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.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the trial court erred in dismissing an actual case and controversy, basing its dismissal only on a statement in an advisory opinion that there was "no inconsistency" between the Everglades Forever Act (EFA), Section 373.4592, Florida Statutes, and the Polluter Pays Amendment, Article II, Section 7(b), Florida Constitution, when that case and controversy involves a challenge to the constitutionality of a discretionary agency action under the EFA "as applied" by the South Florida Water Management District to "specific factual scenarios and individual taxpayers," such as the Petitioners-Taxpayers?

STATEMENT OF THE CASE

Petitioners filed this action claiming that the Respondent, the South Florida Water Management District (hereinafter "SFWMD"), has levied unconstitutional *ad valorem* taxes against Petitioners' real property within the Okeechobee Basin. [R-185-89][1] Petitioners contend that the imposition of these taxes on their properties is in direct contradiction to the provisions of Article II, Section 7(b) of the Florida Constitution (also referred to as "Amendment 5" or the "Polluter Pays Amendment"). [R-185-89] The tax levy is unconstitutional **as applied** to the Petitioners because the levy requires them to pay the costs for abatement of pollution specifically attributable to polluters in the Everglades Agricultural Area ("EAA"), whereas Amendment 5 requires that these costs be borne by the polluters. [R-185-89, 191, 193, 199, 203]

The Florida Everglades are unquestionably one of the world's ecological marvels. [R-194] The late Governor Lawton Chiles properly described the Everglades as an "international treasure." *Advisory Opinion to the Governor – 1996 Amendment 5*, 706 So. 2d 278, 280 (Fla. 1997) (hereinafter the "*1997 Advisory Opinion*"). The Everglades Agricultural Area is a 700,000-acre section of Palm Beach, Hendry and Glades Counties situated immediately south of Lake Okeechobee. [R-195] The EAA was formed, beginning in 1948, when a large portion of the Everglades was

[1] The designation [R-__] refers to the Record on Appeal with the appropriate page number.

drained for farming and for flood control purposes. [R-195] Agriculture in this area consists primarily (82%) of sugar cane grown by corporate farmers, with the remaining acreage yielding assorted vegetables and citrus. [R-195] The Everglades Protection Area ("EPA") is located just south of the EAA and consists of the Loxahatchee National Wildlife Refuge, several Water Conservation Areas and Everglades National Park. [R-195]

Unfortunately, past and continuing pollution has severely damaged this fragile ecosystem. [R-194-98] Nutrient-polluted drainage and runoff from the EAA has flowed into the EPA. [R-196-198]; FLA. STAT. § 373.4592(1)(d). The result of this runoff is that significant portions of the EPA have been destroyed and/or become dangerously imbalanced. [R-195-197] These issues are beyond dispute in this case. As of the early 1990's, there was also no question that the pollution in the Everglades must be abated. [R-197] In fact, the only question remaining was: Who pays?

That question of "who pays?" was initially addressed by the Everglades Forever Act ("EFA"), which was enacted in 1994. [R-198] FLA. STAT. §373.4592. The EFA "was designed to divide the burden of the costs of pollution abatement **on the public** by the 0.1 mil tax and the agricultural users by the privilege tax of $24.89 per acre." *1997 Advisory Opinion*, 706 So. 2d at 280 (emphasis added). The 0.1 mill *ad valorem* tax allowed by the EFA was assessed on property owners in the Okeechobee

Basin, without regard to whether they actually caused any of the pollution to be abated. *Id.*

In 1996, the citizens of the state of Florida considered a proposed amendment to the Florida Constitution that again addressed the issue of "who pays?" for Everglades pollution. [R-199] Proposed Amendment 5 was known as the "Polluter Pays" amendment and provided:

> Those in the Everglades Agricultural Area who cause water 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 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.

Amendment 5 was approved by more than two thirds (68.1%) of the Florida voters and became Article II, Section 7(b) of the Florida Constitution. [R-186]

On March 6, 1997, Governor Chiles requested an advisory opinion from this Court concerning Amendment 5. The two questions posed by Governor Chiles were as follows:

> 1. Is the 1996 Amendment 5 to the Florida Constitution self-executing, and 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 in 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?

1997 Advisory Opinion, 706 So. 2d at 280.

This Court found that Amendment 5 was not self-executing. *Id.* at 281. The Court went on consider whether the EFA could be construed as the "enabling legislation" for Amendment 5. *Id.* In considering this specific issue, the Court stated that it found "no inconsistency" between the EFA and Amendment 5, in that they were adopted for a "similar purpose" and had a "mutuality of subject matter." *Id.* at 282. That is, both Amendment 5 and the EFA attempt to determine "how and at whose expense pollution of the Everglades should be abated." *Id.* However, unlike the EFA, the Court noted that Amendment 5 was adopted "to require polluters to pay for the abatement of their pollution." *1997 Advisory Opinion*, 706 So. 2d at 282 (emphasis added). To this extent, the passage of Amendment 5 was viewed by this Court as mandating a change in the status quo:

> **We believe the voters adopted Amendment 5 to effect a change**, and construing the Everglades Forever Act as Amendment 5's implementing legislation would effect no change, nullify the Amendment, and frustrate the will of the people. *Id.* (Emphasis added).

In response to the second question from Governor Chiles, the Court construed the phrase "primarily responsible" to mean that "those within the EAA who are determined to be responsible [for pollution] must pay their share of the costs of abating that pollution." *Id.* at 283. In other words, "polluters within the EAA as a group must pay for 100% of the cost to abate the pollution they cause…" *Id.* at 283, n. 12. No factual record was supplied to the Court. No other questions were posed to or considered by the Court. No actual case or controversy was presented. *Id.*

On July 13, 1998, Petitioners filed their Amended Complaint (the operative pleading) in Orange County Circuit Court, claiming that the SFWMD's continued taxation of them as non-polluters under the EFA was unconstitutional following passage of the Polluter Pays Amendment. .[2] [R-185] Petitioners are all property owners within the Okeehcobee Basin. [R-188-89] Petitioners are not polluters of the Everglades. [R-185] Nonetheless, Petitioners were all required by the SFWMD to pay the maximum 0.1 mill *ad valorem* tax on their properties levied pursuant to the EFA, as well as additional *ad valorem* taxes levied under the SFWMD's general *ad valorem* taxing authority, for pollution abatement costs specifically attributable to EAA polluters, or else risk penalties for failure to pay those taxes. [R-189-91] This maximum tax was levied on Petitioners despite the fact that the SFWMD had the

[2] The facts alleged in the Amended Complaint are deemed admitted for purposes of this appeal.

discretion under the EFA to impose a lesser (or no) tax. FLA. STAT. § 373.4592 [R-193, 199-200]

On the other hand, Petitioners allege that "polluters" are not being taxed or otherwise made "primarily responsible" for the cost of abating pollution these polluters cause. [R-199-201] Thus, it is alleged that the SFWMD's taxing scheme makes Petitioners and other non-polluters "primarily responsible" for the cost of abating pollution caused by others. [R-201] Petitioners sought, among other things, a declaration from the court that taxes imposed under the EFA against Petitioners, as non-polluters, were unconstitutional. [R-186-88, 191-92, 202-04] The factual question which remains to be determined is whether the SFWMD has unconstitutionally used its taxing authority under the EFA by levying the full 0.1 mill against Petitioners to pay the pollution abatement costs specifically attributable to EAA polluters. [R-186-87, 191, 203]

On October 22, 1998, the trial court entered an order granting the SFWMD's Motion for Judgment on the Pleadings and dismissed the Plaintiffs' Amended Complaint. [R-434] The trial court based its dismissal on the portion of the *1997 Advisory Opinion* where this Court found "no inconsistency" between the EFA and Amendment 5 for the purpose of determining whether the EFA could constitute the enabling legislation for Amendment 5. [R-438] An appeal to the Fifth District Court of Appeals ensued. [R-440]

In a split decision, the Fifth District affirmed the trial court's award of judgment on the pleadings, the majority again relying upon this Court's *1997 Advisory Opinion*. *Barley v. S. Florida Water Management Dist.*, 766 So. 2d 433 (Fla. 5th DCA 2000). The majority ruled that, despite Amendment 5's edict that the "polluter pay", "until the legislature repeals or amends the [EFA] there is a statutory basis to levy against non-polluting land owners to abate pollution." *Id.* at 434. A dissent by Judge Harris stated that, even if the proactive taxing of polluters under Amendment 5 was not self-executing and required further legislation, the SFWMD indeed acted unconstitutionally by continuing its tax of non-polluters in violation of Amendment 5. *Barley*, 766 So. 2d at 434-436 (Harris, J., dissenting). This Court has now accepted jurisdiction to determine whether the trial court erred in granting the SFWMD judgment on the pleadings in light of the allegations contained in the Amended Complaint.

SUMMARY OF THE ARGUMENT

A fundamental premise in a system of government created "by the people" is that the government, itself, may not act in violation of the Constitution. Regardless of any action or inaction by the legislature, the Florida Constitution remains the supreme law of this state and the ultimate expression of the will of its people. This Court must protect the ability of the citizens and taxpayers of Florida to challenge the actions of a state agency which violate a clear mandate of the Florida Constitution.

Petitioners seek protection from an unconstitutional tax levy by the South Florida Water Management District. The SFWMD has chosen to exercise the discretionary authority granted by the Everglades Forever Act, in a manner directly contravening the mandate of the Polluter Pays Amendment. This Court has interpreted the meaning of the Polluter Pays Amendment, holding that it requires that "polluters in the EAA [the Everglades Agricultural Area] as a group must pay for 100% of the pollution they cause." *1997 Advisory Opinion to the Governor*, 706 So. 2d at 283 n.12 (Fla. 1997). If, as Petitioners allege, the SFWMD is choosing to assess non-polluters to pay pollution abatement costs caused by EAA-based polluters, the agency is acting unconstitutionally. Petitioners, as taxpayers, have the right to seek redress from unconstitutional taxation.

This is not the *1997 Advisory Opinion* simply revisited. That case involved three basic issues: 1) an examination of Article II, Section 7(b)'s "primarily

responsible" mandate; 2) an enquiry as to whether the Polluter Pays amendment was self-executing; and 3) consideration as to whether the EFA was itself the implementing legislation for the new constitutional provision. In 1997, this Court found that the "primary responsibility" standard enunciated in the provision imposed 100% liability on EAA polluters for abatement costs of water pollution they cause. Secondly, this Court found that the Polluter Pays amendment was not self-executing, i.e. that legislation was necessary before costs of pollution could actually be assessed against EAA polluters. Finally, while holding that the EFA was facially "consistent" with the Polluter Pays amendment, the Court determined the EFA could not itself be considered the implementing legislation, because to do so would "nullify the Amendment, and frustrate the will of the people." *See 1997 Advisory Opinion*, 706 So. 2d at 281-83.

At no time in 1997 did this Court consider or address factual issues or as-applied constitutional claims. Indeed, this Court has emphasized that advisory opinions are limited to facial constitutionality, and that citizens remain free to bring as-applied challenges. The instant case is just that: a constitutional challenge to the discretionary tax levy by the SFWMD against Petitioners and all non-EAA polluters in the Okeechobee Basin. This Court interpreted Amendment 5 as requiring polluters to pay 100% of the pollution abatement in the Everglades. Now Petitioners claim that the taxes imposed by the SFWMD violate that constitutional standard.

The mandates of the Florida Constitution are not optional, but are binding on the State and its agencies, including the SFWMD. The EFA grants discretionary authority to the SFWMD to impose a tax within the Okeechobee Basin, but does not require such a levy. It is not the EFA, but rather the actions of the SFWMD that violate the Constitution. The levy of a tax on non-polluters for abatement of EAA-caused pollution is unconstitutional, inasmuch as it is inconsistent with the clear mandate of Article II, Section 7(b), and Petitioners have properly stated a claim for which a court can and should grant relief. To affirm the superiority of Florida's organic law over all actions of state government, this Court should reverse the decision of the Fifth District Court of Appeal and remand this case for trial.

STANDARD OF REVIEW

This case concerns the Fifth DCA's affirmance of the trial court's order granting judgment on the pleadings in favor of the South Florida Water Management District. In a ruling on a motion for judgment on the pleadings, all factual allegations in the Petitioner's amended complaint must be accepted as true. *See Reinhard v. Bliss*, 85 So. 2d 131, 133 (Fla. 1956). The standard to be applied in passing on a judgment on the pleadings is the same as in disposing of a motion to dismiss for failure to state a cause of action. *See Williams v. Howard*, 329 So. 2d 277, 280 (Fla. 1976).

A claim should not be dismissed unless the pleadings "show with certainty that a plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim." *Midflorida Schools Fed. Credit Union v. Fansler,* 404 So. 2d 1178, 1180 (Fla. 2nd DCA 1981). A determination as to whether a complaint is sufficient to state a cause of action is a question of law; thus, on appeal, the dismissal of a complaint is reviewable by the *de novo* standard of review. *See Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams*, 769 So. 2d 484, 486 (Fla. 4th DCA 2000) (quoting *Sarkis v. Pafford Oil Co.*, 697 So. 2d 524, 526 (Fla. 1st DCA 1997)).

ARGUMENT

I. INTRODUCTION

The District Court erred in affirming the judgment on the pleadings in favor of the SFWMD because the facts alleged, which must be taken as true, establish a direct violation of the Florida Constitution. It is undisputed that the pollution abatement tax levied against Petitioners, as non-polluters, pursuant to the EFA directly contravenes the express language, purpose and intent of Amendment 5 to the Florida Constitution. Amendment 5 requires polluters to pay 100% of the costs for abating Everglades pollution caused by the EAA. The decision below denies Petitioners' right as taxpayers to challenge the constitutionality of the SFWMD's tax simply because this Court's *1997 Advisory Opinion* stated that Amendment 5 is not self-executing and is not inconsistent with the EFA. The District Court has essentially rendered Amendment 5 an absolute nullity. Such a result ignores the legal standard declared by that advisory opinion, and is contrary to the law of Florida and the expressed intent of its citizens.

II. THE FLORIDA CONSTITUTION IS THE SUPREME LAW OF THIS STATE AND THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT CANNOT CONTRAVENE OR NULLIFY ITS PROVISIONS

"The Florida Constitution is the supreme law of Florida, and, as such, it takes precedence over any contrary provisions of the common law or statutes." *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997); *see also State v. Greer*, 102 So. 739, 743 (Fla. 1924) ("…the Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative *ab initio*, so that the Constitution and not the statute will be applied by the court in determining the litigated rights.")

A. The South Florida Water Management District has Wrongly Construed the EFA and the Constitution Such that the Constitutional Provision is Rendered a Nullity

This Court expressly recognized that a statutory provision cannot operate to nullify a constitutional provision, including a non self-executing provision such as Amendment 5. In construing the validity of challenged statutes, this Court specifically stated that Article II, Section 7, a non self-executing constitutional provision, must be given effect:

> In construing the Constitution every section should be considered so that the Constitution will be given effect as a harmonious whole. *A construction which would leave without effect any part of the Constitution should be rejected*.

Askew v. Game & Fresh Water Commission, 336 So. 2d 556, 560 (Fla. 1976) (Emphasis added); *see also Burnsed v. Seaboard Coastline R.R. Co.,* 290 So. 2d 13,

16 (Fla. 1974); *State* ex rel. *West v. Butler*, 70 Fla. 102, 124-25, 69 So. 771, 776 (Fla. 1915); *cf. Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 177-78 (1803). ("It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such construction is inadmissible unless the words require it.")

Recognizing again that no provision of the Constitution should be rendered a nullity, this Court noted that similar constitutional provisions "must be read in pari materia to ensure a consistent and logical meaning *that gives effect to <u>each</u> provision*." *1997 Advisory Opinion to the Governor,* 706 So. 2d at 281 (emphasis added). In fact, it was for this very reason that this Court held that the EFA could not be the implementing legislation for Amendment 5 because to so hold would "…nullify the Amendment, and frustrate the will of the people." *Id.* at 282.

When interpreting and applying a newly adopted constitutional provision, "[t]he fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such a manner as to fulfill the intent of the people, never to defeat it." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960); *see also State* ex rel. *Dade County v. Dickinson*, 230 So. 2d 130, 135 (Fla. 1969); *City of Tampa v. Tampa Shipbuilding Eng'g Co.*, 136 Fla. 216, 218-19, 186 So. 411, 412 (1939); *State* ex rel. *West v. Butler*, 70 Fla. at 123-25, 69 So. at 777; *cf. Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979) ("The objective to be accomplished and the evils to be remedied by the constitutional provision must

be constantly kept in view, and the provision must be interpreted to accomplish rather than to defeat them.").

Before Amendment 5 was passed, the EFA funded pollution abatement in the EPA and EAA by splitting the abatement costs between agricultural users of the EAA and the public (landowners), without regard to whether any of them are "polluters". *1997 Advisory Opinion,* 706 So. 2d at 280. In 1996, more than two thirds of the Florida electorate "adopted Amendment 5 to effect a change." *Id.* at 282. This Court has recognized that the intended "change" was to make the polluters, not the public, primarily responsible for the cost of abating EAA caused pollution in the Everglades. *Id.* Following passage of Amendment 5, the legislature clearly could not pass a bill mandating that the public be primarily responsible for the costs of abating Everglades pollution. Similarly, the SFWMD cannot effectuate a similar mandate by implementing or continuing a taxation scheme which effectively renders the non-polluting public primarily responsible for these costs. By its actions, the SFWMD has done exactly what this Court refused to do: it has effected no change, it has nullified Amendment 5, and it has frustrated the will of the people. *See*, *1997 Advisory Opinion*, 706 So. 2d at 282.

Likewise, the Fifth District effected "no change" and nullified Amendment 5 when it found there was "no constitutional impediment" to the levy of a tax on non-polluters for pollution abatement. As a result, Amendment 5 rests dormant, mere

printed words of less power or authority than a municipal ordinance or agency regulation, or more specifically, a discretionary tax levy by a water management agency.[3] Under this theory, the constitutional provision is meaningless unless and until the Legislature shall choose to bring it to life. Such thinking has no part in our jurisprudence, and vitiates a court's absolute duty to "'support, protect and defend the Constitution,' by giving effect to its provisions, even if in doing so the statute is held to be inoperative." *State* ex rel. *West v. Butler*, 69 So. at 777 ("Every word of a state Constitution should be given its intended meaning and effect, *and essential provisions of a Constitution are to be regarded as being mandatory*." (emphasis added)).

Whatever a non-self-executing constitutional provision may be, such a provision is not a nullity. It is a mandate from the people of Florida "to require *polluters* to pay for the abatement of their pollution." *1997 Advisory Opinion*, 706 So. 2d at 282 (emphasis added). This Court should reject any argument that Amendment 5 is powerless to prevent government taxing actions inconsistent with and directly contrary to the terms of the Constitution. Such an interpretation would emasculate the Constitution, and render Amendment 5 a "nullity."

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[3] Under the EFA, Section 373.4592(4), Florida Statutes, the SFWMD is not required to levy the full 0.1 mill tax against Plaintiffs, but did so anyway regardless of the requirements of Article II, Section 7(b).

B. Actions of the South Florida Water Management District, and other Agencies, may be Unconstitutional even when Undertaken Pursuant to the Authority of a Facially Constitutional Statute

The mere finding that a statute is not facially inconsistent with a constitutional provision, does not compel a similar finding with regard to agency actions implemented under the authority of that statute. In the instant case, Petitioners do not allege a facial, legal inconsistency between the EFA and Amendment 5. Rather, Petitioners allege that there is a factual inconsistency between the requirements of Amendment 5 and the discretionary taxing actions of the SFWMD. If government actions taken pursuant to some legislation are inconsistent with a non self-executing constitutional provision,[4] that government action must be struck down as unconstitutional.

"It is a well-recognized principle of law that a statute or ordinance may be valid as applied to one set of facts, though invalid in its application to another set of facts." Ex parte *Wise*, 141 Fla. 222, 231-32, 192 So. 872, 875 (1940) (citing *Dutton Phosphate Co. v. Priest,* 67 Fla. 370, 376, 65 So. 282, 284 (1914)). Courts may strike down taxation action as unconstitutional even when the underlying legislation itself is facially constitutional. In *Department of Revenue v. Golder*, 326 So. 2d 409, 410

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[4] As the dissent writes in the District Court opinion below, "even though facially the Everglades Protection Act and Amendment 5 are consistent, they may be, depending on the facts of the case, inconsistent as applied." *Barley*, 766 So. 2d at 436 (Harris, J., dissenting).

(Fla. 1976), a statute allowing taxation of estates of resident decedents was found unenforceable when applied to the particular facts in *Golder*. *Id.* at 411. The statute at issue operated to increase the tax burden upon the estate of a Florida resident in direct conflict with Section 5, Article 7 of the Florida Constitution precluding the legislature from levying an estate tax that would increase the tax burden upon the estate of a Florida resident. *Id.* This Court specifically held that as applied to the specific facts of the case, the statute "produces an unconstitutional result." *Id.*

Likewise, in *Hollywood Jaycees v. State of Florida Dep't of Revenue*, 306 So. 2d 109, 112 (Fla. 1974), a statute was found to be facially valid but the application of that statute was unconstitutional. While this statute was facially constitutional in giving the Department of Revenue power to invalidate a change by the Board of Tax Adjustment, the Department of Revenue's application of this statute became unconstitutional when it deprived taxpayers of their due process rights. *Id.* at 112. Thus, the EFA provisions providing for an *ad valorem* tax might be facially constitutional. However, as applied by the SFWMD, the taxing scheme violates Amendment 5 by making non-polluters "primarily responsible" for pollution abatement costs, and therefore produces an unconstitutional result.

C. Amendment 5 Restricts the SFWMD's Authority to Implement an Inconsistent Taxation Scheme for Pollution Abatement

The time-honored legal doctrine *expressio unius est exclusio alterius* illustrates that when the citizens of Florida set forth in the Constitution the proper manner for doing a certain thing, government is not empowered to do that thing in a different manner. This Court explained:

> The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it.

Sullivan v. Askew, 348 So. 2d 312, 316 (Fla. 1977); *see also State* ex rel. *Ellars v. Bd. of County Comm'rs of Orange County*, 147 Fla. 278, 281, 3 So. 2d 360, 361 (1941); *Weinberger v. Bd. of Public Instruction of St. John's County*, 96 Fla. 470, 478-79, 112 So. 253, 256 (Fla. 1927). Thus, the legislature could not constitutionally pass legislation that would frustrate the purpose and intent of Amendment 5. The lawmaking power of the legislature "is limited only by the express and clearly implied provisions of the federal and state Constitutions". *State* ex rel. *West v. Butler*, 70 Fla. at 123, 69 So. at 777. As this Court recognized:

> Express or implied provisions of the Constitution cannot be altered, contracted or enlarged by legislative enactments. A legislative construction of an ambiguous or uncertain provision of organic law may be persuasive; but

> constitutional provisions that are clear and explicit in terms or made so by the history of their adoption and by long-continued application and recognition in governmental proceedings cannot be given by legislation a meaning that conflicts with the terms of such clear and explicit provisions.

Id., 70 Fla. at 124, 69 So. at 777. Thus, Judge Harris correctly noted that the legislature could not frustrate the intent of Amendment 5 by enacting legislation defining a "polluter as anyone who lives in the district – even if they can show they do not pollute." *Barley*, 766 So. 2d at 435 (J. Harris dissenting).[5]

With the passage of Amendment 5, the Florida Constitution clarified that non-polluters will not be primarily responsible for payment of pollution abatement. Thus, properly understood, Amendment 5 operates as a restriction on the discretion of the government, and not as a donation of authority. *See Peters v. Meeks*, 163 So. 2d 753, 755 (Fla. 1964) (citing *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741-42 (Fla. 1961) (the Florida Constitution is a limitation on the power of the State); *Cawthon v. Town of De Funiak Springs*, 88 Fla. 324, 326, 102 So. 250, 251 (Fla. 1924) ("the

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[5] The District Court mistakenly viewed this action as an attempt to "force the legislature to pass" implementing legislation. *Barley,* 766 So. 2d at 434. However, Petitioners did not initiate this action seeking implementing legislation, nor is such legislation required to resolve the issues presented. As the dissent recognized, "No legislation is necessary to implement the constitutional right to be free from paying a tax to abate others' pollution. This is a current organic right granted by the people." *Id.* at 436 (Harris, J., dissenting).

Constitution affords limitations upon the powers of the Legislature as well as upon the executive and judicial departments.")

If the legislature would be forbidden from passing legislation that would impose primary responsibility for pollution abatement on non-polluters, then an agency of the government should not be permitted from doing the same through discretionary taxing authority. The clear and definite constitutional mandate requiring that EAA polluters pay all of the abatement costs for pollution they cause precludes the SFWMD from imposing some different standard on Petitioner taxpayers, who are not EAA polluters. *See 1997 Advisory Opinion*, 706 So. 2d at 283 n. 12. As aptly noted by Judge Harris in his dissent below:

> The amendment herein contained two provisions: non-polluters should pay nothing and polluters should pay all to clean up *their* pollution. It is apparent that legislation will be required to determine on what basis polluters who cause differing degrees of pollution should pay. But what legislation is required to exempt those who do not pollute from payment of taxes to clean up pollution caused by others?

Barley, 766 So. 2d at 435 (Harris, J., dissenting) (emphasis original).

D. Even though Amendment 5 is not self-executing, it serves as a shield to protect citizens from actions by the SFWMD inconsistent with that provision.

A non self-executing constitutional provision is effective as a shield to protect citizens from governmental actions that are contrary to that provision even where it cannot be used to bring an independent cause of action for monetary damages in the absence of implementing legislation. *See, e.g.*, *Tucker v. Resha*, 634 So. 2d 756, 759 (1st DCA 1994), *aff'd* 670 So. 2d 56 (Fla. 1996); In re *T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989); *see also Juidice v. Vail*, 430 U.S. 327, 335 (1977) (citing Ex parte *Young*, 208 U.S. 123, 162 (1908)); *Edelman v. Jordan*, 415 U.S. 651, 663-65 (1974) (using the sword and shield analogy in describing the interaction of the Fourteenth and Eleventh Amendments).

Since this Court has found that legislation is necessary to implement the affirmative taxation provisions of the Polluter Pays amendment, citizens are not free to seek implementation of that portion of the amendment through the courts. However, even a non self-executing constitutional provision acts to prevent the government from acting in a manner completely inconsistent or directly contrary to its provisions. This should especially be the case where, as here, the State may be using its taxing power unconstitutionally.

The privacy amendment to the Florida Constitution affords one example of a non self-executing constitutional provision's ability to serve as a shield to strike down unconstitutional statutes. Article I, Section 23, Florida Constitution, provides:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This provision is not self-executing and does not create a cause of action for money damages in the absence of some implementing legislation. *See Tucker v. Resha*, 634 So. 2d at 759 (holding that the privacy amendment is not self-executing because the provision fails to provide a specific rule by which a right to money damages could be determined, enjoyed, or protected.)

Nevertheless, this Court ruled that the privacy amendment can be used as a shield to protect citizens from unconstitutional government actions. In *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), this Court examined the parental consent statute, Section 390.011(4)(a), and held that this law violated the privacy provision of the Florida Constitution because it intrudes upon the privacy of the pregnant minor from conception to birth. *Id.* at 1191. This Court wrote:

> Pursuant to this principle, the United States Supreme Court has recognized a privacy right that shields an individual's autonomy in deciding matters concerning marriage, procreation, contraception, family relationships, and childbearing, and education . . . While the federal

> constitution traditionally shields enumerated and implied individual liberties from encroachment by state or federal government, the federal court has long held that state constitutions may provide even greater protection.

Id.

Amendment 5 may not provide a specific rule for assessing the liability of individual polluters for abatement costs. It nevertheless operates as a constitutional shield to protect taxpayers who could not possibly come within the scope of "[t]hose in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area," who are "100% responsible for costs to abate water pollution they cause." *1997 Advisory Opinion*, 766 So. 2d at 283 n.12. Indeed, this Court has twice before held that a declaratory judgment action which seeks a refund for taxpayers who were forced to pay an unconstitutional tax is not the same as an action seeking a monetary judgment. *See Kuhnlein v. Dept. of Revenue*, 662 So. 2d 308 (Fla. 1995); *Kuhnlein v. Dept. of Revenue*, 689 So. 2d 266, 267 (Fla. 1997) (plaintiffs' declaratory judgment suit for refund of unconstitutional taxes differed in nature from an action to obtain a money judgment and therefore no post-judgment interest would be awarded).[6] In *Kuhnlein I,* a statutory funding structure was declared unconstitutional for violating the Commerce Clause, Article

[6] The two *Kuhnlein* decisions involved appeals over pre and post-judgment interest on the tax refund mandated by this Court's decision in *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) (*Kuhnlein I*), *cert. denied sub nom. Adams v. Dickinson*, 515 U.S. 1158 (1995).

I, Section 8, cl. 3, U.S. Constitution. *Kuhnlein I*, 646 So. 2d 717 (Fla. 1994). Even though the Commerce Clause is a grant of regulatory power to Congress (and not implementing legislation for a lawsuit), plaintiffs in *Kuhnlein*, who were forced to pay an unconstitutional $295 auto impact fee, successfully invoked the Commerce Clause as a shield in a declaratory judgment action to strike down the unconstitutional statute and obtain a refund of the illegal taxes. 646 So. 2d at 721.

A second example of a non self-executing constitutional amendment might be the English Language Amendment, Article II, Section 9, Florida Constitution, which provides:

> (a) English is the official language of the State of Florida
>
> (b) The Legislature shall have the power to enforce this Section by appropriate legislation.

By its very language, this constitutional provision indicates that it is not self-executing. Yet if the SFWMD, in its wisdom, were to declare that henceforth Finnish would be the official language of the district, and that all correspondence and meetings would henceforth be conducted only in that tongue, it is nonsensical to suppose that a court could not use the non self-executing English Language Amendment to strike down such an ill-conceived agency action.

In the instant case, the constitutional challenge does not even involve a statute duly enacted by the legislature. Rather, it involves the discretionary actions of a

governmental agency. Where this Court has declared that the Constitution requires that polluters in the EAA be 100% responsible for pollution they cause, an agency of the state is not at liberty to implement an alternate interpretation which places that responsibility on taxpayers in general.

III. THE DISTRICT COURT AND THE TRIAL COURT BELOW MISAPPLIED THIS COURT'S 1997 ADVISORY OPINION IN UPHOLDING THE SFWMD'S APPLICATION OF THE EFA

This Court's *1997 Advisory Opinion* answered two distinct question propounded by Governor Chiles: (1) whether Amendment 5 is self executing and (2) what does the term "primarily responsible" mean in the context of Amendment 5. *1997 Advisory Opinion,* 706 So. 2d at 280. This 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…." *Id.* at 283, n. 12. As such, the District Court improperly relied upon the *1997 Advisory Opinion* in dismissing a claim that the EFA tax, as applied to non-polluters, is unconstitutional.

A. The *1997 Advisory Opinion* Only Considered the Facial Constitutionality of the Everglades Forever Act, and Did Not Address as-applied Constitutionality of Taxing Actions of the SFWMD

An advisory opinion is the considered opinion of the court on a specific question "as to the interpretation of any portion of [the] constitution upon any question affecting [the Governor's] executive powers and duties." FLA. CONST. ART. IV, § 1(c).[7] By their nature, advisory opinions are non-binding and non-precedential.

[7] Advisory opinions are generally rare in the United States. Federal courts cannot issue advisory opinions. *See United States v. Johnson*, 319 U.S. 302, 304 (1943) (case and controversy requirement of Article III, Section 2 requires a "genuine adversary issue between the parties" for courts to issue an opinion); *Muskrat v. United States*, 219 U.S. 346, 362, 31 S.Ct. 250 (1911). The practice of advisory opinions finds its origins as an ancient part of English law, under which judges might be called upon to advise the Crown on select questions of law. For more on the history of advisory opinions, see Van Vechten Veeder, *Advisory Opinions of the Judges of England*, 13 HARV. L. REV. 358 (1900); ALBERT R. ELLINGWOOD, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT 1-30 (1918). Common law courts in other countries also continue to issue advisory opinions. *See, e.g.*, *Reference* Re *Secession of Quebec*, 2 S.C.R. 217 (Can. 1998).

Lee v. Dowda, 155 Fla. 68, 73, 19 So.2d 570, 572 (1944); *State* ex rel. *Williams v. Lee*, 121 Fla. 815, 821, 164 So. 536, 538 (1935); *see also Opinion of the Justices*, 682 A.2d 661, 663 (Me. 1996) ("Advisory opinions . . . are not binding decisions of the Supreme Judicial Court sitting as the Law Court. 'Even when the Justices are constitutionally empowered to render an advisory opinion, that opinion has no precedential value and no conclusive effect as a judgment on any party, and is not binding . . . in any subsequent litigated matter before their Court.'") (quoting *Opinion of the Justices*, 396 A.2d 219, 223 (Me. 1979)); *Opinion of the Justices*, 198 So. 2d 269 (Ala. 1967); *Opinion to the Governor*, 153 A.2d 168, 170 (R.I. 1959); In re *Opinion of the Justices*, 88 A.2d 128, 139 (Del. 1952).

Significantly, courts have consistently stressed the difference between advisory opinions, issued on hypothetical questions of law, and actual cases and controversies. Lord Chief Justice Mansfield noted that judges were "averse to giving extra-judicial opinions, especially where they affect a particular case," reminding the king that the answer was not binding on the judges. *Case of Lord George Sackville*, 28 Eng. Rep. 940, 941 [2 Eden 371] (Ch. 1760). American courts have noted the same, stressing the lesser value of the advisory opinion. *E.g.*, *Opinion of the Justices (School Financing)*, 712 A.2d 1080, 1084 (N.H. 1998) (courts are "not empowered to give advisory opinions on legal questions involving resolution of questions of fact," but only determinations of facial constitutionality) (quoting *Opinion of the Justices*, 123 N.H. 510, 463 A.2d 891, 892 (1983)). This is because advisory opinions are delivered "without the benefit of full factual development, oral argument, or full briefing by all interested parties." *Opinion of the Justices*, 673 A.2d 693, 695 (Me. 1996).

This Court has explained that its advisory opinions, while very persuasive on matters of law, are not binding judicial precedents. *Lee*, 155 Fla. at 79, 19 So. 2d at 572; *State* ex rel. *Williams v. Lee*, 121 Fla. at 821, 164 So. at 538 (1935). In this regard, advisory opinions are distinguished from declaratory judgments, which are binding adjudications of the rights of parties. *See Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236-37 (Fla. 1953) (quoting *Ready v. Safeway Rock Co.*, 157 Fla. 27, 34, 24 So. 2d 808, 811 (1946) (Brown, J., concurring)).

As a matter of law, this Court delivers an advisory opinion to the Governor without the benefit of a record or a specific factual scenario, and this Court has stated that it never addresses whether a taxing statute is being unconstitutionally applied in a particular situation. *See* In re *Advisory Opinion to the Governor*, 509 So. 2d 292, 301-02 (Fla. 1987) (advisory opinions are limited to the facial validity of a statute, not as-applied constitutionality, and opponents remain free to challenge a tax even after the advisory opinion). The action by Petitioners in the instant case is an "as-applied" challenge to the SFWMD's discretionary exercise of its taxing authority in levying the full 0.1 mill tax against Petitioners to make them "primarily responsible" for abating pollution caused by EAA polluters.

B. This Court's *1997 Advisory Opinion* Did Not Determine the Constitutionality of a Tax Levied Pursuant to the EFA on Non-Polluters for the Abatement of Pollution in The EPA and the EAA

The central and necessary issues of this case were not addressed by this Court in the *1997 Advisory Opinion* proceeding. The Court rendered its 1997 advisory opinion without the benefit of any evidentiary factual record. There were no live witnesses, no depositions, no sworn statements, no affidavits, no interrogatory answers, no admissions, and no documentation presented regarding taxes imposed by the SFWMD under the EFA. This Court has previously stated that, because its advisory opinions are not based upon a record or specific factual scenario, the Court is careful never to address the issue of whether a taxing statute is being unconstitutionally applied in a particular situation, as Petitioners are alleging in this case. *1997 Advisory Opinion*, 509 So. 2d at 301-02.

In a 1987 advisory opinion, this Court responded to a question from Governor Martinez on whether the services tax violated various constitutional provisions. *Id.* at 297-98. Significantly, this Court stated:

> [B]ecause by nature an advisory opinion is rendered without the benefit of a record or a specific factual scenario, when such an opinion discusses the constitutionality of a statute it is necessarily limited to the facial constitutionality of the enactment. Thus, in the case of the instant tax on the sales and use of services, <u>any interested parties are free to initiate lawsuits to challenge the tax and are free to argue that this advisory opinion has either been wrongly decided or that the Act is</u>

> unconstitutional as applied to their particular situations. (emphasis added)

Id. at 301-02.

Among the issues raised by opponents of the services tax were possible violations of the due process and equal protection provisions of the Florida Constitution. The Court noted:

> Opponents of the tax on advertising also argue that the Act violates due process by failing to fairly apportion the tax for interstate advertisers and by attempting to tax advertisers who have no significant nexus to Florida. Questions such as this, however, are wholly fact specific and we cannot answer them by a facial examination of the statute based upon hypothetical fact patterns. Thus, this type of due process challenge must await a specific "as applied" challenge in an adversarial setting. (emphasis added)

Id. at 305.

This Court ultimately concluded that the statute authorizing the services tax was facially constitutional, with the exception of one provision found to violate the contract clause, Article I, Section 10 of the Florida Constitution. *Id.* at 315. The Court summarized its holding by explaining the nature of its advisory opinions:

> In summation, we emphasize that an advisory opinion is for the benefit of the Chief Executive and, therefore, does not carry with it the mandate of the court. Moreover, the scope of our advisory authority prevents us from considering either federal constitutional questions or the constitutionality of the statute as applied to specific factual scenarios and individual taxpayers. (emphasis added)

Id. at 315. The situation in the instant case is identical with that foreseen by the Court in the case of the services tax. The *1997 Advisory Opinion* made a finding of facial constitutionality of the Everglades Forever Act, but did not consider the factual scenario raised by this appeal: that the SFWMD would ignore the clear constitutional mandate of Amendment 5 in implementing its taxation policies under the EFA.

Granting Respondent's Motion for Judgment on the Pleadings in the instant case, the trial court judge based his decision on the Supreme Court's finding of "consistency" between Article II, Section 7(b) and the Everglades Forever Act. [R-434, 437-9] In so doing, the judge misapplied the standard set forth for interpreting advisory opinions, extending this Supreme Court's finding of facial consistency of the EFA with the overall purpose of Amendment 5 to the discretionary tax levy by the SFWMD which is authorized, but not mandated, by the EFA. The trial judge failed to apply this Court's clear and specific instructions on how to interpret its advisory opinions.

Likewise, the District Court cited the finding of overall "consistency" between the Polluter Pays Amendment and the Everglades Forever Act. *Barley*, 766 So. 2d at 434 (citing *1997 Advisory Opinion*, 706 So. 2d at 282). The District Court noted that this Court had also found that the EFA and the Polluter Pays Amendment serve a "similar purpose," and that, while the EFA should not be considered as implementing legislation, that the EFA was nonetheless to remain in effect until repealed by the

Legislature. *Id.* Petitioners would agree with this statement by the District Court. However, the District Court added, "until the legislature repeals or amends the Everglades Forever Act there is a statutory basis to levy taxes against non-polluting land owners to abate pollution." *Id.* While true that the statute authorizes a tax, this holding begs the question of whether the tax which is levied comports with the constitutional mandate of Amendment 5.

Petitioners agree that the SFWMD's discretionary authority to levy the 0.1 mill tax is founded on - though not required by - the EFA. However, such a levy, although founded on statutory authority, is prohibited by the subsequent and more explicit constitutional provision, which, as interpreted by this Court, requires that "polluters within the EAA must pay for 100% of the cost to abate the pollution they cause." *1997 Advisory Opinion*, 706 So. 2d at 283 n.12; *see also Fee on the Everglades Sugar Production*, 681 So. 2d at 1130-31 ("those . . . who cause water pollution will pay for their pollution."). As Judge Harris noted in his dissent, "the [Polluter Pays] amendment controls the [EFA] and . . . it is 'unconstitutional' for appellee to continue to tax Petitioners to abate pollution in the Everglades caused by others since the date of the amendment." *Barley*, 766 So. 2d at 436 (Harris, J., dissenting).

The decision by the trial judge to grant the SFWMD's motion for Judgment on the Pleadings further amounts to a denial of Petitioner taxpayers' constitutional right to access to the courts, under Article I, Section 21, Florida Constitution. By

foreclosing a taxpayer from challenging the as applied constitutionality of a tax levy solely because of a misapplication, an advisory opinion may improperly foreclose courts from giving relief to taxpayers subject to an unconstitutional tax levy. *See, e.g., Hollywood Jaycees v. State, Dep't of Revenue*, 306 So. 2d 109, 112 (Fla. 1974) (court holding taxation statute unconstitutional as applied due to failure to afford taxpayer due process in contesting governmental decision.)

Petitioners have challenged the constitutionality of the taxing actions of the SFWMD as applied to them. Because these issues were never addressed by this Court in the *1997 Advisory Opinion*, and because advisory opinions are not meant to foreclose as-applied constitutional challenges, this Court should reverse the decision of the District Court and remand this case back for a trial on the merits.

IV. BECAUSE PETITIONERS HAVE ALLEGED FACTS SHOWING UNCONSTITUTIONAL GOVERNMENT ACTIONS, THEY HAVE STATED A CAUSE OF ACTION FOR DECLARATORY RELIEF, AND IT WAS IMPROPER TO GRANT A MOTION FOR JUDGMENT ON THE PLEADINGS.

Petitioners' request for declaratory relief involves mixed questions of law and fact. A legal construction of both Article II, Section 7(b), Florida Constitution and the discretionary tax levy by the SFWMD is required, as well as a factual determination of whether Petitioner taxpayers are paying for pollution abatement costs specifically attributable to EAA polluters.

As to legal construction, this Court has required that taxing provisions of statutes be construed strongly in favor of plaintiff taxpayers and against the government. *See Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967) ("It is a fundamental rule of construction that tax laws are to be construed in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer."); *Heriot v. City of Pensacola*, 108 Fla. 480, 486-87, 146 So. 654, 656 (1933). Where, as here, not just ambiguity exists, but an outright and overt inconsistency between the mandate of a constitutional provision, and the discretionary actions of the taxing agency, this Court must resolve the discrepancy in favor of the taxpayer and the Constitution.

It cannot be supposed that the Legislature intends that an agency authorized to levy taxes, in this case the SFWMD, should violate or contravene the Constitution. *See, e.g., Cawthon,* 88 Fla. at 327, 102 So. at 251 (statutes cannot serve to authorize violations of the Florida Constitution). Indeed, as this Court understood in its *1997 Advisory Opinion*, the Everglades Forever Act does not, on its face, require or mandate anything which is itself unconstitutional with regard to Article II, Section 7(b). Thus, the EFA may legitimately be upheld and affirmed even where, as here, the agency action taken under the EFA must be invalidated. Here, where the discretionary actions of the government agency in levying the tax are directly contrary to the

mandate of Article II, Section 7(b), any such "ambiguity" or "doubt" should be resolved by allowing Petitioner taxpayers to make their case.

With regard to facts, in considering a motion for judgment on the pleadings, all well-pleaded allegations of Petitioners' Amended Complaint, as well as all fair inferences to be drawn therefrom, must be taken as true. *See Williams*, 329 So. 2d at 280; *Reinhard*, 85 So. 2d at 133. Thus, at this stage of the litigation, the SFWMD admits that: (1) EAA polluters do not presently pay 100% of the abatement costs of pollution they cause; (2) Petitioner taxpayers are not EAA polluters; (3) Petitioner taxpayers currently pay pollution abatement costs specifically attributable to EAA polluters; (4) Petitioner taxpayers are actually paying a significant portion of EAA polluters' cleanup costs; and (5) Petitioner taxpayers risk penalties for failure to pay these taxes even though SFWMD's levy of the taxes is in direct contradiction to the constitutional mandate of Article II, Section 7(b), as interpreted by this Court.

The inquiry at this stage is whether Petitioners have stated a cause of action for declaratory relief. If so, the trial court erred in granting a motion for Judgment on the Pleadings. *Reinhard*, 85 So. 2d at 133 (Fla. 1956) ("The test we apply in this instance is the same as if defendant has made a motion to dismiss the complaint for 'failure to state a cause of action.'"); *Faircloth v. Garam*, 525 So. 2d 474, 475 (Fla. 5th DCA 1988) ("The crucial question being whether a cause of action would be established by proving the plaintiff's allegations."); *Turner v. Turner*, 599 So. 2d 765, 766 (Fla. 5th

DCA 1992) ("[i]f the pleadings reveal issues of fact, then a judgment on the pleadings may not be entered.") Important factual issues remain at this stage: *i.e.,* whether, despite a requirement that "polluters within the EAA as a group must pay for 100% of the cost to abate the pollution they cause," the SFWMD has levied a tax on Petitioners and used these funds to pay for pollution abatement costs specifically attributable to EAA polluters. *1997 Advisory Opinion*, 706 So. 2d at 283 n.12.

In affirming the judgment on the pleadings, the District Court accepted Respondent's argument that the "inconsistency" between the actions of the SFWMD and the text of the Polluter Pays Amendment is only a legal conclusion. However, it is the facts, as alleged by Petitioners, which are inconsistent with the law and the Constitution. Specifically, it is the facts surrounding the SFWMD's continuing levy of taxes against non-polluters which are at issue. Petitioners' allegations, accepted here as true, more than suffice to establish a cause of action. *Faircloth*, 525 So. 2d at 475. Petitioners accordingly seek this Court's protection against unjust taxation.

Indeed, the SFWMD has presented a breathtaking list of legal conclusions which both the District Court and trial court below accepted in granting the motion for judgment on the pleadings: 1) that Article II, Section 7(b) is void and meaningless until such a time as the Legislature may choose to give it life; 2) that the South Florida Water Management District may, notwithstanding the language of Article II, Section 7(b) as interpreted by this Court, continue to levy taxes inconsistent with the

requirements of that constitutional provision; and 3) that, notwithstanding the long legal tradition of strict construction in favor of taxpayers against a taxing authority, taxpayers in this case have no recourse to the courts. All of these legal conclusions should not be considered in granting motion for judgment on the pleadings. *See Whitaker v. Powers*, 424 So. 2d 154, 155 (Fla. 5th DCA 1982); *Yunkers v. Yunkers*, 515 So. 2d 419, 420 (Fla. 3d DCA 1987).

Having alleged a tax levy by the SFWMD as applied to them which is inconsistent with and indeed directly contrary to the definite standard of Article II, Section 7(b), Petitioners have stated a cause of action for which a court can and should grant relief. This Court should reverse the decision of the district court affirming the judgment on the pleadings, and remand this case and allow Petitioners an opportunity to prove the facts they allege.

CONCLUSION

In 1996, the citizens of Florida, by a two-third majority, adopted the "Polluter Pays" Amendment to the Florida Constitution. Article II, Section 7(b) requires that "polluters in the EAA as a group must pay for 100% of the pollution they cause." *1997 Advisory Opinion*, 706 So. 2d at 283 n.12. A fundamental premise of our society is that citizens can be secure from governmental actions which violate the provisions of the Constitution. However, the South Florida Water Management District has chosen to ignore the Constitution and tax non-polluting citizens throughout South Florida to pay costs of water pollution abatement attributable to EAA polluters.

Petitioners, as non-polluters, have an organic, undeniable right under Article II, Section 7(b) not to be forced to pay these costs. Petitioners sought a declaratory judgment on whether the SFWMD can continue to ignore the clear mandate of the Constitution and use its discretion to levy unconstitutional taxes against Petitioner taxpayers to pay for EAA-caused pollution. It is this specific action of the SFWMD as applied to Petitioners, not the facial validity of the Everglades Forever Act or the overall implementation of the Polluter Pays amendment, that is at issue in this case.

Petitioners do not here seek to implement the Polluter Pays amendment, but it would be unjust to require Petitioners to continue suffering an injury based upon the unconstitutional *ad valorem* tax assessments by the SFWMD in the hopeful

expectation that some political solution will be found. Petitioners have alleged facts which, if proven, would show that the discretionary tax levy by the SFWMD is directly contrary to the Polluter Pays Amendment, as interpreted by the Supreme Court and as understood by the voters who overwhelmingly adopted it. Petitioners have presented a claim for which courts can grant relief. Because Petitioners' claims demonstrate a cause of action for declaratory judgment, the trial court erred in granting judgment on the pleadings. A genuine case and controversy exists with regard to the constitutionality of the actions of the SFWMD. For these reasons, Petitioners respectfully request that this Court reverse the decision of the Fifth District Court of Appeal affirming the judgment on the pleadings, and remand this case for a trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this ___th day of March, 2001, to RUTH P. CLEMENTS, ESQUIRE, South Florida Water Management District, P.O. Box 24680, West Palm Beach, Florida 33416-4680; to PAUL L. NETTLETON, ESQUIRE, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 4000 Nationsbank Tower, 100 S.E. Second Street, Miami, Florida 33131; and to WILLIAM L. HYDE, ESQUIRE, Gunster, Yoakley, Valdes-Fauli & Stewart, P.A., 215 South Monroe Street, Suite 830, Tallahassee, Florida 32301.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R. APP. P.

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