ORIGINAL

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

AMENDED JURISDICTIONAL BRIEF OF PETITIONERS AND APPENDIX

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LIST OF ABBREVIATIONS

"DCA"	Fifth District Court of Appeal
"EAA"	Everglades Agricultural Area, defined by Section 373.4592(15), Florida Statutes
"EFA"	Everglades Forever Act, Section 373.4592, Florida Statutes
"SFWMD"	South Florida Water Management District

RELEVANT CONSTITUTIONAL PROVISION

Article II, Section 7(b), Florida Constitution, was adopted by Florida voters in 1996 as Amendment 5, and provides:

> 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 the purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.

SUMMARY OF ARGUMENT

In this uniquely important case, this Court is asked to review a DCA decision which held that the SFWMD was not bound by the Florida Constitution in its discretionary levy of a tax under a statutory grant of authority. In our system of justice, a fundamental duty of the courts is to ensure that agencies comply with the Constitution because courts, not agencies, are the primary expositors and interpreters of the Constitution. *See Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 177-78 (1803). An agency cannot act contrary to the language of the Constitution, nor impose a tax contrary to the explicit language of the Constitution. *See Cawthon v. Town of De Funiak Springs*, 88 Fla. 324, 326,102 So. 250, 251 (1924).[1]

Petitioners, Mary Barley et al., request that the Supreme Court exercise discretion under Article V, Section 3(b), Florida Constitution, and take jurisdiction over this case for four reasons: 1) the DCA expressly declared valid the EFA, Section 373.4592(4), Florida Statutes; 2) the DCA expressly construed Article II, Section 7(b), Florida Constitution; 3) the DCA judgment effectively invalidates and nullifies that constitutional provision; and 4) this is an issue of statewide importance relating to constitutional intent, the Florida Everglades and the precedential weight accorded to

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[1]As Judge Harris noted in dissent, "the [Polluter Pays] amendment controls the [EFA] and . . . **it is 'unconstitutional' for appellee to continue to tax appellants to abate pollution in the Everglades caused by others since the date of the amendment.**" (Slip Op., Harris, J., dissenting, at 4) (emphasis added). He added, "[the SFWMD] cannot defy the will of the people and continue to tax non-polluters

advisory opinions. Each of these bases, and all of them, provide grounds for this Court to take jurisdiction of this important case.

Petitioners challenged the SFWMD's discretionary levy of a fee of 0.1 mill, under the authority of the EFA, contending that it is unconstitutional **as applied** to Petitioners. The levy requires Petitioners to pay cost for abatement of pollution specifically attributable to polluters within the EAA, a policy contrary to the textual mandate of Article II, Section 7(b) that polluters in the EAA are 100% responsible for costs to abate water pollution they cause.[2]

ARGUMENT

I. THE DCA EXPRESSLY CONSTRUED ARTICLE II, SECTION 7(b) OF THE FLORIDA CONSTITUTION TO UPHOLD THE SFWMD'S DISCRETIONARY LEVY ON NON-POLLUTERS IN THE OKEECHOBEE BASIN TO FUND EAA POLLUTION ABATEMENT.

The DCA decision explicitly construed the Florida Constitution, providing a jurisdictional basis under Article V, Section 3(b)(3), Florida Constitution. The DCA opinion construed Article II, Section 7(b), and raises critical issues of the Florida

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to clean up after the polluters." (Slip Op., Harris, J., dissenting, at 4).

[2] *See Advisory Opinion to the Governor - 1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 283 n.12 (Fla. 1997); *see also Advisory Opinion to the Attorney General - Fee on the Everglades Sugar Production*, 681 So. 2d 1124 (Fla. 1996) ("those . . . who cause water pollution will pay for their pollution.").

Constitution's supremacy over discretionary agency actions - questions that only this Court can answer. Petitioners challenge the discretionary levy of a fee by the SFWMD upon taxpayers in the Okeechobee Basin as contravening Article II, Section 7(b), as twice interpreted by this Court. This Court articulated the specific requirement of this provision, that polluters in the EAA are "primarily responsible for paying the costs of abatement" of water pollution they cause to mean that "polluters within the EAA must pay for 100% of the cost to abate the pollution they cause." *Advisory Opinion to the Governor*, 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.").[3]

Although the DCA cited this Court's *Advisory Opinion*, it plainly interpreted Article II, Section 7(b) as having no effect on the SFWMD's discretionary levies against non-polluting taxpayers notwithstanding the 100% Polluter Pays standard enunciated by this Court. Of that provision, the district court only stated, "In our view, the trial court correctly ruled that: there is no constitutional impediment to levying a tax upon these taxpayers to clean up the Everglades." (Slip Op. at 2) Thereby, the DCA expressly interpreted and construed the language of the Constitution to **not** require "polluters to pay for their own pollution," a decision that

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[3] The dissent noted, "if reason applies, non-polluters should pay nothing toward the abatement of pollution caused by others. Therefore, the taxes levied against appellants for that purpose are no longer legal after this provision becomes

flies in the face of this Court's own interpretation of the constitutional provision.

The DCA also ignored this Court's instructions that its advisory opinions, while persuasive on matters of law, cannot decide factual disputes not considered by the advisory opinion. *See In re Advisory Opinion to the Governor*, 509 So. 2d 292, 315 (Fla. 1987); *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). The issue in this case is whether facts alleged by Petitioners demonstrate that they are not polluters and therefore cannot be taxed by the SFWMD under the EFA. These facts could not have been considered in any prior advisory proceeding.

As a matter of law, the Supreme Court delivers an advisory opinion on a limited question without the benefit of a record or a specific factual scenario, and this Court has noted 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 at 301-02 (advisory opinions limited to facial validity of a statute, and opponents remain free afterwards to challenge a tax). This is the instant situation, where Petitioners challenge the SFWMD's discretionary exercise of its taxing authority "as applied" in levying the full 0.1 mill tax against Petitioners.[4]

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applicable." (Slip op., Harris, J., dissenting, at 1) (emphasis in original)

[4] The 1997 *Advisory Opinion* addressed only whether Article II, Section 7(b) was self-executing or required implementing legislation; whether the EFA was itself the implementing legislation; and the exact definition of the term "primarily responsible" as used in the provision. 706 So. 2d at 280. Answering only those

The earlier advisory opinion could not address the dispute in the instant case. The DCA's construction of Article II, Section 7(b) is not merely inherent, but explicit and fundamental to its decision. Though it cited the Supreme Court's 1997 *Advisory Opinion to the Governor*, the effect of the district court decision is to interpret and apply the constitutional provision. Also, unlike an advisory opinion, the DCA has created binding precedent with its decision. The DCA's construction of Article II, Section 7(b) more than meets the standard set by this Court in *Armstrong v. City of Tampa*, 106 So. 2d 407 (Fla. 1958). In *Armstrong*, this Court held that a judgment construed the Constitution in providing language "to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." 106 So. 2d at 409; *see also Ogle v. Pepin*, 273 So. 2d 391, 392-93 (Fla. 1973) (affirming *Armstrong*). The DCA's decision "effectively defined the meaning and effect of the constitutional proscription in these circumstances so as to give rise to the appellate remedy" in this Court. *Board of County Comm'rs of Dade County v. Boswell*, 167 So. 2d 866, 867 (Fla. 1964) (citing *Dade County v. Mercury Radio Svc., Inc.*, 134 So. 2d 791 (Fla. 1961)). The district court's statement that "there is no

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questions, this Court held that the provision was not self-executing. *Id.* at 282. The Court found the EFA to be broadly and facially "consistent" with the purpose of Amendment 5, but said that the EFA could not itself be the implementing legislation. *Id.* The Court explained "primarily responsible" noting that Amendment 5 sets forth a clear standard which meant that "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.

constitutional impediment to levying a tax upon these taxpayers to clean up the Everglades" (Slip Op. at 2) absolutely defines the meaning of Article II, Section 7(b). The purpose of Article II, Section 7(b) was to define who should pay to clean up water pollution caused by those in the EAA.

II. THE SUPREME COURT HAS JURISDICTION IN THIS CASE BECAUSE THE DCA EXPRESSLY DECLARED VALID THE EVERGLADES FOREVER ACT.

Under Article V, Section 3(b)(3), this Court may review district court decisions that expressly declare valid a state statute. In the instant case, the DCA specifically upheld the authority of the SFWMD to levy a fee of up to 0.1 mill on property within the Okeechobee Basin, authority granted by the EFA, Section 373.4592(4), Florida Statutes. The DCA wrote, "In our view, the trial court correctly ruled that: there is no constitutional impediment to levying a tax upon these taxpayers to clean up the Everglades . . ." (Slip Op. at 2) Thus, the DCA rejected a challenge to agency action under this statute based on Article II, Section 7(b).

The DCA upheld the statute though Petitioners never challenged the facial constitutionality of the EFA. Petitioners argued that facts showed the SFWMD acted in direct conflict with the Constitution by exercising its discretionary authority, conferred by the EFA, to levy taxes within the Okeechobee Basin and then using these funds for pollution abatement purposes, including abatement of water pollution arising from the EAA. Petitioners challenge this action as an unconstitutional application of

the statute by the SFWMD.

The DCA's explicit recognition that the EFA continues to grant the SFWMD authority to levy the tax within the Okeechobee Basin is substantive, definite and directly related to the factual issue and holding in the case. *See Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439, 441-42 (Fla. 1959)(distinguishing direct from inherent validation). The validation and interpretation is express: "until the legislature repeals or amends the Everglades Forever Act there is a statutory basis to levy taxes against non-polluting landowners to abate pollution." (Slip op. at 3) (emphasis added) The DCA judgment, unlike an advisory opinion, gives explicit and binding validation to the EFA. This validation against an as-applied constitutional challenge is a basis for this Court's jurisdiction.

III. THE DCA'S DECISION HAS STATEWIDE IMPORTANCE BECAUSE ITS EFFECT IS TO RENDER INVALID A PROVISION OF THE FLORIDA CONSTITUTION AND TO ALLOW A STATE AGENCY TO CONTRAVENE THE EXPLICIT LANGUAGE OF THE CONSTITUTION.

Finally this Court must assume jurisdiction over the instant case because of the drastic results of the DCA's decision. Under Article V, Section 3(b)(1), this Court shall hear appeals "from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution." The immediate and actual effect of the DCA decision in this case was to declare invalid and meaningless Article II, Section 7(b), Florida Constitution.

Through a misapplication of this Court's 1997 *Advisory Opinion*, which never addressed as-applied challenges to the constitutionality of agency actions,[5] the DCA erred by invalidating the constitutional provision. The district court interpreted this Court's finding that Article II, Section 7(b) was not self-executing to render the constitutional provision dormant and of no effect at all until the legislature, in its own time, chooses to enact implementing legislation. (Slip Op. at 3) Petitioners never sought to implement Article II, Section 7(b), but relied on this Court's definition of the constitutional standard as requiring "polluters within the EAA as a group [to] pay for 100% of the cost to abate the pollution they cause." 706 So. 2d at 283 n.12. Petitioners, who are not polluters within the EAA, brought suit saying this constitutional provision acts to restrain a government agency from taxing them to pay for EAA pollution.

Under the doctrine *expressio unius est exclusio alterius*, when the Constitution provides the proper manner for doing a thing, the government may not do that thing in a substantially different manner, thereby frustrating the will of the people. *See Sullivan v. Askew*, 348 So. 2d 312, 316 (Fla. 1977). The precise 100% liability standard for EAA polluters set forth in Article II, Section 7(b) operates as a prohibition on the SFWMD from imposing liability on non-polluters for these costs.

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[5] In so doing, the DCA ignored this Court's statements that advisory opinions do not preclude as-applied challenges by taxpayers to agency actions. *See, e.g., In re Advisory Opinion to the Governor*, 509 So. 2d 292, 315 (Fla. 1987).

The DCA decision renders Article II, Section 7(b) a nullity, and allows an agency to act expressly contrary to its provisions, as twice interpreted by this Court. This Court should affirm what should be clear: "[t]he Florida Constitution is the supreme law of Florida, and, as such, it takes precedence over any contrary provisions of the common law or statutes" or the discretionary actions of executive agencies.[6] As the dissent says, "No legislative action 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." (Slip op., Harris, J., dissenting, at 3).

CONCLUSION

This case is more than an argument over property taxes in South Florida. It is a case of fundamental, and statewide significance determining whether discretionary acts of a state agency are superior to the Florida Constitution, and whether the agency's interpretation of the Constitution enjoys greater deference than the interpretation twice provided by this Court. If the Constitution provides that non-polluters shall not pay polluters' costs in the Everglades, is the SFWMD free to disregard this explicit statement? At issue is the supremacy of the Constitution.

The DCA decision provided three separate and equally valid bases for this Court to take jurisdiction of this case: (1) the DCA expressly construed a provision of

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[6] *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997) (citing *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769 (1914) and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994)); *Cawthon*, 88 Fla. at 326, 102 So. at 251.

the state constitution, namely Article II, Section 7(b); (2) the district court declared valid the EFA, Section 373.4592(4), Florida Statutes; and (3) the decision effectively invalidated this provision of the Florida Constitution, at least until the legislature chooses to enact implementing legislation. Each of these three bases provides grounds for this Court to assume jurisdiction under Article V, Section 3. This case has additional statewide significance due to its importance for Everglades restoration. For these reasons, the petition of Mary Barley et al. should be granted.

Respectfully submitted this 13th day of October, 2000.

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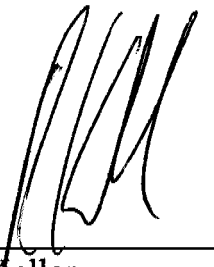
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 13th day of October, 2000, 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.



Richard A. Keller

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IN THE SUPREME COURT OF FLORIDA

Case No. **
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

APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2000

MARY BARLEY etc., et al.,

Appellants,

v. CASE NO. 5D98-3178

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Appellee.

_____/

Opinion filed August 25, 2000

Appeal from the Circuit Court
for Orange County,
Lawrence R. Kirkwood, Judge.

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and E. Thom Rumberger and Richard Keller
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Paul L. Nettleton of Carlton, Fields, Ward,
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THOMPSON, C.J.

The issue in this case is whether allegedly non-polluting property owners may be taxed pursuant to the Everglades Forever Act in light of a constitutional amendment

(Amendment 5) which requires that polluters pay for the abatement of pollution they cause.

The 1994 Everglades Forever Act authorized the South Florida Water Management District (district) to levy up to 0.1 mill on property within its district for pollution abatement. Appellants own property within the district and contest the district's authority to tax them for this purpose in light of the 1996 adoption of Amendment 5. Amendment 5 provides that "those who cause water pollution within the [district] shall be primarily responsible for paying the costs of abatement of that pollution." In our view, the trial court correctly ruled that: there is no constitutional impediment to levying a tax upon these taxpayers to clean the Everglades; and, Florida courts cannot force the legislature to pass the legislation which would implement Amendment 5, the "polluters pay" amendment.

In Advisory Opinion to the Governor - 1996 Amendment 5 (Everglades), 706 So. 2d 278, 283 n. 12 (Fla. 1997), the supreme court determined that Amendment 5 requires those responsible for pollution to pay for its abatement. The court held, however, that (1) Amendment 5 was not self-executing and (2) the Everglades Forever Act was still valid law. The court stated:

> [W]e conclude that Amendment 5 is not self-executing and cannot be implemented without aid of legislative enactment because it fails to lay down a sufficient rule for accomplishing its purpose.

706 So. 2d at 281. Further, the court went on to state: "We find no inconsistency between the Everglades Forever Act and Amendment 5." 706 So.2d at 282.

Moreover, the court also opined that while Amendment 5 and the Everglades Forever Act serve a similar purpose, "we do not construe the Everglades Forever Act to be the

enabling legislation for Amendment 5." Id, at 282. Citing In re Advisory Opinion to the Governor, 132 So. 2d 163, 169 (Fla. 1961), the court stated that because Amendment 5 was not self-executing, the Everglades Forever Act remained in effect until repealed by the legislature. Id. Thus, 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.

The dissent recognizes that the District "can continue to tax for non-abatement purposes and even for abatement of pre-amendment pollution," but contends that the district cannot continue to tax non-polluters. A court, however, 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 Advisory Opinion to the Governor, 706 So. 2d at 281 ("[I]n adopting Amendment 5, the voters expected the legislature to enact supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected").

AFFIRMED.

PETERSON, J., concurs.
HARRIS, J., dissents with opinion.

HARRIS, J., dissenting. **Case No: 5D98-3178**

The issue in this case is whether non-polluting property owners are entitled to immediate relief from taxation based on a constitutional amendment (Amendment 5) which requires that polluters pay the entire cost associated with their pollution. Appellants (property owners within the taxing district) sought to enforce the provisions of Amendment 5 by preventing appellee from continuing to assess a tax against their property to clean up the on-going pollution caused by others. The court granted judgment on the pleadings in favor of appellees' and appellant's appeal. I would reverse.

In 1994, the legislature enacted the Everglades Protection Act which authorized the South Florida Water Management District to levy up to 0.1 mill on property within its district for, among other uses, pollution abatement. Hence, the legislature placed a portion of the burden on all property owners, even those who do not pollute, to pay for pollution control. Appellants own property within the district and have been and continue to be taxed for this purpose. In 1996, the people of Florida adopted Amendment 5 which provided that "those who cause water pollution within the [district] shall be primarily responsible for paying the costs of abatement of that pollution." The supreme court, by advisory opinion,[1] determined that this language requires that the polluters pay 100% of the pollution they cause. Conversely, if reason applies, non-polluters should pay nothing toward the abatement of pollution caused by others. Therefore, the taxes levied against appellants for that purpose are no longer legal after this provision becomes applicable.

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[1] *Advisory Opinion to the Governor - 1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 283 n. 12 (Fla. 1997).

The supreme court also determined that Amendment 5 is not self executing and that the Everglades Protection Act, which it found to be consistent with the amendment, would continue in force until "repealed by the Legislature." This determination was made on a facial examination of both the Everglades Protection Act and Amendment 5. The supreme court stated that the provisions were "adopted for a similar purpose – to require polluters to pay for the abatement of their pollution."[2]

Judge Thompson's well-written opinion assumes that the supreme court has finally spoken on the "self executing" issue; it further assumes that if any portion of a constitutional amendment is not self-executing, then none of it is. But as the supreme court stated in its advisory opinion (by footnote 7), "[t]he will of the people is paramount in determining whether a constitutional provision is self-executing."[3] The amendment herein contained two provisions: non-polluters should pay nothing and polluters should pay all to clean up their pollution.[4] 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

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[2] *Id.* at 282. .

[3] The thing about advisory opinions is that they are merely advisory. They make a determination of rights, albeit tentative, of persons who are not parties and who have had no opportunity to participate in the decision. For that reason, the court is open, when an actual controversy concerning the issue comes up, to reconsider its advisory opinion in light of the parties' arguments.

[4] As stated by the supreme court in *Williams v. Smith*, 360 So. 2d 417, 420 (Fla. 1978) in footnote 6:

> We are not here concerned with any subsection of the Sunshine Amendment other than subsection 8(d). The variety of language in the several subsections of the "Sunshine Amendment" makes it unwise to conjecture whether some, all or none of the other provisions are self-executing.

caused by others? The plain meaning of a non-polluter is one who causes no pollution. It is the plain meaning of the words that the supreme court has attributed to this amendment. Can the legislature now defeat the will of the people by "defining" a polluter as anyone who lives within the district – even if they can show they do not pollute? By refusing to take any action on the amendment for several years, the legislature has done just that.

Although the amendment was adopted some years ago, the legislature has failed to adopt the implementing legislation.[5] Appellants argue that even though the legislature has failed to enact legislation defining water pollution and determining what constitutes a polluter and hence may not be in a position to carry out the mandate of the amendment by making the polluters pay, this does not affect their right as non-polluters, also granted by the amendment, not to pay any of the costs of abating pollution caused by others since the amendment.[6] This portion of the amendment, they urge, is self executing. No legislative action 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. I agree. The legislature cannot by inaction repeal the will of the people.

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[5]If indeed the legislature continues to forestall clear directions from the people by merely taking no action, and the courts approve such tactic, this sleeping giant might awaken someday and cast out its faithless servants. I admit the foregoing sentence may be somewhat trite. It is calculated to dramatically point out the relative importance of the people, the legislature and the courts in a constitutional form of government. Sometimes we forget.

[6]A constitutional provision may act both as a sword as well as a shield against unlawful action. *See Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L. Ed. 2d 376 (1976); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L. Ed. 662 (1974).

And 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.[7] For example, if everyone living in the district is a polluter, there is no inconsistency. If, however, we accept the allegation of appellants, as we must on a judgment on the pleadings, that they are non-polluters, then as applied to this case there is an inconsistency between the act and the amendment because the act requires every property owner, polluter or not, to contribute to cleaning up the pollution. Further, the amendment controls the act and, assuming as I do that the amendment's prohibition against taxing non-polluters to abate others' pollution has current validity, it is "unconstitutional" for appellee to continue to tax appellants to abate pollution in the Everglades caused by others since the date of the amendment.

Obviously the District can continue to tax for non-abatement purposes and even for abatement of pre-amendment pollution. But it cannot defy the will of the people and continue to tax non-polluters to clean up after the polluters.[8]

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[7]By its very nature, an advisory opinion is rendered without the benefit of a record or a specific factual scenario. Thus any discussion of the constitutionality of a statute is necessarily limited to the facial constitutionality of the enactment. *In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987).

[8]I do not challenge the value of conservation nor do I challenge the worthiness of the programs of the South Florida Water Management District. But as courts, we must be most concerned with the law, the rule of law, and role that the voice of the people have in it. Even though that voice expressed in the Constitution is calm and distant, it deserves even more respect than that accorded to a marching hoard with its placards and speeches for it has the authority conferred by being the majority vote.