



December 11, 2017

Sent via Email: william.schifino@flcra.gov

The Honorable William Schifino, Jr.
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399

Dear Chairman Schifino:

On November 27, 2017, I wrote a letter to you expressing the concerns of the Institute and its membership regarding Constitution Revision Commission Proposal 23. It is my understanding that Commissioner Gamez filed a proposed amendment to Proposal 23 late in the day on December 8, 2017, which would modify Proposal 23 to read:

The natural resources of the state are the legacy of present and future generations. Every person has a right to a clean and healthful environment, including clean air and water; control of pollution; and the conservation and restoration of the natural environment as provided by law. A resident of this state, not including a corporation, may enforce this right against any party, public or private, subject to reasonable limitations, as provided by law.

While the amendment would (1) avoid the creation of vague substantive rights to conservation and restoration of the “scenic, historic, and aesthetic values of the environment” and (2) limit the cause of action to non-corporate Florida residents, the amendment does not address our primary concern. Proposal 23 would still place in the Florida Constitution a near-permanent, self-executing, private cause of action for Florida’s more than 20 million residents and non-corporate business entities to sue “any party, public or private” for violation of their constitutional rights to a “clean and healthful environment” including “clean air and water” and “control of pollution.”

As explained in detail in my November 27, 2017 letter, the judicial branch would likely construe Proposal 23 as granting fundamental rights to be further defined on a case-by-case basis by courts, and any attempts by the political branches to legislate around those rights would be strictly scrutinized. Matters of environmental policy and regulation will be handed in large part to the judiciary, and the political branches will be hamstrung to address any concerns created by the amendment. Even for the judiciary, the doctrine requiring lower courts to follow prior precedent set by higher courts will make any changes—even necessary ones—nearly impossible to implement by an individual court. And as shown in my original letter, the experiences in other states—particularly Hawaii and Pennsylvania—have borne out these concerns. None of these concerns go away with the proposed amendment.

Moreover, despite the apparent good-faith attempt to limit the class of persons that can bring this new cause of action, as drafted the amendment would still allow

Florida's more than 20 million residents to sue private and public parties for any perceived violation of the constitutional right to a "clean and healthful environment." While the amendment would specifically exclude corporations from that class, the amendment would not prevent non-corporate Florida business entities, such as partnerships and limited liability companies, from bringing suit.

Again, causes of action already exist that allow almost anyone in Florida—including corporations—to sue to enforce environmental laws. For example, section 403.412, Florida Statutes, grants a broad cause of action to "[a]ny person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state." § 403.412(2)(a)2., Fla. Stat.

The near-permanent cause of action authorized by Proposal 23 is unnecessary and will only open the floodgates to litigation, displacing the well-established regulatory framework and remedies that already exist in Florida for addressing environmental harms. For these reasons, the Institute continues to oppose Proposal 23 and opposes the amendment offered by Commissioner Gamez.

If you have any questions or comments, please do not hesitate to contact me.

Respectfully,



William W. Large
President

cc: Jeff Woodburn
William Spicola