SC15-780

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:
LIMITS OR PREVENTS BARRIERS TO LOCAL SOLAR ELECTRICITY SUPPLY

ATTORNEY GENERAL'S ANSWER BRIEF

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SUMMARY OF THE ARGUMENT

A sponsor using the initiative process to propose constitutional change must give voters the information they need to cast informed and intelligent ballots. A sponsor also must frame an initiative so that it strictly complies with the single subject requirement. Because the Sponsor did not do so here, this Court should remove the proposal from the ballot.

Voters need to know this Amendment will alter the existing landscape of utility regulation. Specifically, the Amendment would remove a class of utilities from regulation by the Public Service Commission. But the ballot title and summary are silent as to this scope and impact—indeed, they obscure it.

Compounding their failure to disclose the Amendment's true impact, the title and summary affirmatively mislead by implying "local solar electricity supply" is currently unavailable, which is not the case. Currently, local solar energy options exist, and the Legislature already expressly encourages solar energy within Florida. Nonetheless, the title and summary tell voters there are "barriers" to local solar energy in Florida, and that the Amendment is necessary to overcome them.

Moreover, the Sponsor chose to include language in the ballot title and summary that invites emotional responses from voters. This language improperly editorializes and does not belong on the ballot.

Apart from its defective ballot title and summary, the Amendment does not strictly comply with the Florida Constitution's single subject requirement. The Amendment combines multiple distinct subjects into one proposal, substantially impacts and performs multiple levels and functions of government, and logrolls potentially popular objectives with potentially unpopular ones. Nothing prevented the Sponsor here from separating the Amendment's multiple and distinct subjects into stand alone initiative petitions, as other initiative sponsors have done.

Because the ballot title and summary are misleading, and because the proposal violates the constitutional single-subject requirement, this Court should remove the proposal from the ballot.

ARGUMENT

I. THE PROPOSAL'S BALLOT SUMMARY AND TITLE ARE MISLEADING.

In framing the initiative, the Sponsor had the opportunity to draft an objective and accurate ballot title and summary. Indeed, in its filings with the Financial Impact Estimating Conference (FIEC), the Sponsor offered a straightforward explanation of the Amendment's chief goals. There, for example, the Sponsor explained that "[t]he Solar Amendment is intended to . . . accomplish the following: 1. Prohibit the Public Service Commission (PSC) from regulating small scale solar energy providers as an electric utility. . . ." *See* Memorandum from Floridians for Solar Choice, Inc. to the Financial Impact Estimating Conference, at 3 (Apr. 8, 2015). But the same candor is missing from the ballot summary and title. Because the title and summary do not provide adequate notice to voters, this Court should remove the proposal from the ballot.

According to the Sponsor's initial brief, the title and summary "clearly inform voters of the chief purpose of the proposal," Sponsor Initial Br. at 23, which is "to limit or prevent barriers to local solar electricity supply," *id.* at 25. But this vague generalization (appearing in the both the ballot title and summary) offers nothing of substance in describing the Amendment's true purpose and impact. Voters will not understand what the Amendment actually does.

Notably, this Amendment is not "writ[ing] on a clean slate." *Advisory Op. to Atty. Gen.—Ltd. Political Terms in Certain Elective Offices,* 592 So. 2d 225, 228 (Fla. 1991). Florida has an extensive statutory and regulatory system governing public utilities. *See* Atty. Gen. Initial Br. at 5-6, 8-9. The chief purpose of the Amendment is to alter this existing landscape in significant ways, yet its summary is "devoid of any mention of these consequences." *Advisory Op. to the Atty. Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994) (striking a proposal for, among other reasons, failing to disclose the consequence of requiring government entities to provide compensation for actions that were not compensable under pre-existing state of law). Specifically, the Amendment would remove a class of utilities from regulation by the Public Service Commission. *See* Atty. Gen. Initial Br. at 5-13. Yet rather than just convey this purpose clearly and directly (as it did in its filings before the FIEC, *see id.* at 6, 13), the Sponsor's chosen ballot title and summary obscure that effect.

The Sponsor suggests that the statutory 15- and 75-word limits prevent it from providing complete details about its intent. *See* Sponsor Initial Br. at 24. But the Court has made clear that these word limits do not "give drafters . . . leave to ignore the importance of the ballot summary and to provide an abbreviated, ambiguous statement in the hope that this Court's reluctance to remove issues from the ballot will prevent [it] from insisting on clarity and meaningful information."

Advisory Op. to Atty. Gen ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 899-900 (2000) (quoting *Smith v. Am. Airlines*, 606 So. 2d 618, 621 (Fla. 1992)); *accord id.* ("[D]rafters of proposed amendments cannot circumvent the requirements of section 101.161, Florida Statutes, by cursorily contending that the summary need not be exhaustive. Although significant detail regarding implementation and speculative scenarios may be omitted, this Court has repeatedly held that ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated.").

Moreover, the Sponsor cannot blame word limits for its choice to use vague and non-informative language in the title and summary. For example, rather than using the Amendment's actual title—"Purchase and sale of solar electricity" (6 words)—on the ballot, the Sponsor elected to use the more vague and non-descript ballot title—"Limits or Prevents Barriers to Local Electricity Supply" (8 words). Similarly, in the summary it could have included "Prohibits the Public Service Commission from regulating small scale solar energy providers" (12 words), like it said in its FIEC filings. *See supra*. Instead, it chose "Limits or prevents government and electric utility imposed barriers to supplying local solar electricity" (14 words). And substitutions aside, the word limit certainly cannot

explain the Sponsor's choice to add *extra* words that affirmatively mislead, by characterizing the Amendment as allowing "*non-utility* supply" of electricity, despite state law (and this Court's decision) making clear that a seller of electricity is a "utility." Atty. Gen. Initial Br. at 11-12; *see also PW Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988).

Compounding their failure to disclose the Amendment's true impact, the title and summary affirmatively mislead by implying "local solar electricity supply" is currently unavailable, which is not the case. *See* Atty. Gen. Initial Br. at 13-17 (discussing current local solar energy supply options). The Legislature has already declared a policy expressly encouraging the promotion, stimulation, development, and advancement of the solar energy industry within Florida. *See* § 288.041(2), Fla. Stat. (2014). It has specifically mandated that "the state shall give priority to removing identified barriers to and providing incentives for increased solar energy development and use." *Id.* § 288.0415; *accord id.* ("[T]his state is committed to advancing the use of solar energy in the state."). And it has directed that the PSC "shall not approve any rate or rate structure which discriminates against any class of customers on account of the use of such facilities, systems, or devices." *Id.* § 366.81; *accord id*. ("Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged.").

Nonetheless, the title and summary tell voters there are "barriers" to solar energy in Florida, and that the Amendment is necessary to overcome them. Because they mislead voters, the title and summary are defective.

Finally, the Sponsor asserts that the title and summary are not misleading because they "do not include emotional language or political rhetoric." Sponsor Initial Br. at 27. However, the term "barriers" and the phrase "unfavorable electric utility rates, charges, or terms of service" (which appears nowhere in the text of the Amendment) both invite emotional responses from voters. *See* Atty. Gen. Initial Br. at 17-18. Who wouldn't want to prohibit "unfavorable" anything? Again, the Sponsor chose to use these words. Because the ballot title and summary improperly editorialize about the Amendment's impact, they do not belong on the ballot.

When asked to effect change, voters deserve full disclosure. A sponsor using the initiative process to propose change must disclose the amendment's true purpose and effect. It must give voters the information they need to cast informed and intelligent ballots. Because the Sponsor did not do so here, this Court should remove the proposal from the ballot.

II. THE PROPOSAL VIOLATES THE SINGLE SUBJECT RULE.

Apart from its defective ballot title and summary, the Amendment suffers from another flaw: It does not strictly comply with the Florida Constitution's single subject requirement. *See* Art. XI, § 3, Fla. Const.

The Sponsor presents the conclusory argument that the Amendment "clearly embraces only one subject," Sponsor Initial Br. at 15, because it presents "a single unified question to voters" and "manifests a logical and natural oneness of purpose," *id.* at 10. But it takes more to satisfy the single-subject rule than to restate the standard.

The Sponsor downplays the Amendment's reach, portraying its impact on state law as "minimal and limited in scope and effect." *Id.* at 18. Yet regardless of how the Sponsor characterizes the proposal, the text of the Amendment speaks for itself. The Amendment combines multiple distinct subjects into one proposal, Atty. Gen. Initial Br. at 19-20, substantially impacts and performs multiple levels and functions of government, *id.* at 20-22, and logrolls potentially popular objectives with potentially unpopular ones, *id.* at 22.

Of course, the Sponsor maintains that it had to combine a prohibition on government regulation with restrictions on electric utilities into one proposal because enacting one without the other would have been "fruitless." Sponsor Initial Br. at 14. Its explanation of why it is pointless to limit state regulation without simultaneously imposing private restrictions is unconvincing and speculative. But regardless, it is no defense to a single-subject challenge; the Constitution demands "strict compliance" with the single-subject rule with any citizen initiative. *See Fine v. Firestone,* 448 So. 2d 984, 989 (Fla. 1984) ("[M]ost important, we find that we

should require strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, ...”). Whatever practical reason the Sponsor may have for including disparate subjects in one proposal, the Amendment violates Article XI, Section 3 of the Florida Constitution.

Additionally, nothing prevented the Sponsor here from separating the Amendment’s multiple and distinct subjects into stand alone initiative petitions, as other initiative sponsors have done. *See, e.g.*, *Advisory Op. to The Atty. Gen. re Extending Existing Sales Tax to Non-Taxed Servs. Where Exclusion Fails to Serve Pub. Purpose*, 953 So. 2d 471, 476 (Fla. 2007) (“In an effort to avoid the single subject and ballot summary problems addressed in *Fairness Initiative*, FAIR has now filed three separate initiative petitions for our mandatory review . . . .”); *Advisory Op. to Atty. Gen.—Fee on Everglades Sugar Prod.*, 681 So. 2d 1124, 1126 (Fla. 1996) (reviewing three initiative petitions each separately addressing water pollution in the Everglades sponsored by one environmental group). Recently, the voters approved two similar initiatives regarding redistricting—one for state legislative districts and one for congressional districts. *See* Art. III, §§ 20-21, Fla. Const. (both adopted Nov. 2010). The sponsors there sought change beyond what could be included in one amendment, so they proposed two. The Sponsor here could have done the same.

CONCLUSION

The ballot title and summary are misleading, and the proposal violates the constitutional single-subject requirement. This Court should remove the proposal from the ballot.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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