FLORIDA
Justice Reform
INSTITUTE

November 27, 2017

Sent via Email: william.schifino@flcrc.gov

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

Dear Chairman Schifino:

I write in opposition to Commissioner Proposal 23 (Proposal 23), which proposes to create new private cause of action to enforce environmental rights. Under Proposal 23, Article II, Section 7 of the Florida Constitution would be amended to add the following provision:

> (c) 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, scenic, historic, and aesthetic values of the environment as provided by law. Any person may enforce this right against any party, public or private, subject to reasonable limitations, as provided by law.

Thus, this provision would grant every person fundamental rights to: (1) "a clean and healthful environment, including clean air and water"; (2) "control of pollution"; and (3) "the conservation and restoration of the natural, scenic, historic, and aesthetic values of the environment." None of these terms are defined. Nonetheless, the amendment would give "[a]ny person" the right to enforce those substantive rights "against any party, public or private," subject to "reasonable limitations, as provided by law."

However well-meaning the proposal is, the Florida Justice Reform Institute opposes Proposal 23. Proposal 23 would enshrine in the Florida Constitution a self-executing, private cause of action allowing "any person" to enforce vague environmental rights that are entrusted to the judiciary to further define. Although the provision also authorizes the legislative enactment of "reasonable limitations" to that cause of action, those reasonable limitations would be strictly scrutinized by Florida's courts to ensure they are narrowly tailored to achieve a compelling state interest. The ultimate result will be that much of the decision-making power over environmental matters will be transferred from the legislative and executive branches—which already have established an extensive regulatory framework for environmental protection—to the judiciary to decide on a case-by-case basis. Once a body of judicial case law is built, defining and enforcing those rights, that case law will be difficult to modify even by

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courts, as courts are bound to follow their prior precedent. For these reasons, Proposal 23 is a near permanent, unnecessary solution in search of a problem.

The interpretation and enforcement of similar constitutional provisions in other states have been placed squarely in the hands of courts and outside the reach of the political branches.

Several other states have adopted similar provisions in their state constitutions. The experience in these states illustrates that the vague rights granted by such constitutional provisions are left wide open to interpretation and enforcement by the judicial branch.

1. Pennsylvania

Pennsylvania's constitution provides that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," and "[a]s trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." Pa. Const. art. I, § 27.

Invoking this constitutional environmental rights amendment, a plurality of the Pennsylvania Supreme Court invalidated the General Assembly's enactment of legislation imposing statewide regulations on fracking and preempting local regulations. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2016). Because the rights granted by the provision were broad and undefined, the plurality said that the job of articulating the provision's standards—like "clean air" and "pure water"—was left to the judiciary.

The General Assembly argued that the constitutional provision itself appeared to authorize the enactment of legislation which would serve to manage and protect the environment while allowing for the development of valuable natural resources. While acknowledging that the Assembly through the legislation had created a comprehensive scheme to accommodate recovery of a resource that would offer the very real prospect of jobs and other important benefits to the commonwealth, the court said that it came at the price of "a detrimental effect on the environment." The court lamented how environmentally-destructive industries of the past, like coal, had arisen with no cause of action available for citizens to stop them. "The litigation response was not available in the nineteenth century [to stop such industries], since there was no Environmental Rights Amendment," the court said, but "[t]he response is available now."

Although there was uncertainty regarding the impact of the *Robinson Township* decision since it was issued by a plurality of the court, the Pennsylvania Supreme Court confirmed a year later in *Pennsylvania Environmental Defense Foundation ("PEDF") v. Commonwealth*, 161 A.3d 911 (Pa. 2017), that a heightened standard of review applies to actions challenged under the environmental rights amendment and that the cause of action created by the amendment is self-executing. Legal commentators in Pennsylvania have warned that future environmental litigation will almost always contain a count under the environmental rights amendment, citing to *PEDF*, and courts will be required to develop tests and rules to implement the *PEDF* court's holding that the commonwealth must act as a trustee toward the environment.

2. *Montana*

Proposal 23's sponsor cites Montana as her primary inspiration for the proposed amendment. Montana's state constitution grants "[a]ll persons" a right to a "clean and healthful environment." Mont. Const. art. II, § 3. This provision has proved a useful tool for litigants as Montana's courts have afforded robust rights under the provision, even at the expense of co-existent constitutional rights, like the right to acquire property.

In *Montana Environmental Information Center v. Department of Environmental Quality*, 988 P.2d 1236 (Mont. 1999), the Montana Supreme Court found that this provision granted all persons a fundamental right, and as a consequence, the court strictly scrutinized legislation viewed as "weakening" environmental protections by exempting certain projects from environmental review.

A few years later, the Montana Supreme Court said that the constitutional provision supported its decision to invalidate a contract between private parties that would have required drilling. *Cape France Enters. v. Estate of Peed*, 29 P.3d 1011 (Mont. 2001). The dissenting justice pointed out that the majority had failed to weigh or even mention the co-existent constitutional right being exercised by the parties to the contract—the constitutional right to acquire, possess, and protect property.

3. *Hawaii*

Hawaii's state constitution contains a substantially similar provision as that set forth in Proposal 23. Article IX, Section 9 of the Hawaii Constitution states that "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."

Hawaii's highest court made clear that this provision creates a self-executing, private right of action in *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 103 (Hawaii 2010). "Put another way," the court said, "the right exists and can be exercised even in the absence of" legislative action concerning that right. Further, to the extent the legislature could enact "reasonable" limitations, the court emphasized that the power to regulate or limit is not unfettered and the cause of action cannot be abolished altogether.

4. *Illinois*

Illinois is often given as an example of a state in which the judicial branch has limited the rights granted by such a constitutional provision—but the fact remains that the state's judiciary was tasked with deciding the scope of the vague provision.

In 1970, the State of Illinois amended its constitution to provide that the "right to a healthful environment . . .. may [be] enforce[d] . . . against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law." Ill. Const. art. XI, § 1.

Facing this nebulous constitutional provision, the parties in *Gillison v. City of Marion*, 720 N.E.2d 1034 (Ill. 1999), argued over what was meant by the phrase "healthful environment." Forced to look past the undefined phrase and to the history of the provision itself, the Illinois Supreme Court ultimately held that the right does not reach protection of endangered species and only reaches lawsuits meant to protect human health. However, that interpretation was one afforded to the court given the vague language of the provision.

Proposal 23 would create new fundamental environmental rights that will be defined by the judiciary and insulated from modification by the political branches.

Much like these other states, Proposal 23 would similarly create fundamental rights by enshrining those rights in the Florida Constitution and granting a self-executing cause of action to enforce those rights. Based on those amorphous rights, "any person" could sue "any party, public or private" for claimed infringement of those rights. Courts would be the final arbiter of those rights, and those rights would be effectively insulated from any real modification by the legislative or executive branches.

Once interpretation and definition of a fundamental right is given to the judiciary, it is difficult for any corrections or modifications to be made by the political branches. Just as it is in the states described above, any legislation viewed as impairing a fundamental right would be strictly scrutinized and would be *presumptively* unconstitutional. *See, e.g., Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1245 (Fla. 2017); *State v. J.P.*, 907 So. 2d 1101, 1114 (Fla. 2004). Thus, even the "reasonable limitations" that may be placed on this cause of action would be subjected to strict scrutiny. Put another way, to the extent the legislature wanted to place a "reasonable limitation" on the expansive cause of action granted, the limitation would only be acceptable if it was narrowly tailored to achieve a compelling state interest—a candidly difficult test for any legislation to satisfy.

For an example of how difficult it is to legislate on the border of a fundamental right, one need look no further than Florida's constitutional right of privacy. "[T]he Florida Constitution contains, in article I, section 23, a strong right of privacy provision." *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002). Because that right is explicit in the Florida Constitution, it is broader, more fundamental, and even more highly guarded than any federal counterpart. *See Weaver v. Myers*, No. SC15-1538, 2017 WL 5185189, at *5 (Fla. Nov. 9, 2017). Invoking that broad privacy right, the Florida Supreme Court recently struck part of the medical malpractice pre-suit statute in *Weaver v. Myers*. The court ruled that statutes authorizing the conduct of informal, ex parte interviews with a medical malpractice claimant's treating physician are an unconstitutional invasion of privacy because such interviews *could possibly* include discovery of medical information unrelated to the malpractice suit.

By giving the interpretation, definition, and enforcement of these vague environmental rights to the judiciary, it also means that changes will be difficult to enact even by future courts because of the doctrine of stare decisis. Stare decisis is the legal doctrine which requires courts to follow precedent—the body of law set forth in earlier court decisions handed down by superior courts that controls what lower courts

do. In Florida, the "presumption in favor of stare decisis is strong." *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637-38 (Fla. 2003). Stare decisis will only give way where there has been a significant change in circumstances since adoption of the precedent or where there has been a clear error in the prior court decision's legal analysis. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). Stare decisis, however, does not yield based on the conclusion that a prior precedent is merely erroneous. The reality is that once a body of case law is built around the constitutional rights proposed to be created by Proposal 23, the cause of action built by that body of case law will be shielded from real, even necessary change—absent amendment of the constitution.

Environmental protection is more effectively addressed through statute and regulation, which can be modified as needed based on expertise and experience.

Statutory legislation and agency rules are better tools for addressing environmental regulation and protection. Statutes may be adjusted through legislation every year as needed, and as a consequence statutes are much more adaptable due to changes in circumstances. Agency rules can give life to legislation, based upon the agency's expertise and experience in that area of the law, and they too can be modified relatively easily in response to changed circumstances. With fundamental rights wholly defined by courts and a body of case law insulated from change due to the doctrine of stare decisis, there is no way to effect real change—even when it is sorely needed.

Other litigation vehicles exist for protecting the environment.

There are also numerous viable avenues for environmental litigation under current law. Torts like nuisance are readily available to address environmental harms that directly affect citizens. As another example, section 403.412, Florida Statutes, authorizes suits by citizens to enforce laws, rules, and regulations for the protection of air, water, and other natural resources, and the law imposes a lessened standing requirement on citizens seeking to bring such suits. Additionally, there are federal causes of action, like those provided under the Clean Water Act, available to challenge governmental environmental decisions. There is no shortage of ways to bring suit to protect the environment. Proposal 23 is not needed.

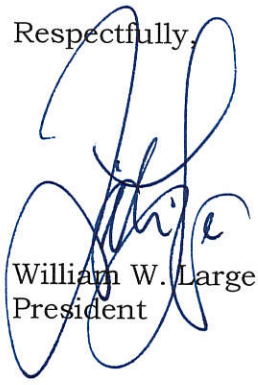
Conclusion

The cause of action to enforce vague environmental rights proposed by Proposal 23 is unnecessary, and will only open the floodgates to litigation and create a new body of case law regarding environmental rights wholly defined by the judiciary. A constitutional amendment is a near permanent action, and is typically reserved for those instances in which there is a strong reason to believe that the political branches of government will fail to bring about the desired policy if left to their own devices. Florida's legislative and executive branches already have enacted numerous comprehensive measures designed to protect Florida's environment. In addition, the state constitution already establishes that it is "the policy of the state to conserve and protect its natural resources and scenic beauty," and this existing provision mandates that "[a]dequate provision shall be made by law for the abatement of air and water pollution and . . . for the conservation and protection of natural resources." Fla. Const

art. II, § 7(a). The current regulatory framework and legal remedies available to address environmental harms are sufficient, and Proposal 23 will do more harm than good in trying to augment that framework.

For these reasons, the Institute opposes Proposal 23. If you have any questions or comments, please do not hesitate to contact me.

Respectfully,



William W. Large
President