IN THE SUPREME COURT OF FLORIDA

Caribbean Conservation Corporation, Inc., et al. Petitioners, v. Fish and Wildlife Conservation Commission, State of Florida ex rel. Robert A. Butterworth, Attorney General, Respondents.	)	Case No. SC01-1885 Lower Tribunal Case Nos. 1D00-1389, 1D00-1804

REPLY BRIEF OF PETITIONERS CARIBBEAN CONSERVATION CORPORATION, INC., et al.

Review of a Final Order of the
District Court for the First District of Florida

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I. THIS COURT HAS NOT APPLIED AN ELEVATED STANDARD OF DEFERENCE WHEN CONSIDERING LEGISLATION THAT MAY USURP THE CONSTITUTIONAL POWERS OF THE GOVERNOR OR OF THE FORMER GAME AND FRESH WATER FISH COMMISSION

Appellees and Amicus Curia Marine Industries Association of Florida (hereinafter "Marine Industries") advocate a highly deferential standard of review of the constitutionality of the legislation at issue. However, when considering legislation that usurped the constitutional powers of an executive agency, this court's decisions contain no references to a highly elevated standard of review but instead adjudicate boundaries between the jurisdiction of the two constitutional branches of government. Jones v. Chiles, 648 So. 2d 48, 51 (Fla. 1994) (legislature may not usurp constitutional authority of governor to appoint compensation claims judges); Florida Dep't of Natural Resources v. Florida Game and Fresh Water Fish Comm., 342 So. 2d 495, 497 (Fla. 1977) (legislature may pass law affecting Commission's budgetary authority but may not deprive Commission of that authority); Whitehead v. Rogers, 223 So. 2d 330, 331 (Fla. 1969) (statute prohibiting use of fire arms on Sunday conflicted with Game Commission rule establishing hunting seasons and therefore did not qualify as legislation "in aid of" the Commission); Beck v. Game and Fresh Water Fish Comm., 33 So. 2d 594, 595 (Fla. 1948) (legislature has no power to regulate within the zone of

constitutional powers of the Game and Fresh Water Fish Commission); State ex rel. Griffin v. Sullivan, 30 So. 2d 919, 920 (Fla. 1947) (legislative acts regulating within the zone of constitutional powers of the Game and Fresh Water Fish Commission held invalid).

II. THE CONSTITUTIONAL AMENDMENT CREATING THE FISH AND WILDLIFE CONSERVATION COMMISSION HAS A PLAIN MEANING, AND THE BALLOT SUMMARY AND SCHEDULING PROVISIONS ARE CONSISTENT WITH THAT MEANING

The Attorney General contends that the rule *inclusio unius est exclusio alterius* has only limited application to interpretation of the Florida constitution. This court has applied as axiomatic the rule *inclusio unius est exclusio alterius* when the legislature has attempted to modify the constitutional powers to other branches of government. Delano v. Dade County, 287 So. 2d 288, 289 (Fla. 1973) (list of three classes of laws that the constitution authorizes the supreme court to review excludes interpretation that additional class of laws may be similarly reviewed); Ex Parte Cox, 33 So. 509, 510 (Fla. 1902) (rule *inclusio unius est exclusio alterius* excludes constitutional interpretation that courts have powers not enumerated on list); Singer Manufacturing Co. v. Spratt, 20 Fla. 122, 124 (1883) (where powers of court are listed, additional powers may not be implied or conferred by the legislature).

Appellees and Marine Industries assert that the ballot summary proves that the Fish and Wildlife Conservation Commission ("Wildlife Commission") was intended to lack jurisdiction over endangered species. As to the creation of the Wildlife Commission, the summary reads:

> . . . creates Fish and Wildlife Conservation Commission, granting it the regulatory and executive powers of the Game and Fresh Water Fish Commission and the Marine Fisheries Commission; removes legislature's exclusive authority to regulate marine life and grants certain powers to new commission; . . .

Appendix C to Answer Brief of Respondent State of Florida. The Attorney General and Marine Industries contend that the inclusion of the word "exclusive" in the phrase "removes legislature's exclusive authority over marine life" proves that Article IV, section 9 means that the legislature retained some powers. From the fact that the legislature retained some of its exclusive powers, it is argued that one of the powers retained was the power to regulate endangered marine species. However, this argument ignores the fact that the list of powers retained by the legislature is spelled out in Article IV, section 9. On that list are the powers 1) to regulate air pollution; 2) to regulate water pollution; 3) to set license fees for taking marine life; 4) to establish penalties; 5) to adopt laws in aid of the new commission; and 6) to regulate management, personnel and purchasing practices. Art. IV, § 9, Fla. Const. Powers over endangered species do not appear on that list of powers retained by the legislature. The rule *inclusio unius est exclusio alterius* forecloses

supplementation of the list with additional legislative powers.

The Attorney General and Marine Industries advance a close variant of this argument based on the phrase "certain powers" in the above-quoted ballot summary. It is contended that the restrictive phrase "certain powers" proves that regulatory powers over endangered species was retained by the legislature. However, this argument proves nothing. The scope of those "certain powers" can and should be ascertained from the text of Article IX, section 9. That provision confers regulatory powers over "marine life" (except for the list of six powers retained by the legislature).

The Attorney General and Marine Industries advance two arguments in an attempt to elevate the scheduling section to the stature of a substantive provision. First, a series of cases is cited for the proposition that substantive grants of power should be construed in *pari materia* with scheduling provisions. Those cases are In re Apportionment Law, 414 So. 2d 1040, 1049 (Fla. 1982); Dade County v. Pan America World Airways, Inc., 275 So. 2d 505, 509 (Fla. 1973); State ex rel. West v. Gray, 74 So. 2d 114 (Fla. 1954). No such holding appears in any of these cases. In addition, Williams v. Smith, 360 So. 2d 417 (Fla. 1978) is cited for the proposition that substantive provisions should be construed in *pari materia* with scheduling provisions. Williams concerned the question of whether a constitutional penalty was self-executing. In finding that implementing legislation was needed, the

court noted that the scheduling section included within a closely related substantive provision – not in Article XII – set out interim requirements effective until implementing legislation was adopted. Id. at 420, text and n. 7.

Second, the Attorney General and Marine Industries contend that the heading "Schedule" refers not to a list of timing and process provisions but to a detailed list of substantive provisions such as the "schedule" of assets and liabilities submitted in a bankruptcy petition. The scheduling provisions at issue here are in section 23 of Article XII, entitled "Schedule." Rather than enumerating a list of powers granted to the commission and to the legislature, the scheduling section specifies only the timing and transition of authority to the new commission. Thus the scheduling provision should not be construed to amend the substantive provisions of Article IV, section 9.

Ultimately, the Appellees and Marine Industries base their claim for an endangered species exception to the Wildlife Commission's powers over marine life on the textual difference between the 1998 voter initiative and the text of Article IV, section 9. The former provision stated that the new commission shall "exercise the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life, and marine aquatic life,"

[1] while the latter provision states that the new commission "shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life." Art. IV, § 9, Fla. Const. The difference between the two provisions is a missing "the." Upon this vanishingly faint textual nuance rests the argument that the Wildlife Commission's authority contained an express exception for endangered species. If the will of the voters is to have any genuine role, such faint nuances should weigh little against the simple, direct language of the substantive provisions of Article IV, section 9 and its enumeration of powers granted to the Wildlife Commission and to the legislature.

The cases cited in the answer briefs and the initial brief articulate a very wide range of principles for applying constitutional provisions. Compare City of Jacksonville v. Continental Can Co., 151 So. 488, 489 (Fla. 1933) ("[I]f the words . . . convey a definite meaning and involve no absurdity or contradiction between parts of the same instrument, no construction is allowable."); Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n, 489 So. 2d 1118 (Fla. 1986) ("principles, rather than direct operation or literal meaning of the words" control meaning of constitutional provisions); State ex rel. West v. Gray, 74 So. 2d 114, 118 (Fla. 1954) ("words are but imperfect vehicles designed

[1] Advisory Opinion to the Attorney General re: Fish and Wildlife Conservation Commission, 705 So. 2d 1351, 1352 (Fla. 1998).

to convey thought . . .”[2]). Within these cases, a unifying principle appears to be that the court will in extreme cases depart from the literal meaning of a provision only when it would contravene the manifest purpose of the provision. The Conservationists contend that the literal meaning of Article IV, section 9 in fact comports with its manifest purpose to create an independent executive branch with jurisdiction over all creatures great and small.

The answer briefs argue extensively that statements of intent by the members of the Constitutional Revision Commission should control the meaning of the words that the electors of Florida adopted in Article IV, section 9 of the Florida Constitution. When the words of the constitution have a plain meaning that comports with the purpose of the overall provision, that meaning will control even if that meaning is not what the framers intended. In re Apportionment Law, 414 So. 2d 1040, 1051 (Fla. 1982). This modern view elevates the voters to their proper role as the ultimate arbiters of changes to the social contract. The voters, rather than the Statutory Revision Commission, adopted the amendments to the constitution. Those voters are entitled to formulate their decision on the assumption that proposed amendments say what they mean and mean what they say.

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[2] Quoting Meredith v. Kauffman, 293 Ky. 395, 169 S.W. 37, 38 (Ky. 1943).

III. EVEN IF THE POWERS OF THE WILDLIFE COMMISSION ARE LIMITED TO THE EXACT POWERS OF THE FORMER MARINE FISHERIES COMMISSION, THOSE POWERS INCLUDE FULL AUTHORITY OVER THREATENED MARINE SPECIES AND MARINE SPECIES OF SPECIAL CONCERN AS WELL AS CONCURRENT AUTHORITY OVER ENDANGERED MARINE SPECIES

If the intent of the Constitution Revision Commission is to be considered, that intent was to give the Wildlife Commission the same powers that the Marine Fisheries Commission ("MFC") had under (then-existing) Florida Statutes section 370.027.

[3] Appellees and Amicus Curia Marine Industries rely heavily on a statement of intent authored by Commissioner Henderson which reads:

> The proposal enlarges the jurisdiction of the commission to include "marine life." It is the express intent of the drafters to use this term as it is used in Chapter 370 Fla. Stat. as the authority of the Board of Trustees is delegated to the Marine Fisheries Commission.

Appendix F to Answer Brief of Attorney General at p. 262 (emphasis supplied).

[4] If the framers' "express intent" was to transfer the statutory jurisdiction of the MFC under then-existing statutes, then the new commission's jurisdiction was

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[3] § 370.027, Fla. Stat. (1987).

[4] The Conservationists submit that this use of the phrase "express intent" encapsulates this appeal. To be "express" intent, that intent must be "expressed" in the constitution, not in a statement of intent in the record of proceedings. The term "express" means "clear, definite, explicit, plain, unmistakable" and expressed in words. Express is contrasted with implied. BLACK'S LAW DICTIONARY 580 (6th ed. 1991).

intended to include "full rulemaking authority over marine life, with the exception of endangered species" and "exclusive rulemaking authority" over the taking of "marine life, with the exception of endangered species." § 370.027, Fla. Stat. (1997).

A. Endangered Species, Threatened Species and Species of Special Concern

Appellees and Marine Industries argue that because the MFC's powers were limited as to "endangered species," those powers were similarly limited as to marine "threatened species" and marine "species of special concern." This is an effort to broaden the "endangered species" exception to the MFC's jurisdiction so as to except "threatened species" and "species of special concern" as well. These three terms have different meanings. In fact, these terms originate in definitions in related Florida statutes and in rules of then-existing Game and Fresh Water Fish Commission ("GFC"). Three grounds are offered by Appellees for the argument that these statutory and rule definitions should be completely ignored.

First, it is contended that the term "endangered species" is a generic term that refers to species that might become extinct. This argument contravenes the rule of statutory construction that technical terms should be interpreted to have the same meaning in related statutes. Goldstein v. Acme Concrete Corp., 103 So. 2d 202, 204-05 (Fla. 1958) (term "subcontractor" in workman's compensation statute

means "subcontractor" as defined in mechanics' lien statute); Hernando County v. Public Service Comm., 685 So. 2d 48, 50-51 (Fla. 1st DCA 1996) (the legislature is presumed to mean the same thing when it uses the same word in related statutory provisions). Section 372.072(3), Florida Statutes, defines "endangered species" and "threatened species" differently. Indeed, the legislation under challenge employs these statutory definitions and refers to "endangered" and "threatened" marine species as being different.

[5] There is no statutory definition of "species of special concern," but the administrative rule of the GFC defining that term cannot be squared with the theory that such species are part of the generic category of species at risk of future extinction. The administrative rule in effect when the Wildlife Commission was created defined "species of special concern" to include species that might become threatened in the future, that occupy an important ecological niche or that are recovering from a major population decline.

[6]

Second, the Appellees argue that although the framers expressed an intent to

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[5] Chapter 99-245 provides in section 39 that: "(4) Pursuant to s. 9, Art. IV of the State Constitution, the commission has full constitutional rulemaking authority over marine life, and listed species as defined in s. 372.072(3), except for: (a) Endangered or threatened marine species for which rulemaking shall be done pursuant to chapter 120." Ch. 99-245, § 39, Laws of Fla. (emphasis added).

[6] Fla. Admin. Code. R. 39-1.004(71) (R. 4/98), included in Appendix A to this brief.

incorporate the MFC's statutory exception for "endangered species" as an exception to the jurisdiction of the Wildlife Commission, the framers actually also intended to enlarge the exception to exclude threatened marine species as well as marine species of special concern. The excerpts cited on pages 24-26 of the Attorney General's Answer Brief show only that the framers referred to endangered [7] manatees and sea turtles and to the continuation of recovery programs administered by the Department of Environmental Protection ("DEP"). Those excerpts contain no suggestion of an intent to enlarge the statutory exception set out in the MFC statute.

Third, Appellees contend that the MFC had no power over species that were endangered, threatened or species of special concern because its role was only to regulate fishing. As previously explained, the MFC had "full rule-making authority" over marine life. For example, the MFC adopted rules prohibiting the injuring, moving, disturbing or taking of coral;

[8] molesting, harming or mutilating Queen Conch;

[9] and a long-standing rule prohibiting the disturbance, harassment, destruction,

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[7] Manatees and four of five species of sea turtle are endangered. Fla. Admin. Code R. 68A-27.003(1)(b) 6-9, 31; Fla. Admin. Code R. 68A-27.004(1)(b)3.
[8] Fla. Admin. Code R. 46-6.003. (New 7/1/97), included in Appendix B to this brief.
[9] Fla. Admin. Code R. 46-16.003(2) (New 6/17/85), included in Appendix B to this brief.

molestation or taking of any sturgeon.

[10] Shortnose Sturgeon are listed as endangered, Atlantic Sturgeon are listed as a species of special concern and Gulf Sturgeon are federally listed as threatened.

[11]

For the reasons set out above, it is clear that the endangered species exception to the powers of the MFC cannot deprive the Wildlife Commission of constitutional powers over threatened marine species and marine species of special concern. As to these classes of marine life, the MFC had "full" rulemaking authority to conserve them and "exclusive" rulemaking authority over their capture. § 370.027, Fla. Stat. (1997).

B. The Wildlife Commission's concurrent authority over marine endangered species.

Appellees offer a handful of arguments why this court's decision in State v. Davis, 556 So. 2d 1104 (Fla. 1990) does not necessitate the conclusion that a transfer of MFC powers must have included powers over endangered marine species. At page 38, the Attorney General argues that threatened or endangered marine species could not be "renewable marine resources" within the jurisdiction of the MFC. This exact argument was rejected by this court in Davis. Id. at 1107.

[10] Fla. Adm. Code R. 46-15.001 (New 11/25/84), included in Appendix B to this brief.

[11] Fla. Admin. Code R. 68A-27.003(1)(b)4; Fla. Admin. Code R. 68A-27.005(1)(b)1; 40 CFR § 17.11(h).

The Attorney General also argues that the holding in Davis is that the MFC only had the power to regulate fishing gear that incidentally protects marine endangered species. No such limitation is stated or implied in that opinion. Instead, Davis held that the MFC had the authority to both conserve marine life as well as regulate fishing. Id. It also held that the MFC's overall charge was to protect renewable marine resources for present and future generations, which necessarily included powers to restore a depleted marine resource. Id.

The Attorney General also argues that any non-exclusive or shared authority of the MFC over endangered marine species could not "invade" the authority of the DEP to implement programs to conserve marine endangered species. The Conservationists contend that if the MFC's exact statutory powers went to the Wildlife Commission, then the latter Commission's authority over marine endangered species must also be concurrent with the authority of other agencies that could regulate in the area of marine endangered species. When agencies have concurrent authority, both are authorized to act but will not normally adopt overlapping regulations. E.g., Lee County v. Lippi, 662 So. 2d 1304, 1306 (Fla. 2d DCA 1995) (state and local governments have concurrent authority to designate areas where personal watercraft are restricted); see § 120.74(1)(f) (agencies with overlapping jurisdiction directed to coordinate rules to promote efficiency). Thus, the MFC acted to protect endangered Shortnose Sturgeon,

[12] while the DEP acted to protect endangered manatees and endangered marine turtles.

[13]

The statement of intent by Commissioner Henderson and comments by Commissioner Thompson cited on pages 24-26 of the Attorney General's brief are fully consistent with this analysis. Existing programs for endangered marine species were not intended to be automatically transferred from DEP to the Wildlife Commission. However, the Appellees and Marine Industries have cited no statement by the framers evidencing an intent to strip away the MFC's concurrent powers over endangered species.

The MFC's concurrent jurisdiction over marine endangered species was constitutionalized by the creation of the Wildlife Commission. Whenever the Wildlife Commission acts within its constitutional authority – whether its jurisdiction is exclusive or non-exclusive – it operates under its own rules of procedure and not those imposed by the legislature. This is because Article IV, section 9 requires that the Wildlife Commission "shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions." For that reason, the Wildlife Commission cannot be subject to

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[12] Fla. Admin. Code R. 46-15.001 (New 11/25/84).
[13] Fla. Admin. Code R. 16N-22 (prior to 1999).

legislative requirements to comply with the Administrative Procedure Act when it regulates in the area of endangered marine species.

CONCLUSION

In conclusion, Conservationists respectfully request that this court find unconstitutional Florida Statutes sections 20.331(6)(c), 370.025(4), 370.12(1)(c)(3), 1(h), 2(g), 2(h), 2(i), 2(k), 2(l), 2(m), 2(n), 2(p)(1) and 2(q) because they usurp the constitutional powers of the Wildlife Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via First Class U.S. Mail this 18th day of June, 2002, to:

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I HEREBY CERTIFY that the text herein is printed in Times New Roman 14-point font, and this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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