment 5" or "the Amendment."

The Everglades Agricultural Area is referred to as "the EAA."

The Everglades Protection Area is referred to as "the EPA."

The Florida Supreme Court *Advisory Opinion to the Governor—1996 Amendment 5 (Everglades)*, 706 So. 2d 278 (Fla. 1997), is referred to as "*Advisory Opinion*" where it appears in the text of the brief.

INTRODUCTION

Much like the Fifth District Court of Appeal, which affirmed the trial court's entry of judgment on the pleadings in the District's favor, we will devote little time to the facts underlying the determination that Petitioners cannot maintain this "as-applied" challenge through which they seek a declaratory judgment of unconstitutionality and a tax refund of amounts allegedly levied under the EFA in contravention of Amendment 5. For now it is enough to say that this Court has already resolved the issues raised in Petitioners' Amended Complaint and, at bottom, Petitioners merely ask this Court to revisit the legal conclusions it reached in its 1997 *Advisory Opinion*. This must be so because, without this Court turning its back on those conclusions, Petitioners cannot state a cause of action, and judgment on the pleadings was properly entered in favor of the District. There being no error in the Court's decision on the matter in 1997, and Petitioners' so-called "as-applied" challenge bringing before the Court the identical issues from the earlier facial analysis, this Court should follow its earlier opinion.

But even if this case arrived at this Court as a matter of first impression the same conclusions reached in the *Advisory Opinion* would obtain: because Amendment 5 provides no policy determinations or definitions of its key terms—no sufficient rule by means of which the rights it affords can be determined or protected—it is not self-

executing and requires implementing legislation; and because the EFA and the ad valorem taxes it authorizes are not inconsistent with Amendment 5, the EFA and the District's taxing scheme are constitutional and Petitioners cannot state a claim for relief.

AMICUS' STATEMENT OF INTEREST AND STATEMENT OF THE CASE

U.S. Sugar is largely employee-owned and has farmed in the EAA for over sixty years. It has a direct and substantial interest in the issues before this Court because it has acted in reliance on the procedures and scientific research schedules provided for by the EFA. U.S. Sugar currently pays both the ad valorem tax imposed by the District which Petitioners challenge here, as well as the agricultural privilege tax imposed on EAA landowners pursuant to section 373.4592(6). Invalidation of any of the EFA's funding mechanisms will impede the timing and implementation of the Everglades Construction Project and may subject U.S. Sugar to significant additional tax levies or other assessments.

This Court has granted U.S. Sugar leave to appear as amicus curiae and to file an amicus curiae brief in support of the South Florida Water Management District's position.

For brevity, U.S. Sugar incorporates by reference the Statement of the Case and

Statement of the Facts contained in the District's Answer Brief.

STANDARD OF REVIEW

The parties agree that review in this Court is *de novo.* (*See* Init. Br. of Pet'rs at 11.) An appellate court reviews the entry of judgment on the pleadings under the same standard used to review the grant of a motion to dismiss. *See Williams v. Howard*, 329 So. 2d 277, 280 (Fla. 1976); *Domres v. Perrigan*, 760 So. 2d 1028 (Fla. 5th DCA 2000). The grant of a motion to dismiss is reviewed *de novo*. *See Ruiz v. Brink's Home Sec., Inc*, 26 Fla. L. Weekly D258 (Fla. 2d DCA Jan. 17, 2001). Therefore, the Court reviews the entry of judgment on the pleadings entered in the trial court *de novo.*

Moreover, to the extent that the trial court construed the EFA and Amendment 5, that, too, of course, is a legal question and the standard of review is again *de novo*. *Dixon v. City of Jacksonville*, 774 So. 2d 763, 765 (Fla. 1st DCA 2000). ("It is well established that the construction of statutes [or constitutional provisions] . . . is a question of law that is reviewable *de novo* . . . .").

SUMMARY OF THE ARGUMENT

We understand Petitioners' argument to be that, because Amendment 5, as interpreted by this Court in its *Advisory Opinion*,[1] provides that "polluters within the [EAA] . . . must pay for 100% of the cost to abate the pollution they cause" within the EAA or the EPA, *id.* at 283, n.12, the Amendment ipso facto exempts Petitioners, as alleged non-polluters within the EAA, from paying anything at all to abate *that* pollution. However, Petitioners do not contest that they can be taxed to fund the myriad other Everglades restoration projects. Petitioners claim that the 0.1 mill tax the District assessed against their property, and other taxes the District levies, are unconstitutional under Amendment 5 because some identifiable amount of that tax revenue is used "for pollution abatement costs specifically attributable to EAA polluters . . . ." (Init. Br. of Pet'rs at 5.)

Initially we note that Petitioners have never challenged—either in the trial court or the District Court of Appeal—the correctness of this Court's conclusions its *Advisory Opinion*. In fact, throughout their brief, Petitioners quote from that

opinion and refer to its conclusions with apparent agreement.[1] It is, then, axiomatic that Petitioners cannot challenge the *Advisory Opinion* or its conclusions for the first time in this Court. *See DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988, 990 (Fla. 3d DCA 1994).

Moreover, the challenge that they do make—that the *Advisory Opinion* doesn't apply because it was rendered in the context of a facial analysis of the constitutionality of the Everglades Forever Act—is unavailing, because Petitioners' "as-applied" challenge is indistinguishable from the analysis made in the *Advisory Opinion*.

Although the *Advisory Opinion* is thus applicable to Petitioners' case and, as we believe, disposes of it, we nonetheless show that the conclusions reached in that opinion were correct, including, of course, the conclusion that Amendment 5 is not self-executing. That conclusion has fatal consequences for Petitioners' action: (1) any existing law not wholly inconsistent with the plain terms of Amendment 5 (including section 373.4592(4), Florida Statutes, under which the tax is imposed) continues to

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[1]See, for example, Pl.s' Mem. of Law in Opp'n to Mot. for J. on the Pleadings at 11 n. 5, where Petitioners admit that Amendment 5 is not self-executing, but argue that the provision may yet serve as a "shield." And, of course, Petitioners' entire claim rests upon this Court's statement in footnote 12 of the *Advisory Opinion*, that, "while polluters within the EAA as a group must pay for 100% of the cost to abate the pollution they cause, Amendment 5 does not require them to pay for the abatement of such portion of the pollution they do not cause." 706 So. 2d at 283 n. 12. *See, e.g.,* Initial Br. of Pet'rs at 4-5, 9.

be effective; and (2) the policy determinations and definitions of essential terms in Amendment 5 necessary to effectuate it have yet to be addressed by the legislature and, in the absence of those determinations, Petitioners can allege no facts that would entitle them to relief and, therefore, have no cause of action. This Court should therefore affirm the decision of the court below.

ARGUMENT

I.

THERE IS NO MATERIAL DISTINCTION BETWEEN THE MATTERS CONSIDERED BY THIS COURT IN ITS ADVISORY OPINION AND THE MATTERS CONSIDERED BY THE COURTS BELOW IN ADDRESSING PETITIONERS' SO-CALLED "AS-APPLIED CHALLENGE" TO THE CONSTITUTIONALITY OF THE DISTRICT'S AD VALOREM TAXING SCHEME, AND THIS COURT SHOULD FOLLOW ITS EARLIER OPINION

In its *Advisory Opinion*, 706 So. 2d 278 (Fla. 1997), this Court concluded that Amendment 5 is not self-executing and that the pre-existing Everglades Forever Act[2] is facially consistent with the thus amended Constitution and remains in effect. Petitioners, accepting the correctness of the *Advisory Opinion*, argue instead that the *Advisory Opinion* resulted merely from a facial analysis of Amendment 5 *vis-à-vis* the EFA, and is inapplicable to their "as-applied" challenge

to the District's taxing scheme. Although we later address why the result below would and should obtain even without reliance on the Court's *Advisory Opinion*, in this section we show that there is no material distinction between the matters considered in the *Advisory Opinion* and the matters Petitioners raise in the present action. Thus, Petitioners' label, "as applied," does not mask the fact that they merely ask this Court to revisit the conclusions it reached in the *Advisory Opinion*.

While the conventional wisdom regarding advisory opinions is that they are not binding authority, that characterization of their legal effect hardly answers the question of what respect is due them.[2] The argument against giving them stare decisis effect is much the same as the argument against issuing them in the first place—that the context of the opinion is hypothetical and abstract. *See, e. g., United States v. Freuhauf*, 365 U.S. 146, 157 (1961) ("Such opinions, such advance expressions of legal judgment [are] upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument

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[2]We understand that this Court is never wholly bound by any of its decisions. However, it honors decisions of the past providing there is no significant change that makes the earlier decision outdated and inapplicable to the present universe. Here there is no reason for the Court to depart from its three-year-old decision on the same facts, whether those facts are supposed as in the *Advisory Opinion* or alleged as in this case.

exploring every aspect of a multi-faced situation embracing conflicting and demanding interests . . . ."). But, as Professor Laurence Tribe suggests, this empty-chair formulation about the lack of adversarialness is easily overcome by reaching out to obtain the varying points of view much the same as is done in legislative and administrative rule-making hearings. Laurence H. Tribe, *American Constitutional Law* § 3-10, at 56-68 & n.7 (1978). Indeed, that was precisely what was done by this Court. The *Advisory Opinion* states that, "To ensure full and fair consideration of the issues raised, we permitted interested persons to file briefs and to present oral argument before the Court[,]" and goes on to note that "Briefs were filed on behalf of Save Our Everglades, Inc.; Florida Audubon Society and National Audubon Society; Flo-Sun, Inc., Osceola Farms Co., Atlantic Sugar Association, Inc., and Okeelanta Corporation; United States Sugar Corporation; Sugar Cane Growers Cooperative of Florida and St. Joe Corporation; The Florida Chamber of Commerce, Inc.; and Florida Legal Foundation." *Advisory Opinion*, 706 So. 2d at 281 & n.3.

Thus, the respect due to the *Advisory Opinion* issued by this Court in 1997 should, under these circumstances, be virtually the same as the respect due to any other opinion of this Court, that is, it should be followed in the absence of some compelling societal change making the earlier decision outdated. Because the review of the judgment on the pleadings in this case with its *alleged* facts is the functional

equivalent of the *Advisory Opinion* with its *supposed* facts, stare decisis should apply.

But even if the respect due to a unanimous opinion fashioned after a fully-briefed, fully-argued proceeding covering the issues now before this Court does not reach that level or deserve a stare decisis label, the *Advisory Opinion* is a formidable presence deserving of great deference; it cannot simply be cast aside with the formalistic invocation that the case now before the Court attacks the constitutionality of the EFA "as applied."[3]

A.

[3]*See* Terrance A. Smiljanich, *Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 Fla. L. Rev. 328, 332-35 (1972). Mr. Smiljanich points out that "The availability of briefs and oral arguments has transformed the advisory opinion into a judicial forum resembling an adversary proceeding[,]" *id.* at 335, and that "In their practical application advisory opinions in Florida have virtually the same precedential effect as a case. . . . Not one instance was found [in 128 advisory opinions studied] in which a Florida court expressly 'overruled' an advisory opinion." *Id.* at 332.

Because This Court In Its *Advisory Opinion* Analysis Presupposed That The Everglades Forever Act Delegates The Authority To Impose An Ad Valorem Tax Without Regard To A Taxpayer's Status As A Polluter, And Because The Court Recognized That The EFA Does Not Allocate the Financial Burden of Everglades Water Pollution Abatement Based On Fault, Petitioners' Allegation That They Are Non-Polluters Being Taxed Changes Nothing In The Facial Analysis.

Petitioners assert that "[t]his Court was *not* asked, and therefore did not address, whether application of the EFA to tax non-polluters, such as Petitioners, was constitutional in light of Amendment 5's purpose that polluters 'pay for 100% of the cost to abate the pollution they cause . . . .'" (Init. Br. of Pet'rs at 26).[3] In fact, however, this Court did address that issue and held that Amendment 5 renders nothing in the EFA unconstitutional, including the statute's authorization of the District's taxing scheme:

> We find no inconsistency between the Everglades Forever Act and Amendment 5. . . . [T]he "[EFA] was enacted . . . to determine how and at whose expense pollution of the Everglades should be abated." Amendment 5 was adopted for a similar purpose—to require polluters to pay for the abatement of their pollution.

Advisory Opinion, 706 So. 2d at 282 (quoting March 6, 1997 letter from Governor Chiles requesting advisory opinion).

The Court's observation that the EFA "was enacted . . . to determine how and

at whose expense pollution of the Everglades should be abated" recognizes that those determinations were to-be-made, and that thus the EFA did not already include a mechanism for determining causation and imposing costs of abatement based on causation. And so it now stands.[4]

In its observation that "Amendment 5 was adopted for a similar purpose—to require polluters to pay for the abatement of their pollution," and its conclusion that "the voters adopted Amendment 5 to effect a change," the Court recognized that Florida voters intended the financial burdens of abating Everglades water pollution to be allocated based on causation. But despite recognizing that the EFA does not now tie liability strictly to causation, this Court found nothing unconstitutional in the EFA or the taxing scheme it authorizes.[5]

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[4]An ad valorem tax is "[a] tax levied on property . . . in proportion to its value . . . ." *Black's Law Dictionary* 51 (6th ed. 1990). Therefore, by definition, ad valorem taxing power is not accompanied by discretion to tax one property owner differently from another; all property is taxed based on its value, not on any other factor. *See also* Art. VII, § 2, Fla. Const. ("All ad valorem taxation shall be at a uniform rate within each taxing unit . . . .").

[5]In support of their argument that their "as-applied" challenge to the District's tax is different from this Court's facial analysis of the EFA, Petitioners say "The EFA grants discretionary authority to the [District] to impose a tax . . . , but does not require such a levy." (*See* Pet'rs Init. Br. at 10 and 5-6, 8.) But surely while Petitioners could not complain about the unconstitutionality of *no* tax, neither can they complain, as here, about the unconstitutionality of an ad valorem tax imposed

It follows, then, that Petitioners' claim in their Amended Complaint that they are non-polluters changes nothing about the inquiry into the constitutionality of the EFA or its authorized taxing scheme. Petitioners are among those taxed under the EFA, which this Court has already determined is constitutional after the adoption of Amendment 5. Labeling themselves "non-polluters" against whom the District has levied the same generally applicable taxes this Court reviewed in its *Advisory Opinion*, a fact already supposed by this Court in that opinion, changes nothing about the analysis or the outcome of that opinion. The EFA *and the taxes Petitioners challenge* in this case are not unconstitutional after the adoption of Amendment 5 for exactly the same reasons given by this Court in its *Advisory Opinion*.

B.

Because, As This Court Recognized In Its *Advisory Opinion*, The Law Is Not Now Structured To Allocate The Financial Burden Of Everglades Water Pollution Abatement Based On Fault, Petitioners Have No Framework On Which To Base A Cause Of Action And The Dispositive Question In Petitioners' "As-Applied" Challenge And The Advisory Opinion's Facial Analysis Is Exactly The Same.

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without regard to anyone's status as a polluter. The only issue is whether such a decision is constitutional after Amendment 5 and in the absence of implementing legislation.

Recognizing that no mechanism existed to allocate the financial burdens of abating Everglades water pollution based on causation, this Court looked to the words of Amendment 5 and its place in the Constitution to determine whether it provided sufficient guidelines to effectuate the voters' intent without the aid of supplemental legislation. The Court found that it did not. In this case, alleging that no causation-allocating mechanism has been established by the legislature, Petitioners ask the courts to devise such a mechanism, a task this Court already determined was left to the legislature by the voters, and was, indeed, the business

of the legislature only.[4] Again, Petitioners' "as-applied" challenge is no different from the facial comparison of Amendment 5 with the EFA in which this Court engaged in the *Advisory Opinion* proceedings.

In *Advisory Opinion*, the Court concluded that Amendment 5 is not self-executing, in part because, as a matter of law, the provision "fails to lay down a sufficient rule for accomplishing its purpose." *Id.* at 281. Specifically, the Court found that "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."

Id.[6] This Court agreed that: "[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." *Id.* This conclusion is a legal one, not a factual one, and applies to Petitioners' current "as-applied" challenge because they have never questioned its correctness.[7]

By its *Advisory Opinion* finding that Amendment 5 fails to set forth a sufficient rule to effectuate the voters' intent, the Court did *not* mean merely, as Petitioners say, "that legislation was necessary before costs of pollution could actually be assessed against EAA polluters." (Init. Br. of Pet'rs at 9.) The Court clearly recognized that the legislature must set to work to define essential terms like "pollution," devise a means by which the source and cause of pollution in the EAA and EPA can be traced,

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[6]Petitioners suggest that Amendment 5 authorizes their action in circuit court on the issue of how one is to "be adjudged a polluter" or, at the very least, to absolve them from responsibility as non-polluters. The fallacy with their suggestion is that no such cause of action in circuit court was created by Amendment 5. That is something the Legislature has yet to do, as the *Advisory Opinion* notes. Until the Legislature addresses this issue, there is no process in place or any standard to determine how one is "to be adjudged a polluter" or, for that matter, how one is to be adjudged a non-polluter and thus a party with arguable standing.

[7]Even though Petitioners have elected to accept the correctness of the *Advisory Opinion*, thus waiving a direct attack on it, and have chosen instead to attempt to distinguish it on their "as-applied" theory, in an abundance of caution we will later demonstrate the correctness of the conclusions the Court announced in its *Advisory Opinion*.

and create a statutory mechanism by which the costs of abatement can be allocated based on fault. The EFA, the Court held, is not that legislation. Existing Everglades legislation does not even define pollution.[8]

If, then, there is no existing definition of pollution applicable to the unique Everglades ecosystem and no mechanism to identify a polluter or to determine cause and liability, no determination can be made whether an individual taxpayer is a "non-

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[8]In fact, the term "pollution" is found nowhere in the EFA. Petitioners argued before the district court—but apparently have abandoned the argument since then—that a definition of pollution exists in section 403.031(7), Florida Statutes, which a court might borrow to apply to Petitioners' case. But because section 403.031(7) defines "pollution" to include specified categories of discharges "unless authorized by applicable law," adopting that definition to implement Amendment 5 would accomplish nothing. First, as this Court noted in its *Advisory Opinion*, the voters intended a change from the law as it existed before the adoption of Amendment 5. Second, if applicable law authorizes certain discharges that would properly be considered pollution in the absence of the authorization, there would likely be a conflict with Amendment 5. Third, by authorizing those discharges that *would be* pollution except that they have been authorized by law, the legislature may well have contemplated that the specialized needs of specific ecological areas, like the Everglades, require individualized definitions of pollution because pollution necessarily has different meanings for different ecosystems. Thus, while borrowing definitions may be appropriate in certain arenas, it would be inappropriate to do so when faced with the unique needs of the Everglades. Moreover, nine judges (five in this Court's *Advisory Opinion*, three in the Fifth DCA, and the trial judge in the present case) have agreed that there is no definition of "pollution" for Amendment 5 purposes. Even Judge Harris, in his dissenting opinion, recognized that "the legislature has failed to enact legislation defining water pollution and determining what constitutes a polluter." *Barley v. South Fla. Water Mgmt. Dist.*, 766 So. 2d 433, 435 (Fla. 5th DCA 2000).

polluter" or is paying the costs for those at fault. As this Court recognized in its *Advisory Opinion*, the law has not been established in such a way as to hold those at fault liable for the costs of abating water pollution they cause. Without such implementing legislation, Petitioners cannot state a claim that they have been made to pay those costs.[9]

As this Court observed in *Advisory Opinion*, "the voters expected the legislature to enact supplementary legislation to make [Amendment 5] effective . . . . " The Court thus found that Amendment 5 requires the legislature to revisit the allocation of burdens and create a mechanism to determine the cause of Everglades water pollution, and to allocate the financial burden of abatement based on the fault found. In essence, through their so-called "as-applied" challenge to the District's taxing scheme, Petitioners have merely requested that the courts revisit the questions this Court answered in its *Advisory Opinion*: whether Amendment 5 is self-executing and

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[9]Because Amendment 5 fails to provide a sufficient rule to effectuate its provisions, Petitioners do not enjoy the presumption of truth on such matters as whether their taxes are funding abatement of pollution specifically attributable to EAA polluters because the legal meaning of such a statement is undefined. Thus, Petitioners can not now prove facts that would entitle them to a remedy, and judgment on the pleadings was appropriate. This proposition is closely related to the limitation of "ripeness"; that is, that an issue is not ripe for adjudication where legislation is needed to crystallize the controversy. *See* Laurence H. Tribe, *American Constitutional Law* § 3-13, at 60-62 (1978).

whether the EFA (and its allocation of burdens through the taxing scheme) is consistent with the amendment. More specifically, Petitioners ask this Court to revisit its conclusion that the voters intended the legislature, not the courts, to effectuate Amendment 5's purposes. There is nothing different in the analysis or the outcome between the facial and as-applied approach. The result is the same: the EFA and the taxes it authorizes are not unconstitutional, either facially or as applied to Petitioners, because essential policy determinations remain to be made by the Legislature.

II.

THE TAXES LEVIED AGAINST PETITIONERS UNDER THE EVERGLADES FOREVER ACT ARE CONSTITUTIONALLY VALID BECAUSE AMENDMENT 5 IS NOT SELF-EXECUTING AND THE DISTRICT'S TAXING SCHEME IS NOT IRRECONCILABLY INCONSISTENT WITH AMENDMENT 5'S INCHOATE COMMAND THAT POLLUTERS SHALL PAY 100% OF THE COSTS TO ABATE POLLUTION THEY CAUSE

Apart from our position that the *Advisory Opinion* should govern the outcome of this case, and despite Petitioners' concession that Amendment 5 is not self-executing and their decision not to challenge the *Advisory Opinion*, we here set about to show by independent analysis that Amendment 5 is not self-executing and is consistent with both the EFA and the District's taxing scheme authorized by it. Moreover, whether or not the lower courts relied on the *Advisory Opinion*, Petitioners' "as applied" action was properly dismissed, and this Court should affirm.

A.

Amendment 5 Is Not Self-Executing Because The Amendment Fails To Supply Meanings Of Key Terms Or Set Forth Necessary Policy Determinations To Effectuate The Rights And Responsibilities The Voters Intended

Because Amendment 5 fails to lay down a sufficient rule to effectuate its intended purposes, and because Amendment 5 is part of a larger constitutional provision that the voters intended to be implemented by legislative enactment, under this Court's well-established tests Amendment 5 is not self-executing.[5]

1.

Amendment 5 Fails To Lay Down A Sufficient Rule By Means Of Which Its Intended Purpose May Be Effectuated Without Implementing Legislation

The law is well settled that a constitutional amendment that does not supply sufficient guidelines by which the provision may be effectuated is not self-executing and requires legislative implementation. *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960). In *Gray*, the Court was called upon to determine whether then-section 6(2), Article V, Florida Constitution, which established a new numeric formula for setting the number of circuit judges, was self-executing.[6] The Court noted that the amendment set forth "an inflexible rule" to calculate the required number of judges based on the application of a formula to census figures, and characterized the provision as a "marked departure

from the prior provisions of the constitution," which had given the legislature substantial discretion to determine the number of judges in each circuit. *Id.* at 851.

Initially, the Court in *Gray* made clear that the question whether an amendment is self-executing depends principally upon the sufficiency of its provisions to facilitate implementation without further assistance from lawmakers:

> The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not 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. Applying that test, the court concluded that the amendment was self-executing because it delineated a complete mechanism for determining the number of judges, based on a formula that required nothing to be "supplied from an extraneous source" other than the census figures. As the Court emphasized, the means of implementation prescribed in the provision were "so certain and inflexible as to leave nothing to be done by the legislature except to adopt legislation which accords with the words of the section." *Id.* at 851-52. But in applying *Gray* to a different constitutional amendment adopted through the initiative process, this Court also decided that a provision is *not* self-executing if it "requires so much in the way of definition, delineation of time and procedural requirements, that the intent of the people cannot be carried out without the

aid of legislative enactment." *Williams v. Smith*, 360 So. 2d 417, 420 (Fla. 1978). Judged by that standard, Amendment 5 cannot be deemed self-executing.

Amendment 5 provides:

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

Art. II, § 7(b), Fla. Const.

First, unlike the provision at issue in *Gray*, Amendment 5 does not set forth a means of implementation "so certain and inflexible" as to leave nothing to be done by the legislature; nor can it be given effect—except to the extent, which we discuss later, that no law irreconcilably repugnant to the provision may stand—without some additional provisions being "supplied from an extraneous source." Indeed, Amendment 5 delineates no method or mechanism whatsoever by which its mandate can be "executed" through an affirmative act. Without a wholesale addition of detailed policy determinations and definitions of its terms, Amendment 5 cannot be construed as self-executing. Not only does it fail to provide a complete blueprint for implementing a claim, it offers no clue at all as to where, when, or by whom such a claim might be asserted.[10]

Amendment 5 provides no insight regarding meanings or sources of meanings for key terms such as "water pollution," "polluter," "costs of abatement," or even "cause." "Water pollution in the EPA or EAA" is not a phrase that defines itself. With regard to the specialized ecosystem of the Everglades, it is necessary to determine the level of phosphorus or other elements that should be considered "pollution" before causation can be traced to a "polluter." Other questions that require answers to effectuate the purposes of Amendment 5 are whether Amendment 5 is retroactive in effect or prospective only; how joint liability for pollution in the EAA and EPA will be apportioned; what will be the liability of upstream, non-EAA landowners who deliver phosphorus-enriched waters to the EAA before it enters the EPA; how the value of non-monetary contributions to water quality improvements will be calculated and weighed when assessing responsibility; and how costs of abatement will be assessed and by whom.[11] This long list of critical policy

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[10]Amendment 5 does not state, either expressly or by necessary implication, by whom it is to be enforced. Petitioners obviously believe that they are the authorized enforcers. But Amendment 5 does not create an exemption for "non-polluters," whether they are located in the EAA or in the non-EAA portions of the Okeechobee Basin, the South Florida Water Management District, or, for that matter, the State of Florida as a whole. The *Advisory Opinion* merely says that EAA polluters are responsible for 100 percent of the costs of abating *their* water pollution.

[11]Amendment 5 provides no guidance whatsoever as to how the "cost of pollution abatement [will] be assessed." Will it be by permit fee, special assessment or tax

determinations yet to be addressed demonstrates beyond question that Amendment 5 does not establish a sufficient rule to be self-executing.

Moreover, had the voters intended Amendment 5 to supply a complete mechanism to achieve its goals, that intent easily could have been effectuated, because the Amendment does supply specific meanings for the terms "Everglades Protection Area" and "Everglades Agricultural Area": "[EPA] and [EAA] shall have the meanings as defined in statutes in effect on January 1, 1996." Art. II, § 7(b), Fla. Const. In contrast, although Amendment 5 could have directed the reader to a source of meaning for the provision's remaining terms, it did not. "Had the framers of the [provision] intended a self-executing grant of power, they could have chosen self-executing language. Our present constitution contains numerous examples of such phrases . . . ." *Florida Dept. of Educ. v. Glasser*, 622 So. 2d 944, 947 (Fla. 1993).

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levy? Will the amount imposed be determined by acreage, by volume of water discharged, by the amount of "water pollution" discharged in that water, or by some amalgam of all three factors, or different factors? How will these costs be apportioned among and between multiple sources of "water pollution"? When a landowner receives "water pollution" from upstream sources before passing it downstream for reuse by others, what will be the extent of that landowner's liability and hence costs for abating that "water pollution"? This Court recently described similar questions arising in Everglades environmental regulation as "complex technical issues[,] . . . not simple, routine matters which may be easily understood by trial judges and juries." *Flo Sun, Inc. v. Kirk*, 26 Fla. L. Weekly S189 (Fla. Mar. 29, 2001).

Thus, because Amendment 5 does not set forth a sufficient rule for accomplishing its objectives, and because the drafters supplied definitions for certain terms but not others, Amendment 5 is plainly not self-executing and requires legislative action to bring the provision into operation.

2.

Amendment 5, Read In *Pari Materia* With The Rest Of Article II, Section 7, Was Clearly Intended To Be Effectuated With Implementing Legislation

An inquiry as to the meaning and effect of a constitutional amendment necessarily entails a consideration of related provisions. Long-established rules of interpretation require that "amendments to the Constitution should be construed so as to harmonize with other constitutional provisions," and that "[a] constitutional amendment . . . must be construed in *par[i] materia* with all of those portions of the Constitution which have a bearing on the same subject." *State v. Div. of Bond Fin.*, 278 So. 2d 614, 618 (Fla. 1973). *See also State v. City of Avon Park*, 149 So. 409, 416 (Fla. 1933), *modified*, 158 So. 159 (Fla. 1934); *Barrow v. Holland*, 125 So. 2d 749, 751 (Fla. 1960). More specifically, this Court has recognized that constitutional provisions should be read in *pari materia* with related clauses of the same section. *See Burnsed v. Seaboard Coast Line R.R. Co.*, 290 So. 2d 13, 16 (Fla. 1974).

The only existing provision of the Florida Constitution that directly bears upon

the subject of Amendment 5 is Article II, section 7, "Natural resources and scenic beauty," to which Amendment 5 was added. As modified by the voters' approval of Amendment 5, Article II, section 7 now provides in its entirety:

> (a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate ***provision shall be made by law*** for the abatement of air and water pollution and of excessive and unnecessary noise.
>
> (b) Those in the [EAA] who cause water pollution within the [EPA] or the [EAA] shall be primarily responsible for paying the costs of the abatement of that pollution. For purposes of this subsection, the terms [EPA] and [EAA] shall have the meanings as defined in statutes in effect on January 1, 1996.

Reading Amendment 5 in relation to the rest of Article II, section 7, makes plain that the voters intended that the legislature would enact supplemental laws to effectuate the purposes and goals of the amendment. Section 7(a) confers upon the legislature the general power and duty to make "[a]dequate provision . . . by law for the abatement of air and water pollution." Before the adoption of Amendment 5, the legislature had essentially unlimited discretion as to the specific manner in which it would exercise that general power. However, the people, through their approval of Amendment 5, modified the general power conferred in section 7(a) by adding a policy mandate in section 7(b), that limits the discretion of the legislature in discharging its duty to provide by law for the abatement of a specific kind of pollution

in a specific geographical area.

In effect, the voters said to the legislature: "When you provide by law for the abatement of air and water pollution pursuant to Article II, section 7(a), you must impose the primary responsibility for abating water pollution in the EAA and the EPA on those who are causing it, rather than require the taxpayers of Florida to bear most or all of the burden." Construed in this manner, consistently with preexisting provisions dealing with the same subject matter, Amendment 5 was plainly intended by the voters to be effectuated by implementing legislation and is not, therefore, self-executing.

B.

The District's Taxing Scheme Can Be Reconciled With Amendment 5, And The Tax Is Therefore Not Necessarily Or Obviously Inconsistent With The Plain Words Of The Provision

Again, should the Court determine to revisit the issues it addressed and, we believe, fully resolved in its *Advisory Opinion*, the final step in its inquiry is to determine whether the District's *ad valorem* tax on Petitioners can, by any fair course of reasoning, be reconciled and harmonized with the "plain terms" of Amendment 5. Although this Court has already answered in the affirmative, we here independently demonstrate that the two laws are consistent and the taxing scheme therefore remains

viable after Amendment 5.

1.

Applying The Rule That A Pre-Existing Statute Must, Whenever Possible, Be Construed As Consistent With A Later Adopted Amendment, The EFA Can Be Fairly Read To Render The Taxes Levied Against Petitioners Consistent With Amendment 5 And, Therefore, Constitutional.

This Court long ago stated the rule regarding the effect of constitutional amendments on pre-existing statutes:

> In considering the effect of constitutional amendments upon existing statutes, the rule is that the statute will continue in effect unless it is completely inconsistent with the plain terms of the Constitution. However, when a constitutional provision is not self-executing, as is the case here, all existing statutes which are consistent with the amended Constitution will remain in effect until repealed by the Legislature. Implied repeals of statutes by later constitutional provisions is not favored and the courts require that in order to produce a repeal by implication the **repugnancy** between the statute and the Constitution must be **obvious or necessary**. Pursuant to this rule, if **by any fair course of reasoning** the statute can be harmonized or reconciled with the new constitutional provision, then it is the duty of the courts to do so.

In re Advisory Opinion to the Governor, 132 So. 2d 163, 169 (Fla. 1961) (emphasis added).[7] Therefore, in this case, if by any fair course of reasoning the Court can construe the District's taxing and spending scheme in harmony with the plain terms

of Amendment 5, the trial court properly dismissed Petitioners' Amended Complaint.[12] The issue thus framed is whether the District's generally applicable ad valorem tax, levied pursuant to the EFA without regard to the taxpayer's status as a polluter or non-polluter, can by a fair course of reasoning be reconciled and harmonized with the plain terms of Amendment 5's mandate that "Those in the [EAA] who cause water pollution within the [EPA] or the [EAA] shall be primarily responsible for paying the costs of the abatement of that pollution . . . ."

Petitioners allege that the tax would be inconsistent with Amendment 5 if levied to fund abatement costs for pollution caused by those in the EAA. Indeed, Petitioners' entire action is based on their allegation that their taxes are funding "abatement costs of pollution specifically attributable to EAA polluters." Petitioners acknowledge, as they must, that Amendment 5 does not exempt them from taxation to fund general Everglades restoration. They challenge the District's taxing scheme only to the extent these tax revenues are allegedly directed to "abatement of pollution specifically attributable to EAA polluters."

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[12] Petitioners ask this Court to accept *their* interpretation of Amendment 5, and to apply definitions of the key terms presumably of their choosing to show ***one*** possible construction of the District's taxing scheme that would be ***inconsistent*** with Amendment 5. This is simply not a proper application of the long-standing rule.

Because Amendment 5 contains no mechanism to effectuate its purposes and no definitions of its key terms, this Court cannot possibly declare that the taxing scheme of the EFA cannot be reconciled with the new constitutional amendment. Indeed, for the EFA to be constitutional, the Court need find only *one* construction of the statute's taxing scheme that renders it consistent with the Amendment.

It need go no further than this. The background of the EFA ably explained in the briefs of interested parties in this litigation and in the *Advisory Opinion* proceedings, shows that the Everglades Construction Project, to which Petitioners' tax revenues are specifically directed, *see* § 373.4592(4)(a), Fla. Stat., includes far more than what Petitioners term "abatement of pollution specifically attributed to EAA polluters."[13] Everglades restoration pursuant to the EFA includes such various projects as hydroperiod management (restoration of the natural Everglades through control of the flow of water); construction of storm water treatment areas ("STAs") to purify water from many sources in and out of the EAA; and scientific studies to determine the proper levels of various agents in water that will flow through protected

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[13]We repeat that, today, it is impossible to identify who has "caused" Everglades "pollution" because "pollution" has not been defined for purposes of the specialized needs of the Everglades protected areas. And as we have said, without a definition for Everglades water pollution, and other policy decisions, causation cannot fairly be traced.

areas. Petitioners have never challenged and do not challenge the District's power to impose taxes against them to fund any other aspect of the EFA or the Everglades Construction Project. *See* § 373.4592(4)(a), Fla. Stat.

The Court's duty to reconcile, where at all possible, earlier-enacted statutes with new constitutional provisions requires that the Court look only to the plain words of the constitutional provision. Here, Amendment 5 states that "Those in the [EAA] who cause water pollution within the [EPA] or the [EAA] shall be primarily responsible for paying the costs of the abatement of that pollution." Art. II, § 7(b), Fla. Const. The District's tax, levied to fund the myriad projects that comprise the Everglades Construction Project, patently is not inconsistent with the plain words of Amendment 5. Therefore, on this ground alone, the Court may affirm the dismissal of Petitioners' action.

To the extent Petitioners' action challenges the continued absence of implementing legislation, their remedy is not in the courts but at the voting polls. The import is that the District's taxing scheme can, by a fair course of reasoning, be harmonized with Amendment 5.

2.

Amendment 5 Is Not A Nullity, But Is Effective To The Extent That No Law Can Stand That Is Entirely Inconsistent With The Constitutional Provision

Petitioners observe that "[a] non self-executing constitutional provision is effective as a shield . . . even where it cannot be used to bring an independent cause of action . . . ." (Init. Br. of Pet'rs at 21-22.)[8] They offer the example of Article II, section 9, Florida Constitution, which provides that "English is the official language of the State of Florida." While the official-language amendment is undisputedly not self-executing,[14] Petitioners correctly observe that the English-only provision would nonetheless preclude the legislature from enacting a law purporting to make Finnish the official State language. But the reason such a conflicting law could not stand is not, as Petitioners allege, that certain constitutional provisions act "as a shield"; rather, such a law would not pass muster under this Court's test for consistency. Those which *do* pass consistency muster remain valid because the pre-existing statute can, as in this case, be reconciled with the new constitutional amendment. *See In re Advisory Opinion to the Governor*, 132 So. 2d 163 (Fla. 1961).

Thus, Amendment 5 is effective, but now only to the extent that neither the Legislature nor the District could enact a patently inconsistent law stating, for example, that "Those in the [EAA] who cause water pollution within the [EPA] or the [EAA] shall be ***secondarily*** responsible for paying the costs of the abatement of that

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[14]This is so because, like Amendment 5 in this case, Article II, section 9 states in an adjacent subsection that the provision shall be made effective by legislation.

pollution"; or providing that "Polluters in the [EAA] who cause water pollution within the [EPA] or the [EAA] shall ***not pay***." The District's generally applicable taxing scheme, authorized by the EFA, clearly is not such a patently inconsistent law.

CONCLUSION

For these reasons, we request that this Court affirm the decision of the court below approving the entry of judgment on the pleadings in favor of the District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on _____, 2001, we mailed a copy of the Brief Of Amicus Curiae United States Sugar Corporation In Support Of The Position Of Respondent South Florida Water Management District to **Ruth P. Clements, Esq**., Counsel for South Florida Water Management District, P.O. Box 24680, West Palm Beach, Florida 33416-4680; **Paul L. Nettleton, Esq**., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 4000 Nationsbank Tower, 100 SE Second Street, Miami, Florida 33131; **Jon Mills, Esq**., and **Timothy McLendon**, P.O. Box 2099, Gainesville, Florida 32602; **Allison Beck, Esq**., General Counsel, International Ass'n of Machinists and Aerospace Workers AFL-CIO, 9000 Machinists Place, Upper Marlboro, Maryland 20772-2687; **Roy C. Young, Esq**., Young, van Assenderp, Varnadoe & Anderson, P.A., P.O. Box 1833, Tallahassee, Florida 32302; **William H. Green, Esq.** and **David L. Powell, Esq.** and **Gary V. Perko**, Hopping Green Sams & Smith, P.A., P.O. Box 6526, Tallahassee, Florida 32314; **and E. Thom Rumberger, Esq**., and **Richard Keller, Esq**., Rumberger, Kirk & Caldwell, Signature Plaza, Suite 300, 201 South Orange Avenue, Orlando, Florida 32802.

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CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate procedure as it has been prepared in Times New Roman 14-point font.

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[1] *Advisory Opinion to the Governor—1996 Amendment 5 (Everglades)*, 706 So. 2d 278 (Fla. 1997).

[2] § 373.4592, Fla. Stat. (Supp. 1994).

[3]What Petitioners actually challenge here is the *use* of the revenue collected from the ad valorem tax to the extent such funds are allegedly used to abate pollution caused by those in the EAA. This Court was also well aware during the *Advisory Opinion* proceedings that, pursuant to the EFA, the revenue raised from the maximum .1 mill tax was "for the purposes of the design, construction, and acquisition of the Everglades Construction Project," § 373.4592(4)(a), Fla. Stat. (Supp. 1994), a purpose the Court found to be completely consistent with Amendment 5 and certainly not repugnant to it.

[4]Of course, as recognized by the courts below, the doctrine of separation of powers prevents the courts from forcing the legislature to enact legislation. *See Barley v. South Fla. Water Mgmt. Dist.*, 766 So. 2d 433, 434 (Fla. 5th DCA 2000) ("A court . . . cannot tell the legislature when it must enact legislation, or dictate the content of its legislation. Similarly, a court cannot override the will of the people, as expressed in the constitution, which was to adopt an amendment that requires legislative execution."). *See also, e.g.*, *Brewer v. Gray*, 86 So. 2d 799, 803 (Fla.

1956) ("The Legislature is a coordinate branch of government and even though the performance of a duty is required by the Constitution, the courts, being another coordinate branch of the government, are not authorized to compel the Legislature to exercise a purely legislative prerogative."); *Council 13, Am. Fed'n of State, County, and Mun. Employees, AFL-CIO v. Casey*, 595 A.2d 670, 672 (Pa. Commw. Ct. 1991) (Legislation "related to policy decisions concerning revenue sources, is a matter of broad and complex discretion vested in the legislature and is not subject to mandamus relief, applicable to judicial compulsion of nondiscretionary public acts.").

[5]Many of the arguments we present in this part were ably made before this Court in the *Advisory Opinion* proceedings. In particular, we acknowledge that we have borrowed liberally from the Florida Legal Foundation's analysis of the issue whether Amendment 5 is self-executing.

[6]In pertinent part, Section 6(2), Article V provided:

> The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the last census authorized by law.

[7]As summarized in *American Jurisprudence 2d*, cited with approval in *In re Advisory Opinion to the Governor*, 132 So. 2d 163 (Fla. 1961):

> Implied repeals of statutes by later constitutional provisions are not favored any more than in the case of an implied repeal of one statute by another. To effect a repeal by implication, the inconsistency between existing legislation and a new constitutional provision must be irreconcilable; that is, the inconsistency must be obvious, clear, and strong. Such a statute cannot be upheld if it is opposed to the plain terms of the new constitution. Otherwise, the statute will be deemed to be still in force and effect. In making the determination whether there is a conflict between a pre-existing statute and a new constitutional provision so that the statute is repealed by implication, a court will presume in favor of the constitutionality of the statute until the contrary clearly appears and will, if possible, construe a statute so as to render it valid. The repeal must be plain and unambiguous.

16 Am. Jur. 2d, *Constitutional Law,* § 49 (1998).

[8] This is the essence of Judge Harris' dissent below.