IN THE SUPREME COURT OF FLORIDA

CARIBBEAN CONSERVATION CORPORATION, INC., et al.,	)	
Petitioners,	)	Case No. SC01-1885
vs.	)	Lower Tribunal Case Nos. 1D00-1389, 1D00-1804
FISH AND WILDLIFE CONSERVATION COMMISSION and STATE OF FLORIDA ex rel. ROBERT A. BUTTERWORTH, ATTORNEY GENERAL,	)	Trial Ct. No. 99-4188
Respondents.	)	

BRIEF OF MARINE INDUSTRIES ASSOCIATION OF FLORIDA, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

On Review of a Final Order of
the District Court of Appeal
For the First District

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PREFATORY NOTE

References to the Record on Appeal are denoted by brackets containing "R." followed by the pertinent page number, or "[R. __]". References to the Supplemental Record on Appeal are denoted by brackets containing "S.R." followed by the pertinent page number, or "[S.R. __]". References to the Appendix are denoted by brackets containing "A." followed by the pertinent page number, or "[A. __]". In addition, the following abbreviations are used throughout the text of the brief:

APA . Administrative Procedure Act, Chapter 120, Florida Statutes

CRC . . . . Constitution Revision Commission

DEP . . . . Florida Department of Environmental Protection

FWCC . . . . Fish and Wildlife Conservation Commission

MIAF . . . . Marine Industries Association of Florida, Inc.

STATEMENT OF INTEREST

Amicus Curiae Marine Industries Association of Florida, Inc. ("MIAF"), is a Florida non-profit 501(c)(6) corporation with approximately 2,000 members interested in recreational boating in the State of Florida. MIAF members consist of marinas, yacht brokers, boat dealers, boat yards, marine construction contractors, marine professionals (such as engineers and marine surveyors), marine products manufacturers, engine dealers, marine and fishing equipment and supply businesses, boat charter businesses, water taxi services, manufacturers and wholesalers of boats, marine finance and insurance companies, and regional trade associations, whose property and business values, product markets, revenues, and costs of doing business depend substantially on reasonable access by watercraft to navigable Florida waterways without undue delay or unduly restricted access zones. Some of its members have business properties and operations in or near manatee habitat for which the State of Florida has imposed speed limits and other restrictions to protect manatees.

The missions of MIAF are: to represent and educate Florida's recreational boaters and marine industry workforce; to promote and protect recreational boating as a traditional family pasttime; to promote Florida boating as a tourist attraction; and to protect and enhance the environment and Florida's waterways. In pursuit of these

goals, MIAF representatives have regularly appeared before Florida legislative and administrative bodies on behalf of its members with respect to, among other things, the statutory and rule provisions establishing restricted zones and motorboat speed limits for the protection of manatees. Two of its constituent regional trade associations have challenged rules of the Florida Department of Environmental Protection ("DEP") governing the speeds and operation of motorboats for the protection of manatees. *See, Southwest Fla. Marine Trades Ass'n, Inc., v. Florida Dep't of Envtl. Protection*, Case No. 98-4161RP (Fla. Div. of Admin. Hearings); *Marine Indus. Ass'n of South Fla., Inc., v. Florida Dep't of Envtl. Protection*, 672 So.2d 878 (Fla. 4th DCA 1996). In all such efforts, MIAF and its members have relied on procedural rights which would be eliminated if Petitioners prevail in this appeal.

Specifically, Petitioners seek to have this Court declare unconstitutional those provisions of Chapter 99-245, Laws of Florida, which subjected to Florida's Administrative Procedure Act ("APA"), Chapter 120, Florida Statutes, certain powers which the Legislature transferred from DEP to the new Florida Fish and Wildlife Conservation Commission ("FWCC"), effective July 1, 1999. The direct effect of such a ruling would be to deprive MIAF and its members of the right to participate as

substantially affected persons, pursuant to the APA, in rulemaking designed to protect manatees through the regulation of motorboat speed and operation.

Absent APA rights to address substantive geographic limitations, factual and scientific analyses, and balancing of the rights of boaters with the protection of the manatees, all as imposed by the Legislature, the Florida regulatory scheme could lead to less rigorous decision-making by the FWCC and lack the predictability and fundamental fairness which have characterized it to date. In rule-making proceedings for the restriction of boat speed and operation to protect manatees, the ability of MIAF and others similarly situated to protect their businesses serving the boating public, their rights to use the waters of Florida for navigation, and their investments in waterfront properties and watercraft, would be severely diminished by the elimination of their rights to bring administrative challenges to proposed and existing rules under legislatively-imposed standards. Moreover, elimination of APA rights would force affected persons to initiate civil litigation to vindicate their interests in this area.

Upon issuance of the trial court's Final Summary Declaratory Judgment, MIAF attempted to intervene in order to move for rehearing. However, the trial court denied MIAF's motion to intervene without comment by order dated April 11, 2000.

On appeal of the trial court's order, MIAF sought and, without opposition, was granted leave to appear as *amicus curiae* in support of the FWCC and Attorney

General. *See, Florida Fish & Wildlife Conservation Comm'n v. Carribean Conservation Corp., Inc.*, 789 So.2d 1053 (Fla. 1st DCA 2001).

STATEMENT OF THE CASE AND OF THE FACTS

MIAF adopts the Statement of the Case and of the Facts set forth in the Answer Brief of Respondent State of Florida ex rel. Robert A. Butterworth, Attorney General.

STANDARD OF REVIEW

The constitutionality of a statute is reviewed *de novo*. *Florida Dep't of Ins. v. Keys Title and Abstract Co., Inc.*, 741 So.2d 599, 601 (Fla. 1st DCA 1999). The reviewing court must begin the process of appellate review with a presumption that the statute is valid. *Ocala Breeders' Sales Co., Inc. v. Florida Gaming Centers, Inc.*, 731 So.2d 21, 24 (Fla. 1st DCA 1999). Moreover, all reasonable doubts as to the validity of a statute are to be resolved in favor of constitutionality. *In re Estate of Caldwell*, 247 So.2d 1, 3 (Fla. 1971).

SUMMARY OF ARGUMENT

Collectively known as "1998 Revision 5", Article IV, Section 9 and Article XII, Section 23(b) of the Florida Constitution, as amended in 1998, transferred to the FWCC "[t]he jurisdiction of the marine fisheries commission as set forth in statutes in effect on March 1, 1998." Art. XII, § 23(b), Fla. Const. As of March 1, 1998, the Marine Fisheries Commission ("MFC") had *no* authority to regulate motorboat speeds and operation to protect manatees. Instead, such authority rested exclusively with DEP and was statutorily, not constitutionally, transferred to the FWCC by Chapter 99-245, Laws of Florida. As a statutory transfer, it was subject to legislatively-imposed limitations and protections, including APA rulemaking requirements.

Petitioners' Initial Brief ignores the fundamental rule requiring constitutional provisions to be read in a manner that effectuates the intent of the framers. Instead, Petitioners argue that the plain meaning of Article IV, Section 9 gives the FWCC sole constitutional authority over endangered and threatened marine life. Petitioners can only pursue this "plain meaning" argument by ignoring the ballot summary and record of the Constitution Revision Commission ("CRC"), as well as the plain language of Article XII, Section 23, all of which confirm that the Framers of Revision 5 intended that the constitutional transfer *not* include authority over manatees and sea turtles. Indeed, the CRC purposely *excluded* such authority from the constitutional transfer

because it sought to ensure that existing APA rights in this area would not be eliminated.

As reflected in Chapter 99–245, Laws of Florida, the Legislature's subsequent construction of the constitutional revision comports with the Framers' intent and is entitled to deference. Petitioners' contrary construction would nullify over two decades of statutory and regulatory history and would undermine the credibility of the FWCC's regulation of endangered and threatened marine species in the future.

ARGUMENT

The pivotal issue in this appeal is *not* whether the new FWCC can adopt rules governing motorboat speed and operation to protect endangered or threatened marine species, such as manatees and sea turtles. Rather, the issue is whether the FWCC's authority in this area is *constitutional* -- and therefore beyond the reach of the Legislature -- or *statutory* and thus subject to legislative standards and APA safeguards.

This is not merely an academic issue. Some level of controversy will attend any regulatory regime governing the speed and operation of motorboats for the protection of manatees in Florida waters. Persons whose livelihoods and recreational pursuits depend on their use of the waterways experience significant restrictions on their ability to navigate. Persons devoted to the protection of manatees -- which roam freely throughout the coastal waters of peninsular Florida -- place high value on the avoidance of motorboat collisions with manatees. Conflicting interests between humans and manatees are inevitable because they occupy the same waters. Yet only one of those species -- humans -- can be regulated. That is why the Florida Legislature has required the protection of manatees where necessary, but also has infused the regulatory regime with substantive standards and procedural protections. Petitioners now ask this Court to overturn that balance by attributing to the Framers

and voters intentions which were neither advanced by the CRC nor identified in the ballot summary.

I. By improperly reading Article IV, Section 9 in isolation, Petitioners ignore the clear intent of Framers to promote open government through citizen involvement and legislative oversight.

In construing constitutional provisions, this Court must ascertain and effectuate the intent of the framers. *Metropolitan Dade County v. City of Miami*, 396 So.2d 144, 146 (Fla. 1980). Petitioners' Initial Brief ignores this fundamental rule and instead argues that the plain meaning of Article IV, Section 9 gives the FWCC sole constitutional authority over endangered and threatened marine life. Petitioners can only pursue this "plain meaning" argument by ignoring the ballot summary and record of the CRC, as well as the plain language of Article XII, Section 23, all of which confirm that the Framers of Revision 5 intended to promote, rather than thwart, legislative oversight and citizen involvement in the regulatory process and -- for that very reason -- did *not* intend to provide the FWCC constitutional authority over endangered and threatened marine species.

The ballot summary accompanying Revision 5 made it abundantly clear to the voters that the Revision only granted the FWCC "certain" powers over marine life and that the remaining powers remained for the Legislature to delegate. The plain language of Article XII, Section 23, specifies that the "certain" powers over marine life granted

to FWCC were limited to those exercised by the MFC under the statutes in existence as of March 1, 1998. As explained in the State's brief, the MFC's jurisdiction as of that date did not extend to endangered and threatened marine species. Accordingly, Revision 5 left the regulation of endangered and threatened marine species within the Legislature's power to delegate.

For the most part, Petitioners' Initial Brief ignores Article XII, Section 23. Ultimately, however, Petitioners attempt to gloss over the clear limitation of the FWCC's constitutional authority by mis-characterizing Article XII, Section 23 as simply a "timing and process" provision which does not involve an allocation of substantive powers. Such a mis-characterization ignores the plain language of the provision which makes it clear that the FWCC's power over marine life cannot be expanded beyond that exercised by MFC as of March 1, 1998, "except as provided by general law." Moreover, Petitioners' premise that the "Scheduling" provisions in Article XII of the Constitution relate solely to timing and process is fallacious. By definition, a "schedule" provides detail to matters treated elsewhere.[1] Here, Article XII, Section 23 provides detail to the Article IV, Section 9 description of powers granted to the FWCC.

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[1] *See,* BLACK'S LAW DICTIONARY, at 1206 (5th Ed. 1979) (defining "schedule" as "[a] sheet of paper annexed to a statute, deed, deposition, or other legal instrument, exhibiting in detail the matters mentioned or referred to in the principal document; *e.g.*, schedule of assets and liabilities (debts) in a bankruptcy proceeding.").

Petitioners also inexplicably ignore the record of the CRC, which conclusively demonstrates that the Framers of Revision 5 purposely did *not* intend for the FWCC to have *constitutional* authority over endangered or threatened marine species, such as manatees and sea turtles, because they sought to ensure that existing APA rights in this regulatory area would not be eliminated. As noted in the Official Commentary to the 1998 Constitutional Amendments, the CRC took pains to respond to "objections to adding jurisdiction to an agency that is not subject to the [APA], when exercising constitutional jurisdiction[.]"[2] Vol. 26, FLA. STAT. ANN., at 10 (2000 Pocket Part).

Based on the understanding that "any functions delegated by the legislature would be subject to the APA", the CRC intentionally "left for the legislature to determine the administering agency" for certain programs "–namely, the Florida Marine Patrol, certain research facilities, and *manatee and marine sea turtle programs.*"[3] *Id*.

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[2] Florida courts commonly look to CRC commentary and debate when interpreting constitutional revisions. *See e.g., Lake Worth Utilities Authority v. City of Lake Worth,* 468 So.2d 215, 217 (Fla. 1985) (citing official reporter of 1968 CRC); *Schreiner v. McKenzie Tank Lines*, *Inc.* 432 So.2d 567, 569 (Fla. 1983) (citing transcripts of the 1968 CRC to determine framers' intent). *C.f., Williams v. Smith*, 360 So.2d 417, 420 n.5 (Fla. 1978) (contrasting constitutional amendment adopted by CRC or legislative vote, where intent of framers is paramount, with amendment adopted by initiative, where voters' intent is given more weight).

[3] As further explained in the State's brief, this intent is confirmed by the CRC's debate over the so-called "Thompson amendment" approved on March 17, 1998. At that time, Commissioner Clay Henderson explained: "By the Thompson amendment, we recognize that there are still some matters that still remain within the regulatory authority of DEP; namely at this time, manatees and sea turtles." CRC Transcript, Mar. 17, 1998, at 53-54 [S.R. 92-93].

(Emphasis added). Additionally, to supplement this APA-based measure for statutory delegations, the CRC even added a new provision in Article I, Section 9 to require the FWCC "to establish procedures to ensure adequate due process in exercising its [constitutional] functions." *Id.* As CRC Commissioner Clay Henderson explained in the Statement of Intent offered with final passage of Revision 5, and in a subsequent FLORIDA BAR JOURNAL article, these measures were intended to increase access to the new commission and to allay concerns that the commission would be too insulated. *See, Statement of Intent Regarding Conservation of Natural Resources and Creation of Fish and Wildlife Conservation Commission,* JOURNAL OF THE SENATE, at 261-62 (May 5, 1998) [R.407-08]; Wm. Clay Henderson & Deborah Ben-David, *Revision 5: Protecting Natural Resources,* FLA. BAR J., at 36 (Oct. 1998) [R.415-17].

Rather than promote public access, Petitioners' construction of Revision 5 would decrease it by extinguishing APA rights that MIAF and other concerned citizens previously enjoyed when DEP was the agency responsible for adopting regulations governing the speed and operation of motorboats in order to protect manatees. This result would contravene the intent of the CRC in drafting Revision 5, as well as the intent of the Legislature in enacting Chapter 99-245, Laws of Florida, which specifically requires the FWCC to follow APA disciplines when adopting rules in this area.

II. As reflected in Chapter 99-245, Laws of Florida, the Legislature's construction of the constitutional revisions is consistent with the Framers' intent and is, therefore, conclusive.

"In matters of constitutional interpretation, the Legislature's view of its authority is highly persuasive." *Gallant v. Stephens*, 358 So.2d 536, 540 (Fla. 1978). Indeed, "[w]here a constitutional provision is susceptible to more than one meaning, the meaning adopted by the legislature is conclusive." *Vinales v. State*, 394 So.2d 993, 994 (Fla. 1981), *citing, Greater Loretta Improvement Ass'n. v. State ex rel. Boone*, 234 So.2d 665, 669 (Fla. 1970). As this Court explained in *Greater Loretta Improvement Association*, 234 So.2d at 670, this rule of deference is founded on the separation of powers doctrine:

> When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another of power committed to the latter. The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary.

Thus, even if the Court finds Revision 5 could be construed differently, it should accept the construction adopted by the Legislature in Chapter 99-245, Laws of Florida.

In this case, deference to the Legislature's construction is particularly appropriate because the Legislature construed Revision 5 in the manner the CRC

intended – as giving the Legislature the choice in determining which agency should administer manatee and sea turtle programs so as to protect citizen access under the APA. Moreover, the meaning of the constitutional provision in question rests at bottom on the interpretation of pre-existing *statutes* (i.e., the MFC's jurisdiction under Chapter 370, Florida Statutes, as of March 1, 1998) and, therefore, is a matter for which deference to the Legislature's construction is particularly compelling.

III. Ignoring the Framers' intent would nullify over two decades of statutory and regulatory history and would undermine the credibility of the FWCC's regulation of endangered and threatened marine species in the future.

In 1979, the Legislature first amended the Florida Manatee Sanctuary Act, Section 370.12(2), Florida Statutes, to authorize the adoption of rules governing the speed and operation of motorboats for the protection of manatees. *See*, Ch. 79-164, § 6, Laws of Fla. Since then, DEP, its predecessor agency DNR, and FWCC, DEP's successor agency, have adopted almost 200 pages of such regulations pursuant to the APA. *See,* Ch. 68C-22, Fla. Admin. Code (App. B). Most of those regulations were adopted before March 1, 1998, by DEP and its predecessor, and no other state agency adopted any before that date.[4] This mature regulatory scheme existed when Revision

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[4] Petitioners' assertion that, at most, endangered species -- but not threatened species or species of special concern -- were excepted from the jurisdiction of the MFC, makes no practical sense. Otherwise, the agency regulating manatees or sea turtles would have shifted depending on whether the species was listed as endangered

5 was framed by the CRC and adopted by the voters. To pretend that the Framers or the voters intended to supplant it for the future with a new constitutionally-based scheme subject to no statutory standards and no prescribed procedures (other than constitutional minimum due process) is incredible and defies common sense, yet that is Petitioners' claim in its simplest form.

It is understandable that Petitioners would complain, as they did in their Memorandum of Law in Support of Motion for Summary Judgment [R. 318-333], that the exercise by others of their rights under Chapter 120 "effectively postponed the effective date of conservation measures for marine species", citing a grand total of seven reported cases over twenty years of regulation. One party's substantive and procedural rights are always another party's inconvenience, however, and the few reported cases are the exceptions which prove the rule: The legislatively-devised regulatory scheme has worked well in an arena which inevitably produces some controversy, but has resulted in extensive, area-specific regulations for the protection of manatees throughout the waterways of peninsular Florida.

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or threatened at any particular moment. Indeed, Petitioners recognized in their Answer Brief in the District Court that this would be an absurd construction. *Answer Brief of Appellees Caribbean Conservation Corporation, Inc., et al.*, at 24, fn 15. Therefore, it may be disregarded by this Court.

It should come as no surprise that the APA process has worked so well. A leading treatise describes the state's powerful motivation for adopting the APA in its current structure as follows:

> One of the moving forces for reform of Florida's administrative process in 1974 was the inability of the public to gain meaningful access to agency rules, adjudicatory decisions, and other policies. Without meaningful access to this information, the public was left to the mercies of bureaucrats and a select group of lawyers or others with insider knowledge of an agency's rules, policies, and adjudicatory orders. This state of affairs significantly contributed to what Senator Baron, one of the sponsors of [APA] reform in the Senate, called the evil of "phantom government" - a government with secret rules and processes known only to a select few to the great detriment of the many.

Arthur J. England & L. Harold Levinson, FLORIDA ADMINISTRATIVE PRACTICE MANUAL, at §4.01 (D & S Pub. 1999) (footnotes omitted). The seminal decision in *State of Florida, Department of General Services v. Willis*, 344 So.2d 580 (Fla. 1st DCA 1977), similarly described the pre-1974 administrative processes and remedies as "primitive in comparison to those available under the Administrative Procedure Act of 1974"

> * * * which subjects every agency action to immediate or potential scrutiny; which assures notice and opportunity to be heard on virtually every important question before an agency; which provides independent hearing officers as fact finders in the formulation of particularly sensitive administrative decisions; which requires written findings and conclusions on impact issues; which assures prompt administrative action; and which provides judicial review of final, even of interlocutory, orders affecting a party's interests.

Id. at 590. Citing Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975):

> [i]ncreasingly, the function of administrative law is . . . the provision of a surrogate political process to insure the fair representation of a wide range of affected interests in the process of administrative decision . . .

Id. at 591, fn11, the *Willis* court also found that

> Florida's 1974 Act . . . recognizes that a hearing independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discretion. Section 120.57 is central to the Act's purpose to provide: ". . . basic fairness which should surround all governmental activity, such as the opportunity for adequate and full notice of agency activities, the right to present viewpoints and to challenge the view of others, the right to develop a record which is capable of court review, the right to locate precedent and have it applied, and the right to know the factual bases and policy reasons for agency action . . . ."

Id. at 591, 592 (footnote omitted).

Further elucidating the purposes of the APA in rulemaking, the same court in *McDonald v. Department of Banking and Finance,* 346 So.2d. 569, 582-83 (Fla. 1st DCA 1977), held that:

> . . . the hearing officer's duty to respond to the evidence . . . cannot fail to promote responsible agency policymaking. The hearing officer's function . . . encourages an agency to fully and skillfully expound its non-rule policies by conventional proof methods; and, in appropriate cases, subjects agency policymakers to the sobering realization their policies lack convincing wisdom, and requires them to cope with the hearing officer's adverse commentary.

As one prominent treatise warns, "conferring broad policy making power on unelected bureaucrats raises serious questions concerning the compatibility of the administrative state with our basic system of democratic government." Kenneth Culp Davis & Richard J. Pierce, ADMINISTRATIVE LAW TREATISE, at 102, § 17.1 (3rd Ed. 1994). Yet under Petitioners' view of Revision 5, the regulation of endangered and threatened marine species would no longer be subject to APA rule challenges which, in the words of one noted Florida APA scholar, implement the "ideal of participatory democracy." Patricia A. Dore, *Access to Florida Administrative Proceedings,* 4 FLA. ST. U. L. REV. 1014, 1015 (1986) (footnote omitted). Put differently, the regulation of endangered and threatened marine species would be thrown back to the era of "phantom government" that precipitated Florida's APA.

The effect of this Court's decision will not end with Chapter 99-245, Laws of Florida. During the 2002 legislative session, the Florida Legislature strengthened both the requirement of a sound evidentiary basis for rules regulating the speed and operation of motorboats for protection of manatees and the ideal of participatory democracy, and it made clear that the protection of manatees and the rights of the public to navigate the waterways are to be balanced in all waters of the state.[5] Under

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[5] *See* Ch. 02-264, Laws of Fla. (App. B). In particular, *see* section 16, which adds subsection 370.12(2)(f) requiring balanced committees of interested local citizens as a prelude to rulemaking, amends redesignated subsections 370.12(2)(g), (h), (i), (k), (n), and (p) by requiring the use of best available scientific and other reliable

the Petitioners' theory of Revision 5, the FWCC would be free to act pursuant to its constitutional authority and to ignore the 2002 legislation, so long as its action meets the requirements of minimum due process. This Court has always protected the administrative process from premature judicial incursion. *See*, *Flo-Sun, Inc. v. Kirk*, 783 So.2d.1029, 1037(Fla. 2001), *Key Haven Assoc'd Enters., Inc. v. Board of Trustees, Internal Improvement Trust Fund*, 427 So.2d 153, 157 (Fla. 1982), *Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So.2d 695, 698-99 (Fla. 1978). It would be ironic for this Court now to eliminate altogether the application of legislative standards and administrative procedures in a regulatory area of such great public interest solely as an unintended and unidentified consequence of a governmental reorganization.

CONCLUSION

The District Court's holding that the Fish and Wildlife Conservation Commission does not possess constitutional authority to regulate motorboat speed and operation to protect endangered and threatened marine species conforms with established precedent as well as the intent of both the Constitution Revision Commission and the Florida Legislature. Accordingly, Marine Industries Association

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information, and amends redesignated subsection 370.12(2)(k) to preclude the posting of boat speeds generally throughout all waters of the state in a manner that would unduly interfere with the rights of fishers, boaters, and water skiers.

of Florida, Inc., respectfully requests that this Court affirm the District Court's Final Order.

Respectfully submitted on this 3rd day of June, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Brief of Marine Industries Association of Florida, Inc., as Amicus Curiae in Support of Respondents" and Appendix was furnished by hand-delivery, on this 3rd day of June, 2002, to the following:

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I hereby certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure as the font used is 14-point New Times Roman.

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