IN THE SUPREME COURT OF FLORIDA

Case No. SC15-780

Upon Request from the Attorney General for an Advisory Opinion as to the Validity of an Initiative Petition

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

ANSWER BRIEF OF OPPONENTS FLORIDA POWER & LIGHT CO., DUKE ENERGY FLORIDA, GULF POWER COMPANY, and TAMPA ELECTRIC COMPANY

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The sponsor's arguments cannot cure the Initiative's two violations of the single subject requirement. First, the Initiative violates the prohibition against "enfolding disparate subjects with the cloak of a broad generality" in an effort to satisfy the single subject requirement. Second, the Initiative violates the prohibition against restricting both governmental actions and the conduct of private entities. Mixing regulation of both government and private actions in the same constitutional amendment has been determined by this Court to be a single subject violation. None of the cases relied upon by the sponsor upholds proposed amendments that substantially affected both public agencies and private entities.

The sponsor recites a number of general propositions expressed by this Court in connection with single subject analysis, but fails to acknowledge that in applying those general propositions the Court has consistently held that a proposed amendment fails when it substantially affects multiple branches or levels of government, in addition to both public and private entities. A number of the cases cited by the sponsor for those general propositions have stricken proposed amendments because, as here, they had such an effect.

The sponsor asserts that the Initiative will have no impact upon the Public Service Commission's ("PSC's") supervisory authority because the Commission

will continue to have the same authority over the same utilities that it has presently, with the exception of local solar electricity suppliers ("LSES"). Initial Brief of sponsor, p. 21. These LSES would, in fact, be regulated under current law. Far more significantly, however, the Initiative would substantially impair the ability of the PSC to oversee and manage system-wide functions in order to provide a reliable source of energy at reasonable cost. The Initiative would have a similar impact upon the ability of the Florida Department of Agriculture and Consumer Services with respect to its duties in connection with statewide energy policy.

II. The Ballot Summary Is Incomplete and Misleading

The sponsor argues that the ballot Summary is sufficient because it summarizes the literal language of the amendment. This Court has recognized that a summary may be rendered invalid by what it fails to say as well as by what it does say. The Summary does not mention the Initiative's restrictions on health, safety, and welfare regulations. The Initiative is significantly misleading because it is worded to suggest that it is intended to preserve the police power of government to protect public health, safety and welfare when, in reality, its purpose and effect is to *bar* such protections if the difficulty or cost of meeting health, safety and environmental requirements is high enough to be financially prohibitive. The Summary must disclose such a purpose.

The Summary is also fatally defective because of its significant ambiguity. The Summary states that an electric utility remains obligated to furnish service to customers who also purchase solar power. But it gives no hint of whether this means that a utility must be prepared to provide full backup power to solar consumers when solar power fails to provide all of their needs. The Initiative also states that electric utilities cannot charge any special rate, charge, or tariff to a solar consumer that is not also charged to other customers. The Initiative and the Summary fail to indicate whether this means that solar customers cannot be charged their fair share of the cost of maintaining the capacity to provide them with full backup power. These questions are not answered in the amendment itself and certainly not in the Summary, which refers only to the imposition of "barriers."

ARGUMENT

I. The Single Subject Requirement is Violated in Multiple Ways

The sponsor argues that the amendment contains but a single subject, which the sponsor defines as "whether there should be restrictions or limitations on the ability of government or electric utilities from (sic) imposing or placing charges or terms of service upon a local solar electricity supplier . . . ." Initial Brief of sponsor, p. 10. [Initial Brief of sponsor, Section I.A]. The sponsor cites a number of cases in which the Court has utilized broad phrases to describe the nature of the single subject requirement. *E.g.,* Amendment should have "but one main purpose

and object in view and all else included therein is incidental thereto, and reasonably necessary to effectuate the main object and purpose contemplated." *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944); Amendment should deal with a "logical and natural oneness of purpose," *Advisory Opinion to the AG re: Florida Marriage Protection,* 926 So. 2d 1229, 1233 (Fla. 2006); *Fine v. Firestone,* 448 So. 2d 984, 990 (Fla. 1984), and should be "logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Advisory Op. to the Atty. Gen. re Standards for Establishing Legislative District Boundaries,* 2 So. 3d 175, 181 (Fla. 2009); *Advisory Opinion to the AG re: Patient's Right to Know About Adverse Med. Incidents,* 880 So. 2d 617, 620 (Fla. 2004).

Taken alone, these general propositions would encompass any number of disparate subjects and, thus render the single subject requirement practically meaningless. The Court, clearly never intending such a result or broad interpretation, has cautioned that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single subject requirement." *Advisory Op. to the Ag Re Requirement for Adequate Public Education Funding,* 703 So. 2d 446, 449 (Fla. 1997); *In re Advisory Op. to Atty. Gen. Restricts Laws Relating to Discrimination*, 632 So 2d 1018, 1020 (Fla. 1994); *Evans v. Firestone,* 457 So. 2d 1351, 1353 (Fla. 1984). That is precisely what the Initiative sponsor attempts to do

here. Under the broad cloak of eliminating restrictions on solar electricity, the Initiative substantially reduces the powers of the legislative and executive branches, imposes substantial restrictions on local government, and restricts private contract and property rights.

The Court also has gone beyond the broad propositions cited by the sponsor and held that the single subject requirement is violated when an amendment substantially affects multiple functions and levels of government, substantially affects multiple articles and sections of the Constitution that are not identified in the amendment, contains restrictions on both the exercise of governmental powers and private property rights, and deals with separate subjects in a manner that results in logrolling. The application of these requirements has resulted in the Court striking proposed amendments from the ballot in some of the very cases cited by the sponsor for the general propositions noted above. In *City of Coral Gables v. Gray,* the Court struck the amendment under consideration, finding that it contained multiple subjects and amounted to logrolling. The Court noted that, "If it were otherwise, the elector would be put in the position where, in order to aid in carrying a proposition which he considered good or wise, he would be obliged to vote for another which he would otherwise reject as bad or foolish." *City of Coral Gables,* 19 So. 2d at 889. The Court has since explained that avoidance of logrolling is at the heart of the single subject requirement. *Advisory Opinion to the*

AG re: Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient, 880 So. 2d 659 (Fla. 2004); *In re Advisory Op. to the Atty. Gen. - Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994).

In *Fine v. Firestone,* the Court struck the proposed amendment, finding that it "addresses at least three subjects which affect separate, distinct functions of the existing governmental structure of Florida, and substantially affects multiple sections and articles of our present constitution which are not in any way identified to the electorate." *Fine,* 448 So. 2d at 990.

The true test of single subject compliance is whether the proponents can articulate a single subject that is narrow enough to meet the single subject restriction as this Court has interpreted it, and that still encompasses all of the provisions of a proposed amendment. The sponsor's description of what it claims is a single subject in the Initiative fails this test. The sponsor describes the subject of the Initiative as "restrictions or limitations on the ability of *government* or *electric utilities* from (sic) imposing or placing charges or terms of service upon a local solar electricity supplier . . . ." Initial Brief of sponsor, p. 10. Thus, the sponsor's own articulation of the subject includes restrictions on both government and private companies, which, as discussed in the initial brief of these opponents, has been determined by this Court to be a single subject violation.

The sponsor cites *Advisory Opinion to Atty. Gen. - Limited Marine Net Fishing*, 620 So. 2d 997 (Fla. 1993), *Advisory Opinion to the Atty. Gen. Re Limited Casinos,* 644 So. 2d 71 (Fla. 1994), and *Right to Treatment and Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491 (Fla. 2002) as cases in which the Court found that proposed amendments did not substantially affect multiple branches of government. The cited cases each found that there was a single dominant purpose, that the other provisions were simply incidental or implementing, and that there was no impact upon multiple branches or levels of government. In *Limited Casinos,* for example, the Court found that the opponents presented only "speculative scenarios in which the proposed amendment might usurp the functions of the three branches of government." *Limited Casinos*, 644 So. 2d at 74. The Court upheld the proposed amendment, concluding that "nothing in the petition usurps, interferes with, or affects, the powers and authority of the executive branch of government or of local governments . . . ." *Id.*

The Initiative is markedly different and its single subject infractions are far from speculative in their impacts on multiple branches and levels of government. The multiplicity of provisions contained in the Initiative would remove the regulation of rates, service and territory of LSES from the law-making power of the Legislature, and from the regulatory power of the executive branch and local governments. In addition, the Initiative imposes such restrictions on the generation

and sale of electricity by Florida's 34 municipal utilities. None of these provisions is incidental to or for implementation of any of the others. They are independent restrictions leveled at different branches and levels of government and none is necessary to implement any other. For example, as is the case with many laws, an amendment could restrict certain actions of private utilities without also restraining the discretion of government agencies to regulate solar electric suppliers, when such agencies deem it to be in the public interest to do so. Or an amendment could restrict the powers of the executive branch or local government without tying the hands of the Legislature to determine overall public energy policy.

The sponsor concludes that the PSC's supervisory authority will not be altered, since the Commission will continue to have the same authority over the same utilities it has always had, with the exception of LSES. Initial Brief of sponsor, p. 21. [Initial Brief of sponsor, Section I.B]. Current law would require PSC supervision over LSES. The Summary makes no reference to this fundamental departure from PSC oversight. Far more significantly however, LSES, under the Initiative, will have the ability to locate wherever and whenever they wish in essentially unlimited numbers. This will severely impact the PSC's ability to perform significant, essential, system-wide functions: to plan, develop and maintain a coordinated grid, to assure an adequate and reliable source of energy and to avoid uneconomic duplication of generation, transmission and

distribution facilities. *See* § 366.04(5), Fla. Stat. PSC-approved territorial agreements, a key component of an orderly, economical system, could not be enforced to impose limitations on the unregulated LSES, which will be free to go wherever their financial interests direct them.

Similarly, the functions currently exercised by the Florida Department of Agriculture and Consumer Services for the purpose of having a well-coordinated state energy program will be substantially impaired. §§ 377.703(1)-(2), Fla. Stat. It would be exceedingly difficult for this agency to accurately assess the state's energy resources, perform proper forecasts of energy supply and demand, prepare plans and recommend policies for improvement, and meaningfully determine effect's on the "health, safety, and welfare of Florida residents," §§ 377.703(2)(a)-(n), Fla. Stat., when an entire segment of the energy industry is exempted from regulation.

In addition to severely limiting the rate-setting and service authority of municipalities over their own utility systems, the Initiative would effectively exempt LSES from compliance with any local zoning, land management and safety regulations that might impede their efforts to market their product.[1] [Initial Brief of sponsor, Section I.C]. These multiple impacts are more fully described in the

[1] The sponsor makes no effort to identify the health, safety and welfare regulations which might be said to have the effect of prohibiting the supply of solar-generated electricity. The Initiative provides that it is "not limited to" those few referenced in the Initiative. None is referenced in the Title or Summary.

opposition briefs filed by The Florida League of Cities and the Florida Municipal Electric Association, the Orlando Utilities Commission, the City of Coral Gables and the Florida Council for Safe Communities.

In addition to the foregoing restrictions on governmental regulation of solar electricity, the Initiative imposes substantial restrictions on contract and property rights of private electric companies. In *Advisory Op. to the Ag Re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998), the Court found that combining restrictions on government regulations with limitations on the contracting rights of private parties constituted logrolling and thereby violated the single subject requirement. None of the cases cited by the sponsor attempted to impose such restrictions on both governmental bodies and private citizens, and the sponsor makes no attempt to explain how combining the two subjects in a single amendment can comply with the single subject requirement.

II. The Ballot Summary is Incomplete and Misleading

The essence of the sponsor's defense of the ballot Summary is that it summarizes the literal language of the amendment, but the Court has taught that such a literal summary is not always sufficient. [Initial Brief of sponsor, Section II]. The problem with a summary may lie not in what the summary says, but, as here, in what it fails to say. *Advisory Opinion to Atty. Gen. re Casino Authorization*, 656 So. 2d 466 (Fla. 1996).

The Initiative contains a material provision that is misleading in the Initiative itself and not mentioned at all in the ballot Summary. The provision states:

> Notwithstanding paragraph (1), nothing in this section shall prohibit reasonable health, safety and welfare regulations, including but not limited to, building codes, electrical codes, safety codes and pollution control regulations, *which do not prohibit or have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier.*

Initiative, § (2) (emphasis added). The provision is worded to give the impression that its purpose is to preserve the police power of government to protect the public health, safety and welfare. However, the real purpose and effect, based upon the italicized language, is to bar provisions of "building codes, electrical codes, safety codes and pollution control regulations" and other unspecified health and safety regulations if they "prohibit or have the effect of prohibiting the supply" of electricity generated by LSES. In other words, if the cost or difficulty of meeting health, safety and environmental requirements is high enough to be financially prohibitive, solely in the view of the LSES, those requirements would be constitutionally prohibited. Rarely, if ever, is the government completely barred from requiring that businesses comply with health and safety requirements, regardless of how high the risk, simply because compliance would cost too much. Yet, the ballot Summary fails to give even a hint of this restriction.

The Court has found ballot summaries to be fatally defective when they contained ambiguous language that would force a voter to guess as to the amendment's full impact. *See e.g., Advisory Opinion to the Ag Re Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888 (Fla. 2001); *Right of Citizens to Choose Healthcare Providers*, 705 So. 2d 563; *Restricts Laws Related to Discrimination*, 632 So. 2d 1018. In the case of the Initiative, the language of both the proposed amendment and the Summary contain material ambiguities, that, when taken together, leave a gaping chasm of uncertainty for both voters and this Court.

The Initiative states:

> An electric utility shall not be relieved of its obligation under law to furnish service to any customer within its service territory on the basis that such customer also purchases electricity from a local solar electricity supplier.

Initiative, § 29(b)(3). When the Initiative says that an electric utility is not relieved of its obligation to furnish service to solar consumers, it is not clear whether it is intended to require electric utilities to maintain the capacity to provide full backup power to solar consumers, in the event that their solar system fails or they choose to draw electricity from the grid.

Currently, the cost of maintaining the infrastructure of and providing access to the electric grid is distributed equitably among electricity consumers as required by law. The Initiative states:

> No electric utility shall impair any customer's purchase or consumption of solar electricity from a local solar electricity supplier through any special rate, charge, tariff, classification, term or condition of service, or utility rule or regulation, that is not also imposed on other customers of the same type or class that do not consume electricity from a local solar electricity supplier.

Initiative, § 29(b)(2). It is not apparent whether this language is intended to prohibit electric utilities from charging to solar consumers their reasonable share of the cost of maintaining the capacity to provide them with full backup power.

The text of the Initiative does not answer these two questions and neither does the Summary, which says only that the amendment limits or prevents the imposition of "barriers" which, in turn, are defined as "government regulation of local solar electricity suppliers' rates, service and territory, and unfavorable electric utility rates, charges, or terms of service . . . ."

If the answers to the two questions posed above are both "yes," then the effect of the amendment would be to require non-solar consumers to underwrite the full cost of providing solar consumers with backup electricity at all times. This would surely be material to a voter's decision.[2]

The voter is also left to guess at the meaning of "unfavorable." In *Treating People Differently Based on Race in Public Education*, the Court found that the phrase "bona fide qualifications" was ambiguous, as a result of which "voters

[2] The sponsor does not address these questions in its initial brief. If it fails to do so in its answer brief, it is urged to explain the intent of the proposed amendment at the time of oral argument.

would undoubtedly rely on their own conceptions of what constitutes a 'bona fide qualification.'" 778 So. 2d at 899. The Court struck the measure from the ballot stating:

> We have never required that the summary explain the complete details of a proposal and create an undue length nor do we do so now. However, the word limit does not give drafters of proposed amendments 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 us from insisting on clarity and meaningful information.

Id. (quoting *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992)). Surely, the word "unfavorable" is as ambiguous in a summary as the term "bona fide qualification." This is particularly true when the word refers to ballot language that is itself linguistically opaque.

Here, both the Initiative and the Summary use ambiguous language, leaving the Court with no yardstick by which to determine intent and "leaving voters to guess at its meaning." *Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d at 899.

CONCLUSION

The sponsor's arguments all fail to show that the Initiative has a single subject or that the Summary is clear and unambiguous. In fact, for the reasons discussed above and in the initial briefs of the opponents, the Initiative addresses multiple subjects and its Summary is riddled with ambiguity. The Court should not permit the Initiative to appear on the ballot.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished electronically to Attorney General Pamela Jo Bondi at pam.bondi@myfloridalegal.com; Solicitor General Allen Winsor at allen.winsor@myfloridalegal.com; and counsel for the sponsor, Jon L. Mills, at jmills@bsfllp.com, this 30th day of June, 2015.

/s/ Barry Richard
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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced and in compliance with Florida Rule of Appellate Procedure 9.210.

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