IN THE SUPREME COURT OF FLORIDA

Case No. SC04-1134

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: REFERENDA REQUIRED FOR ADOPTION AND AMENDMENT OF LOCAL GOVERNMENT COMPREHENSIVE LAND USE PLANS

ANSWER BRIEF OF OPPONENT FOUNDATION FOR PRESERVING FLORIDA'S FUTURE, INC.

On Direct Review of Validity of an Initiative Petition

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SUMMARY OF ARGUMENT

The sponsor's Initial Brief offers the Court nothing more than conclusory statements with no explanation of how the proposed amendment can be reconciled with the single-subject requirement of the Florida Constitution and the title and summary requirements of Section 101.161.

The sponsor's bald assertion that the amendment would substantially affect only one aspect of government ignores the patently obvious impact upon important functions of city and county governments, the Legislature, and multiple executive branch agencies. Moreover, the impression conveyed by the brief that only local functions are affected echoes one of the worst flaws in the title and summary.

Foundation illustrated in its Initial Brief that the language of the summary is materially inconsistent with the statutory definition of "local comprehensive plan" and with the dictionary definition and common usage of the word "comprehensive." The sponsor's claim that the definition in the amendment is descriptive of the definition in the Local Government Comprehensive Planning and Land Development Act is demonstrably wrong, yet the sponsor makes no effort to explain its claim.

The sponsor attempts to excuse the use of blatant political rhetoric in the first line of the summary by suggesting that such rhetoric will invalidate

an initiative only if it is also misleading. The purported quotation from *Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994) does not appear in that case or elsewhere and the Court has never held that political rhetoric is permissible so long as it is not deceptive. In this case, the statement also happens to be deceptive, but the issue should be clarified by the Court in order to stop the increasingly prevalent practice by initiative sponsors of including political rhetoric in both their proposed amendments and the titles and summaries.

ARGUMENT

I
SINGLE-SUBJECT REQUIREMENT

Significantly, the sponsor of the proposed amendment makes no effort to discuss the aspects of the amendment that, if they do not render it blatantly defective, at very least cry out for explanation. Instead, they offer the Court only conclusory statements that the amendment "should be logically viewed as a single dominant plan to enhance Florida's environmental policy by increasing public participation in local government land use planning," that it "alters only one aspect" of local land use planning, and that it "simply provides that the final local legislative decision to adopt a plan or plan amendment shall be by referendum." Sponsor's Initial Brief, pp. 8, 11.

Similar characterizations were made by the proponents of the 1997 proposal to require that 40% of legislative appropriations be earmarked for education. The proponents argued that that amendment embraced a single dominant plan to assure adequate funding for education and altered only one aspect of government ? the Legislature's appropriations power. Those assertions were rejected by the Court, which struck the proposal and repeated its earlier statement that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement."

Adequate Public Education Funding, 703 So. 2d 446 (Fla. 1997) quoting *Evans v. Firestone,* 457 So. 2d 1351, 1353 (Fla. 1984).

In *Adequate Public Education Funding*, the fact that the amendment would technically have restricted only one function of one branch of state government was irrelevant to the real question of how many government functions were actually altered. The same is true with the current amendment. It may technically only apply to the "final local legislative decision," but, as discussed in detail in Foundation's Initial Brief, it indisputably alters the functions of multiple branches and levels of Florida government. The Legislature currently possesses and exercises the significant power to mandate local governments to adopt land planning provisions that comply with state requirements. State executive agencies currently possess and exercise the significant power to enforce compliance by local governments with state land planning requirements. Those powers will undeniably be altered, indeed rendered impotent, by the proposed amendment.

In its Initial Brief, Foundation noted that the initiative mentions only Article II ("General Provisions"), Section 7 ("Natural Resources and Scenic Beauty"), which it would amend, and fails to mention other substantially affected provisions as this Court requires. See *Tax Limitation,* 644 So. 2d

486 (Fla. 1994); *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). The sponsor insists that the amendment would not substantially affect any provision other than Article II, Section 7. The assertion ignores the glaringly obvious fact that the amendment would substantially affect Article III (Legislature), Article IV (Executive), and Article VIII (Local Government).

II
BALLOT TITLE AND SUMMARY

The sponsor claims that "the definition of 'local government comprehensive land use plan' set forth in the initiative is plainly descriptive of the existing 'comprehensive plans' required by the 1985 Local Government Comprehensive Planning and Land Development Regulation Act, as amended." Sponsor's Initial Brief, p. 20. Once again, the sponsor makes no effort to support its conclusory statement with an explanation. The statement is simply not true. As illustrated in Foundation's Initial Brief, the proposed amendment contains a definition completely and materially *inconsistent* with the definition in the cited statute as well as with the dictionary definition and common usage of the term "comprehensive." Even more importantly, the summary itself is inconsistent with the definition in the proposed amendment and fails to inform the voter of the effect of the definition in the amendment.

The sponsor's insistence that the proposed amendment affects only one aspect of local land planning itself illustrates one of the worst faults of the title and summary. The title and summary convey the same impression as does the sponsor's brief ? that the proposed amendment affects only local government functions. That impression is egregiously inaccurate as discussed in detail in Foundation's Initial Brief.

The Attorney General's transmittal letter notes that the ballot summary and the text of the proposed amendment contain language that may be considered political rhetoric. In its Initial Brief, Foundation argued that the very first sentence of the summary very definitely is political rhetoric and misleading to boot. As anticipated in Foundation's Initial Brief, the sponsor attempts to justify the sentence by stating that it "fairly informs the voters of the text of the first sentence of the initiative." Sponsor's Initial Brief, p. 16. As noted in Foundation's Initial Brief, the mere fact that the sponsor has repeated the rhetoric in the body of the amendment itself makes it no less objectionable. If that were all that were required to render the statement acceptable, the prohibition on political rhetoric would be meaningless.

The sponsor quotes language from several prior cases in which the Court has upheld initiatives despite the inclusion in the summaries of

language that would reasonably fall into the category of political rhetoric. It is true that one can read some past decisions of this Court as sending mixed signals on the issue, but the Court's statement of the principle that political rhetoric is unacceptable has been consistent. It is respectfully suggested that this case is an excellent one in which to make clear to sponsors that political rhetoric has no place in a ballot summary and will result in invalidation.

The sponsor obliquely suggests that political rhetoric will only invalidate an initiative when it is also deceptive, making the following statement on pages 17 and 18 of its Initial Brief:

> "Political rhetoric" that "materially misstates the substance of the amendment" cannot appear in the ballot summary. In re Advisory Op. to the Att'y Gen. – Save Our Everglades, 636 So.2d 1336, 1341-42 (Fla. 1994).

In fact, the quoted language does not appear in the cited opinion or any other opinion of the Court on the issue of ballot language.[1] The actual language in the cited opinion regarding political rhetoric was as follows:

> Finally, the summary more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment. As this Court stated in *Evans:* [T]he ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell

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[1] The undersigned has discussed the quoted language with opposing counsel and he acknowledges that the phrase "materially misstates the substance of the amendment" does not appear in the opinion and that the use of quotation marks was inadvertent. The undersigned does not question counsel's veracity or good faith.

> 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. *Evans,* 457 So.2d at 1355.

Save Our Everglades, 636 So. 2d 1336, 1342 (Fla. 1994).

The Court has never required that political rhetoric also constitute a material misstatement in order to invalidate an initiative. Such a requirement would have rendered the Court's strong commentary on political rhetoric superfluous since a deceptive summary invalidates the initiative by itself. Such a result would be unfortunate because the principle that political rhetoric alone will invalidate an initiative is an important one. To permit the kind of rhetoric included in the current summary would be the equivalent of allowing an incumbent candidate to include a political slogan beside his or her name on the ballot, but to deny the opposing candidate the same privilege. The test should not be whether political rhetoric is deceptive, but whether it serves to objectively explain the chief purpose or effect of the proposed amendment or is simply designed to pander to voters' emotions. In the current petition, the latter is clearly the case.

Even if the Court were to require that political rhetoric also be misleading, the first sentence in the summary under review would meet that test. As noted in Foundation's Initial Brief, the first sentence is deceptive

because it indicates that the amendment would do nothing more than provide for "public participation" when, in reality, it does much more.

CONCLUSION

The Court is respectfully urged to strike the proposed amendment from the ballot.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served by U.S. Mail upon Ross Burnaman, Attorney for Florida Hometown Democracy, Inc., 1018 Holland Drive, Tallahassee, FL 32301, and by hand delivery to Charlie Crist, Attorney General of Florida, The Capitol, Tallahassee, Florida 32301, this ____ day of August, 2004.

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BARRY RICHARD

CERTIFICATE OF COMPLIANCE

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

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BARRY RICHARD