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IN THE SUPREME COURT OF FLORIDA

Case Nos. SC15-2150; SC16-12

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: RIGHTS OF ELECTRICITY CONSUMERS REGARDING SOLAR ENERGY CHOICE

RESPONSE OF AMENDMENT SPONSOR
CONSUMERS FOR SMART SOLAR, INC.
TO MOTION FOR RELIEF FROM JUDGMENT,
OR IN THE ALTERNATIVE TO REOPEN CASE

WHITE & CASE LLP
Raoul G. Cantero
T. Neal McAliley
Quinshawna Landon
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

Counsel for Amendment Sponsor, Consumers for Smart Solar, Inc.

For the reasons stated below, Consumers for Smart Solar, Inc. ("Sponsor") hereby opposes the "Motion for Relief from Judgment or Order, or Alternative Motion to Reopen Case Due to Fraud or Other Misconduct on the Court on the Part of the Proponents of Citizen Initiative" (the "Motion").

The Motion asks the Court to revisit its decision in *Advisory Opinion to the Attorney General Re Rights of Electricity Consumers Regarding Solar Energy Choice,* 188 So.3d 822 (Fla. 2016)—issued in March of this year—approving the language of the ballot initiative now known as Amendment 1. The Motion presents no new substantive arguments. Rather, it repeats arguments that the Amendment's opponents had previously raised. The only new "information" – newspaper articles in which third parties allegedly describe the Sponsor's political motivations – lacks substance and is legally irrelevant. The Motion is procedurally deficient, and the Court should dismiss it as a transparent effort to garner media attention in the days before the election.

Before this Court issued its decision earlier this year, it considered every substantive argument made in the Motion about the sufficiency of the ballot title and summary for Amendment 1. For example, the Motion claims that Amendment 1 is a political strategy to restrict solar by presenting pro-solar language (Mot. at 2). The Opponents made that same argument in January. *See, e.g.*, Initial Br. of Progress Florida, Inc., et al., at 5-6 (filed Jan. 12, 2016) (arguing that the "ballot

title and summary . . . 'fly under false colors' . . . by disguising itself as pro-solar"). The Motion also claims that Amendment 1 was "really designed to negate the pro-solar effort of the Coalition for Solar Choice" (Mot. at 3). That argument, too, was in their earlier briefs. *See, e.g.*, Initial Br. of Florida Solar Energy Industries Ass'n ("FSEIA Br."), at 4-6 (filed Jan. 12, 2016) ("The Proposed Amendment was drafted in direct . . . political opposition to a separate proposed ballot initiative . . . drafted by Floridians for Solar Choice"); Answer Br. of Floridians for Solar Choice, Inc. ("FSC"), at 2, 9 (filed Feb. 1, 2016) ("The true purpose of the Proposed Solar Amendment . . . is to 'kill' the Approved Solar Amendment put forth by Floridians for Solar Choice, Inc."). And the argument that the creation of a "right to generate solar power for one's personal use . . . impliedly excludes the constitutional right to share excess power" (Mot. at 5 & n.2), was made by another party. Br. of Florida Energy Freedom, Inc., at 2, 5-9 (filed Jan. 29, 2016) (extensively arguing the "expressio unius" doctrine addressed in the Motion).

In approving Amendment 1 for inclusion on the ballot, the Court considered these arguments. In fact, the Motion refers to the dissenting opinion (Mot. at 4-5), which contains some of the same types of statements made in the Motion. *See, e.g.*, *Rights of Electricity Consumers*, 188 So.3d at 834-35 (characterizing Amendment 1 as "[m]asquerading as a pro-solar energy initiative," and stating that

"the chief purpose of the proposed amendment [is] to maintain the status quo favoring the very electric utilities who are the proponents of this amendment") (Pariente, J., dissenting). The Motion is essentially a motion for rehearing—untimely by several months—that improperly presents arguments previously raised. Fla. R. App. P. 9.330(a); *Dept. of Revenue v. Leadership Housing, Inc.*, 322 So. 2d 7, 8 (Fla. 1975) (holding that challenges to the correctness of a court's conclusions are "not appropriate in a motion for reconsideration or for rehearing."); *UniFirst Corp. v. City of Jacksonville,* 42 So. 3d 247, 248 (Fla. 1st DCA 2010) (noting that a motion for rehearing may not "reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind").

The only new information – a newspaper article alleging that "the sponsors of Amendment 1 'attempted to deceive voters'" (Mot. at 2) – is not only unsubstantiated but directly contradicted by the Sponsor's statements in the very same article. In earlier filings with the Court, the Sponsor made its motivations clear: Amendment 1 is designed to protect the use of solar energy in Florida, but would ensure that government can manage its growth to protect the broader public interest.

Instead of engaging in a policy debate, the Motion attaches newspaper articles that cite statements by someone named Sal Nuzzo, of the James Madison

Institute, about the alleged political motivations behind Amendment 1. Based on Mr. Nuzzo's statements, the Motion alleges that "Consumers for Smart Solar, Inc., the amendment's proponents, . . . misled the Court" (Mot. at 2). Yet, nothing in the articles indicates that Mr. Nuzzo speaks for Consumers for Smart Solar, other than assertions of guilt by association. To the contrary, the articles quote representatives of both Consumers for Smart Solar and the James Madison Institute denying that Mr. Nuzzo or his organization had been hired, funded, or asked to do anything by the Sponsor in the conception, development or drafting of Amendment 1 (Consumers for Smart Solar is prepared to submit affidavits to that effect if necessary). Mr. Nuzzo may have his own motivations for supporting Amendment 1, but he is not the Sponsor. And it is, frankly, reckless to accuse Consumers for Smart Solar of "fraud or other misconduct on the Court" based on newspaper articles citing the statements of a third party.[1]

[1] In separate filings, the FSEIA and FSC assert that the Motion "involves no disputed facts," Motion to Expedite, at 2, and "[t]his case does not involve fact-finding functions and does not require an evidentiary hearing," *see* Petition for Writ of Mandamus, at 6. Of course it does. The same articles on which those parties rely reveal disagreement over whether Mr. Nuzzo represents the Sponsor's views. Moreover, the Court cannot grant a motion under Florida Rule of Civil Procedure 1.540(b)(3) without holding an evidentiary hearing. *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So.2d 487, 489 (Fla. 1st DCA 1986) (unless a Rule 1.540(b)(3) motion fails to raise a colorable entitlement to relief, "a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.").

Although the Sponsor categorically denies the allegations in the Motion, this Court need not reconcile disputed facts, appoint a referee, or do anything other than deny the Motion outright. It can deny the Motion on the law alone. The Motion is based on the false premise that a ballot summary is misleading if it does not state the political motivations of the sponsor. But this Court has repeatedly held that a ballot summary *cannot* address the sponsor's political motivations. *Evans v. Firestone*, 457 So.2d 1351, 1355 (Fla. 1984) ("The ballot summary should tell the voter the *legal effect* of the amendment, and no more. The *political motivation* behind a given change must be propounded outside the voting booth.") (emphasis added); *In re Advisory Op. to the Atty. General –Save Our Everglades Trust Fund*, 636 So.2d 1336, 1342 (Fla. 1994) (same). As Justice Pariente explained in the context of another ballot measure, arguments about political motivation are left to the political process:

> [T]he proponents of this amendment appear to have an ulterior purpose. However, that is not a fatal flaw at this stage of the process. Advocates of a constitutional amendment may have different motives. . . . To ascribe one primary motive to advocates of a measure, and then require that this motive be conveyed in a seventy-five word ballot summary, is impractical if not impossible. I conclude that the task of informing the public as to the possible motivations behind the proposed amendment and its practical effects must fall on the proponents and opponents of the measure.

Advisory Op. to the Att'y General re: Med. Liab. Claimant's Comp. Amendment, 880 So.2d 675, 680 (Fla. 2004) (Pariente, J., concurring).

The Motion is also procedurally deficient. It relies on Florida Rule of Civil Procedure 1.540(b). Even if Rule 1.540 applied to proceedings in this Court for an advisory opinion, it is not enough to "rehash a matter fully explored at trial," or use "the term 'fraud' . . . to label all conduct which has displeased an opposing party." *Flemenbaum v. Flemenbaum*, 636 So.2d 579, 580 (Fla. 4th DCA 1994). Instead, "a rule 1.540(b)(3) motion must specify the fraud with particularity and explain why the fraud, if it exists, would entitle the movant to have the judgment set aside." *Freemon v. Deutsche Bank Trust Co. Ams.*, 46 So.3d 1202, 1204 (Fla. 4th DCA 2010). The Motion alleges no facts specifying a fraud by the Sponsor; it only attaches newspaper articles citing statements by an individual who does not speak for the Sponsor. And even if the statements about the Sponsor's political motivations were accurate – they are not – a sponsor's political motivations are irrelevant to whether a proposed amendment's ballot summary and title should be placed on the ballot.

In truth, this Motion is an attempt to use the judicial process to garner more media attention in the days before the election. The articles attached to the Motion were published more than *two weeks* before the Motion was filed; and the Motion was filed less than a week before the election, in conjunction with a press conference announcing it. While the movants have now asked this Court to set an "expedited schedule" to resolve the Motion, even under their fast-track schedule,

the Motion would not be ripe for decision until *after* the election. It is therefore clear that what the Movant wants to achieve is not the granting of the Motion, but the publicity attendant to filing the Motion, by which they seek to rally the voters to vote against Amendment 1. The Court should reject this last-ditch effort.

Respectfully submitted,

WHITE & CASE LLP
Southeast Financial Center, Ste. 4900
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 995-5290
Facsimile: (305) 358-5744
E-mail: raoul.cantero@whitecase.com
E-mail: nmcaliley@whitecase.com
E-mail: quin.landon@whitecase.com

By: /s/*Raoul G. Cantero*
Raoul G. Cantero
Florida Bar No. 552356
T. Neal McAliley
Florida Bar No. 172091
Quinshawna Landon
Florida Bar No. 99835

Counsel for Amendment Sponsor, Consumer for Smart Solar, Inc.

CERTIFICATE OF SERVICE

I certify that on November 2, 2016, a copy of this brief was served by e-mail on the following:

Tim Cerio
Executive Office of the Governor
State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001
Telephone: (850) 717-9310
Facsimile: (850) 488-9810
E-mail: tim.cerio@eog.myflorida.com

General Counsel to Governor Rick Scott

Matthew Carson
General Counsel
Florida House of Representatives
420 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300
Telephone: (850) 717-5500
E-mail:
matthew.carson@myfloridahouse.gov

General Counsel to House Speaker Steve Crisafulli

Daniel Nordby
Shutts & Bowen LLP
215 South Monroe St., Suite 804
Tallahassee, Florida 32301-0600
Telephone: (850) 521-0600
Email: DNordby@shutts.com

Counsel for The 60 Plus Association, Inc.

Adam S. Tanenbaum
General Counsel
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
Telephone: (850) 245-6536
Facsimile: (850) 245-612
E-mail:
adam.tanenbaum@dos.myflorida.com

General Counsel to Ken Detzner in his Official Capacity as Florida Secretary of State

Bradley Marshall
David Guest
Earthjustice
111 S. M L King Jr. Blvd
Tallahassee, Florida 32301-1451
Telephone (850) 681-0031
Email: bmarshall@earthjustice.org
Email: dguest@earthjustice.org

Counsel for Progress Florida, Inc., Environment Florida, Inc., and the Environmental Confederation of Southwest Florida, Inc.

George T. Levesque
General Counsel
The Florida Senate
409 The Capitol
404 S. Monroe Street
Tallahassee, Florida 32399-1100
Telephone: (850) 487-5237
E-mail: levesque.george@flsenate.gov

General Counsel to Senate President Andy Gardiner

Amy J. Baker
Coordinator
Financial Impact Estimating Conference
Office of Economic and Demographic Research
111 West Madison Street, Suite 574
Tallahassee, Florida 32399-6588
Telephone: (850) 487-1402
Facsimile: (850) 922-6436
E-mail: baker.amy@leg.state.fl.us

Director
Division of Elections
Florida Department of State
R.A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250
Telephone: (850) 245-6200
Facsimile: (850) 245-6217
E-mail: DivElections@dos.myflorida.com

William C. Garner
Robert L. Nabors
Carly J. Schrader
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
Telephone: (850) 224-4070
Facsimile: (850) 224-4073
Email: bgarner@ngn-tally.com
Email: rnabor@ngn-tally.com
Email: cschrader@ngn-tally.com

Counsel for Floridians for Solar Choice, Inc.

Jim Kallinger (By US Mail)
Chairperson
Consumers for Smart Solar, Inc.
2640-A Mitcham Drive
Tallahassee, Florida 32308-0000

D. Bruce May, Jr.
Tiffany A. Roddenberry
Holland & Knight, LLP
P.O. Drawer 810
Tallahassee, Florida 32302
Telephone (850) 224-7000
E-mail: bruce.may@hklaw.com
E-mail: tiffany.roddenberry@hklaw.com

Co-Counsel for the Florida Electric Cooperatives Association, Inc.

Pamela Jo Bondi
Attorney General
Allen C. Winsor
Solicitor General
Gerry Hammond
Senior Assistant Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1060
Telephone: (850) 414-3300
Facsimile: (850) 401-1630
E-mail:
oag.civil.eserve@myfloridalegal.com
E-mail: allen.winsor@myfloridalegal.com
E-mail:
gerry.hammond@myflorida.com

Ennis Leon Jacobs, Jr.
Law Office of Ennis Leon Jacobs, Jr.
P.O. Box 1101
Tallahassee, FL 3302-1101
Telephone: (850) 222-1246
Email: jacobslawfla@gmail.com

Counsel for Florida Solar Energy Industries Association

Warren L. Rhea
Florida Energy Freedom, Inc.
10104 Southwest 17th Place
Gainesville, Florida 32601
Telephone: (352) 231-2579
Email:
warren.rhea@floridaenergyfreedom.org

Alvin Bruce Davis
Squire Patton Boggs, LLP
200 S Biscayne Blvd, Suite 4100
Miami, FL 33131
Telephone: (305) 577-2835
Email: alvin.davis@squirepb.com

Counsel for Florida Power & Light Co.

Michelle Lynn Hershel
Florida Electric Cooperative Association
2916 Apalachee Pkwy
Tallahassee, FL 32301-3608
Telephone: (850) 877-6166
Email: mhershel@feca.com

Benedict P. Kuehne
Michael T. Davis
Law Office of Benedict P. Kuehne, P.A.
BENEDICT P. KUEHNE, P.A.
100 S.E. 2nd St., Suite 3550
Miami, FL 33131-2154
Telephone: 305.789.5989
Facsimile: 305.789.5987
Email: efiling@kuehnelaw.com
Email: ben.kuehne@kuehnelaw.com
Email: mdavis@kuehnelaw.com
Counsel for Florida Solar Energies Association and *Floridians for Solar Choice, Inc.*

/s/*Raoul G. Cantero*
Raoul G. Cantero

CERTIFICATE OF COMPLIANCE

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

/s/*Raoul G. Cantero*
Raoul G. Cantero