IN THE SUPREME COURT OF FLORIDA

Case No. SC15-2150

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

INITIAL BRIEF OF OPPONENT FLORIDIANS FOR SOLAR CHOICE, INC.

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STATEMENT OF CASE AND FACTS

This matter comes before the Court upon a petition for an advisory opinion submitted by the Attorney General on November 24, 2015, in accordance with the provisions of Article IV, Section 10, Florida Constitution, and section 16.061, Florida Statutes. The question before this Court is whether the text of the proposed amendment entitled "Rights of Electricity Consumers Regarding Solar Energy Choice" (hereinafter "Proposed Solar Amendment"), complies with the single subject requirement of Article XI, Section 3, Florida Constitution, and whether the proposed ballot title and summary comply with section 101.161, Florida Statutes. This Court has jurisdiction pursuant to Article V, Section 3(b)(10), Florida Constitution.

SUMMARY OF THE ARGUMENT

The Proposed Solar Amendment, entitled "Rights of Electricity Consumers Regarding Solar Energy Choice," would enshrine into Florida's Constitution the current law with respect to a consumer's ability to supply electricity using solar electricity generating equipment. Yet the proposed amendment's ballot title and summary confuses and misleads voters by suggesting the amendment somehow relates to the ability of the consumer to exercise a right to make a "solar energy choice" when none is granted. The Proposed Solar Amendment causes this confusion among voters in an apparent effort to defeat the initiative advanced by Floridians for Solar Choice, Inc. (which has already been approved by this Court).

More specifically, the Proposed Solar Amendment initiative is flawed because its ballot title and summary fail to meet the accuracy requirement of section 101.161, Florida Statutes. The sponsor's failure to disclose in the proposed amendment's ballot title and summary that consumers currently have the right under the Florida Constitution and by law to own or lease solar equipment installed on their own property to generate electricity for their own use, when the summary purports that the amendment establishes this right, creates a "false impression" among voters misleading them to believe that they must vote in favor of the amendment in order to have rights already afforded to them. As this Court has held, a failure to disclose in the ballot language that the conditions purported to be

created by the amendment already exist under current law is misleading to the voters and is therefore a fatal flaw requiring the ballot language to be stricken. In addition, the use of the term "Solar Choice" in the ballot title impermissibly "flies under false colors" and "hides the ball" regarding the amendment's true effect because the Proposed Ballot Amendment keeps in place the status quo which prohibits electricity consumers from making choices regarding solar electricity.

The Proposed Solar Amendment's ballot language is also defective because the summary tells voters that, if the amendment is adopted, local governments will retain their ability to protect consumers who do not install solar equipment from having to subsidize "backup power" and electric grid access for those that do. However, the vast majority of local governments lack the authority to address electric rate subsidies or grid access, and therefore, a voter could be misled to think a vote for the Proposed Solar Amendment is necessary to preserve an existing power of his or her city or county which simply does not exist. By the same token, the Proposed Solar Amendment's ballot summary also promises that State and local governments will retain their abilities to "protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do." This statement is misleading because the government's authority in this regard is not at risk. The summary's implication

that "consumer rights" and "public health, safety and welfare" can only be guaranteed with a vote for the Proposed Solar Amendment, constitutes an emotional appeal without any factual basis. As such, the Proposed Solar Amendment should be denied placement on the ballot.

Finally, the Proposed Solar Amendment fails to meet the Florida Constitution's single-subject requirement because it is composed of at least three disparate subjects which do not manifest any logical and natural oneness of purpose. Each serves a distinct purpose separate from the subject advanced by the other. One purpose of the Proposed Solar Amendment purports to establish a constitutional right for an electricity consumer to own or lease solar equipment to generate electricity on his or her own property for his or her own use which right already exists. A separate and disparate purpose of the Proposed Solar Amendment grants constitutional protection for the ability of State and local government to ensure that customers who do not install solar are not required to subsidize costs for those who do. Finally, the Proposed Solar Amendment purports to grant constitutional protection for the retention by the State and local government of their ability to protect consumer rights and public health, safety and welfare. Neither proposal is necessary or essential to advance and maintain the other. Nor does the proposal articulate a single dominant plan or scheme which relies on or is supported or advanced in some way by these disparate provisions.

Failure of the proponent to meet this Court's test for constitutional single-subject compliance provides an independent basis for denying placement of the Amendment on the ballot.

ARGUMENT

I. INTRODUCTION AND STATEMENT OF INTEREST OF FLORIDIANS FOR SOLAR CHOICE, INC., IN THE PROPOSED AMENDMENT.

Floridians for Solar Choice, Inc. is the Sponsor of the amendment proposed by citizens' initiative approved by the Florida Supreme Court for placement on the general election ballot (the "Approved Solar Amendment"). *See Advisory Opinion to the Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235 (Fla. 2015).

The Approved Solar Amendment (excluding definitions and effective date) provides:

> Section 29. Purchase and sale of solar electricity. –
>
> (a) PURPOSE AND INTENT. It shall be the policy of the state to encourage and promote local small-scale solar-generated electricity production and to enhance the availability of solar power to customers. This section is intended to accomplish this purpose by limiting and preventing regulatory and economic barriers that discourage the supply of electricity generated from solar energy sources to customers who consume the electricity at the same or a contiguous property as the site of the solar electricity production. Regulatory and economic barriers include rate, service and territory regulations imposed by state or local government on those supplying such local solar electricity, and imposition by electric utilities of special rates, fees, charges, tariffs, or terms and conditions of service on their customers consuming local solar electricity supplied by a third party that are not imposed on their other customers of the same type or class who do not consume local solar electricity.

(b) PURCHASE AND SALE OF LOCAL SMALL-SCALE SOLAR ELECTRICITY.

(1) A local solar electricity supplier, as defined in this section, shall not be subject to state or local government regulation with respect to rates, service, or territory, or be subject to any assignment, reservation, or division of service territory between or among electric utilities.

(2) 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.

(3) 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.

(4) 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 as defined in this section.

The major investor-owned electric utilities, Florida Power & Light Co., Duke Energy Florida, Gulf Power Company, and Tampa Electric Company (the "Major Investor-Owned Electric Utilities") filed briefs in opposition to the Approved Solar Amendment and participated in oral argument against its placement on the ballot. That these same entities are also the force sponsoring and

advocating the Proposed Solar Amendment whose approval is at issue in this cause is beyond logical debate.[1]

For comparison, the Proposed Solar Amendment (excluding definitions and effective date) provides as follows:

> BALLOT TITLE: Rights of Electricity Consumers Regarding Solar Energy Choice
>
> BALLOT SUMMARY: This amendment establishes a right under Florida's constitution for consumers to own or lease solar equipment installed on their property to generate electricity for their own use. State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do.
>
> ARTICLE AND SECTION BEING CREATED OR AMENDED: Add new Section 29 to Article X FULL TEXT OF THE PROPOSED CONSTITUTIONAL AMENDMENT:
>
> Section 29 – Rights of electricity consumers regarding solar energy choice. –

[1] *See* Lindsay Alexander, *Behind The Brewing Battle Over Solar In The Sunshine State*, November 23, 2015 (http://www.wuft.org/news/2015/11/23/behind-the-brewing-battle-over-solar-in-the-sunshine-state/); Michael Auslen, *Donations pour into utility-backed solar initiative*, Tampa Bay Times, Nov. 11, 2015 (http://www.tampabay.com/news/politics/stateroundup/big-money-floods-coffers-of-solar-energy-amendment/2253499); Bruce Ritchie, *Utility-backed solar group spends more than $3M. on petition gathering*, PoliticoFlorida, Nov. 11, 2015 (http://www.capitalnewyork.com/article/florida/2015/11/8582621/utility-backed-solar-group-spends-more-3-m-petition-gathering#).

> (a) ESTABLISHMENT OF CONSTITUTIONAL RIGHT. Electricity consumers have the right to own or lease solar equipment installed on their property to generate electricity for their own use.
>
> (b) RETENTION OF STATE AND LOCAL GOVERNMENTAL ABILITIES. State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do.

As articulated by a co-chair of the effort to place the Proposed Solar Amendment on the ballot, the unstated motive behind the Proposed Solar Amendment is to "kill" the Approved Solar Amendment:

> "Candidly," says Dick Batchelor, a Democratic former state legislator who's co-chairing the utility-backed campaign, "the purpose is to kill their amendment and to pass ours."

Amy Martinez, *Duel Over the Sun*, Florida Trend, Nov. 2015, at 83.

The Proposed Solar Amendment is presented to the voter through its title as a "Solar Energy Choice"; however no such choice exists in the text of the Proposed Solar Amendment, nor is any described in the ballot title and summary. The voter is misled to an erroneous belief that he or she is required to make a Solar Energy Choice between competing constitutional proposals. Under their strategy the votes for both amendments are thereby diluted and thus neither receives the constitutionally mandated sixty percent approval. The competition to the Major Investor-owned Electric Utilities from the limited generation and sale of solar

energy in the Proposed Solar Amendment is killed and the status quo under the current regulatory scheme remains virtually intact.

Any attempt to frame the issue in this case as a solar energy choice between the Approved Solar Amendment and the Proposed Solar Amendment is patently misleading and beyond the scope of these proceedings to approve the Proposed Solar Amendment for ballot placement. If approved, each amendment could exist concurrently.

Fundamentally, the issue before this Court in these proceedings is whether the Proposed Solar Amendment meets constitutional and statutory requirements to be placed before the voters. Because the Proposed Solar Amendment is manifestly misleading to voters by failing to disclose it simply maintains the status quo, among other issues as set forth below, and because it violates single-subject requirements, it should not be placed on the Ballot.

II. THE BALLOT TITLE AND SUMMARY ARE MISLEADING IN VIOLATION OF SECTION 101.161, FLORIDA STATUTES.

In conducting its section 101.161(1), Florida Statutes, inquiry into the validity of a ballot title and summary, this Court must make two inquiries. First, does the "ballot title and summary … fairly inform the voter of the chief purpose of the amendment." *Right to Treatment and Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 497 (Fla. 2002). Second, "whether the language of the

title and summary, as written, misleads the public." *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998). The Proposed Solar Amendment fails the Court's test under both inquiries.

A. The Summary Misleads By Creating the False Impression That Voters Must Vote In Favor Of The Amendment To Have The Constitutional Right To Own Or Lease Solar Equipment Installed On Their Property For Their Own Use.

The statement in the ballot summary that the purpose of the proposed initiative is to establish a constitutional right for electric customers to own or lease solar equipment installed on their own property to generate electricity for their own use is misleading since property owners currently possess such rights.

This statement in the ballot summary creates the false impression that electric customers do not have the current right to own or lease the solar equipment that is installed on their own property to generate electricity for their own use. This is not true. The Florida Constitution and current statutes and regulations afford consumers the right to own or lease solar equipment installed on their property to generate electricity for their own use.

In *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), this Court considered an amendment proposed by the Legislature that would remove the constitution's absolute ban on lobbying by a former government officeholder. The proposed amendment in that case would have prohibited lobbying unless the affected person

met certain financial disclosure requirements. This Court found that the ballot summary, which purported that the amendment would prohibit lobbying, was defective because it failed to inform the voter that the existing constitution already banned lobbying. This Court concluded that the problem with the summary "lies not with what the summary says, but, rather, with what it does not say." *Id.* at 156.

Similarly, in *Advisory Op. to the Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466 (Fla. 1995), this Court struck an amendment that purported in its ballot summary to prohibit casinos, when most kinds of gaming in Florida were already prohibited. This Court determined that the summary created a "false impression" that casinos were, at the time, allowed in Florida, when they were not. The Court said, that without the admission that casinos were already prohibited in Florida absent the proposed amendment's prohibition, the summary failed "from the same defect as did the summary in *Askew*." *Id.* at 469.

The Proposed Solar Amendment's summary suffers precisely the same defect. The right to own property is one of the "Basic Rights" afforded to Florida Residents. Article I, Section 2 of the Florida Constitution states that "[a]ll natural persons … have inalienable rights … to acquire, possess and protect property … ."

Because the ballot summary tells the voter that the amendment *establishes* a right under Florida's constitution to own or lease solar equipment installed on his

or her property to generate electricity for his or her own use, that voter may be misled into thinking that he or she does not already have a right protected by the Florida Constitution to own or lease the solar equipment that is installed to generate electricity for his or her own use. This is exactly the type of "false impression" that this Court has historically prohibited in citizens' initiative summaries. It is clear that the Proposed Solar Amendment's ballot summary is defective because of what it fails to say in this regard.

B. Use Of The Term "Solar Energy Choice" In The Ballot Title Is Misleading Since Nothing In The Text Of The Proposed Solar Amendment Provides Or Creates Any Solar Energy Choice.

The ballot title for the Proposed Solar Amendment reads: "Rights of Electricity Consumers Regarding Solar Energy Choice."

When they vote, voters do not see the actual language of the proposed constitutional amendment, and therefore must rely on an accurate ballot title and summary. Therefore, the ballot title and summary "cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000).

It is unclear how this title describes the Proposed Solar Amendment. Nothing in the Proposed Solar Amendment creates the ability for electricity consumers to make a choice regarding solar energy, nor does the amendment address any existing ability of an electricity consumer to make a choice regarding

solar energy. On the contrary, the Proposed Solar Amendment is calculated to keep in place the status quo which *prohibits electricity consumers from making choices* regarding solar electricity. The amendment appears to constitutionally codify the status quo, which proponents of the Approved Solar Amendment seek to change.

Because the Proposed Solar Amendment's ballot title describes the amendment as concerning "Rights of Electricity Consumers Regarding Solar Choice," the amendment "flies under false colors," as the text of the amendment is devoid of anything concerning "Solar Choice."

In *Florida Department of State v. Mangat*, 43 So. 3d 642, 647-648 (Fla. 2010), this Court upheld circuit court findings that ballot language was invalid because its introduction contained a statement about access to health care without waiting lists and a statement about protecting the doctor-patient relationship. The circuit court noted that the amendment itself said nothing about waiting lists or the doctor-patient relationship or confidentiality, and found that the amendment should be removed from the ballot.

In *Mangat*, this Court categorized these statements as "classic examples of a ballot summary 'flying under false colors' as the amendment does not address 'waiting lists' or the 'doctor-patient relationship' at all." The Court continued, "These statements do not give fair notice of the purpose and effect of the

amendment. Even if the amendment is approved by the voters, it will not create a constitutional right to access health care services without a waiting list and will not affect the doctor-patient relationship." *Id.* at 648.

Because its ballot title creates the impression that the Proposed Solar Amendment in some way addresses "Solar Choice," the amendment similarly "flies under false colors" and should be prohibited from appearing on the ballot.

C. The Ballot Summary Is Misleading Because Most Local Governments Have No Existing Ability To Prevent An Electric Rate Subsidy By Consumers Who Do Not Choose To Install Solar.

The ballot summary explains that if the Proposed Solar Amendment is adopted that State and local governments shall retain their abilities to ensure that customers who do not choose to install solar equipment are not required to subsidize the cost of backup power and electric grid access for those that do. The statement falsely implies that local governments currently have the power to address subsidies embedded in electric utility rates and charges when, in most cases, they have absolutely no influence over such matters. The current rate-making power for the generation of solar electricity by "public utilities" is vested in the State by the legislative creation of the Florida Public Service Commission. *See* § 366.04(1), Fla. Stat.; *Florida Power Corp. v. Seminole County*, 579 So. 2d 105 (Fla. 1991) (where this Court held the ratemaking jurisdiction of the Florida Public Service Commission preempted the home rule constitutional and statutory

authority of a county to engage in electric utility ratemaking activities). Additionally, matters relating to local utility rates are frequently preempted by special acts creating utility authorities or general law provisions relating to provision of municipal utility services. *See, for example*, Ch. 180, Fla. Stat. (relating to the powers of municipalities in various public works and utility matters). Additionally, such rate-making power for the generation of solar electricity by rural electric cooperatives is vested in each such cooperative's Board of Trustees elected by the cooperative's membership. *See* §§ 425.04(4), 425.10, Fla. Stat. Only local governments that own a municipal utility have an ability to ensure the prevention of any electric rate subsidy, but only to customers of its own utility.

Because of these false implications, the voter may be tricked into believing that he or she must vote in favor of the Proposed Solar Amendment to preserve a "power" of local government that does not exist.

The rate-making power of the Florida Public Service Commission is vested in the State and the ability to set rates for municipal-owned utilities under existing statutory and home rule initiatives are required to meet constitutional standards of reasonableness that would protect against any rate subsidy.

D. The Proposed Solar Amendment's Ballot Summary Impermissibly Uses Subjective Political and Emotional Rhetoric.

This Court has said:

> [T]he ballot summary is no place for subjective evaluation of special impact. *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.*

Evans v. Firestone, 457 So. 2d 1351, 1355 (Fla. 1984) (emphasis added).

Following this principle, the Court has invalidated ballot summaries that relied upon impermissible political rhetoric or solicited an emotional response. *E.g., Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004)(concluding that use of the phrase "provides property tax relief" in the ballot summary "constitutes political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment"); *Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994)(stating that the ballot summary must be accurate and informative and "objective and free from political rhetoric"); *In re Advisory Op. to the Att'y Gen. – Save Our Everglades (Save Our Everglades I)*, 636 So. 2d 1336, 1341-42 (Fla. 1994)(finding "emotional language" of ballot title and summary to be misleading, as it resembled "political rhetoric" more than "an accurate and informative synopsis"); *Evans v. Firestone*, 457 So. 2d at 1355 (holding ballot summary defective in part because phrase "thus avoiding unnecessary costs"

constituted "editorial comment"). This Court has also condemned "[p]olitical rhetoric in a ballot title and summary that invites an emotional response from the voters as opposed to providing only a synopsis of a proposed amendment." *Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1229, 1238 (Fla. 2006).

1. The Use Of The Term "Subsidize" Is Misleading And Inflammatory Political Rhetoric.

The Proposed Solar Amendment's ballot summary provides that "[s]tate and local governments shall retain their abilities to … ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do." The implication of the summary's statement is that consumers who install solar equipment require subsidies from those who do not so that the solar customers can continue to access the shared grid and have backup power, and that the establishment of a constitutional right to own or lease solar equipment requires preservation of State and local government's ability to prevent such subsidies. Such an implication is false.

Initially, the use of the term "subsidy" or "subsidize" is a politically charged term, which can be used to evoke an emotional response. A subsidy is commonly understood to be money that is paid usually by a government to keep the price of a

product or service low or to help a business or organization continue to function.[2] Well known examples of controversial government subsidies include: federal cost assistance to lower premiums for health insurance obtained in the health insurance marketplace[3]; preferential tax treatment to the oil and natural gas industries to write-off operating expenses related to exploration[4]; and federal price and revenue subsidies to agribusiness[5].

In *Save Our Everglades I* this Court rejected the ballot title and summary because "the summary more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." *636 So. 2d* at 1342. The *Save Our Everglades I* summary stated in part that the amendment "Directs the sugarcane industry, which polluted the Everglades, to help pay to clean up pollution and restore clean water supply." *Id.* at

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[2] www.Merriam-Webster.com/dictionary/subsidy

[3] *See* Robert Jones, *Affordable Care Act survives Supreme Court challenge*, Washington Post, June 25, 2015 (https://www.washingtonpost.com/politics/courts_law/obamacare-survives-supreme-court-challenge/2015/06/25/af87608e-188a-11e5-93b7-5eddc056ad8a_story.html).

[4] *See* Jordan Weissmann, *America's Most Obvious Tax Reform Idea: Kill the Oil and Gas Subsidies*, The Atlantic, March 19, 2013 (http://www.theatlantic.com/business/archive/2013/03/americas-most-obvious-tax-reform-idea-kill-the-oil-and-gas-subsidies/274121/).

[5] *See Milking Taxpayers: As crop prices fall, farmers grow subsidies instead*, The Economist, February 14, 2015 (http://www.economist.com/news/united-states/21643191-crop-prices-fall-farmers-grow-subsidies-instead-milking-taxpayers).

1338. The Court objected to this statement for being inconsistent with the text of the amendment because although the summary asserted that the sugarcane industry would be required to *help* pay to clean up pollution implying that others would also help pay, the text of the amendment placed this requirement only on the sugarcane industry. *Id.* at 1341. In addition, the Court also took issue with the subjective and rhetorical nature of the statement. *Id.* at 1342.

In this case, the Proposed Solar Amendment's ballot summary fails to inform the voter of the meaning and effect of the amendment. First, it fails to inform the voter of the nature of the subsidy at issue, and if one exists at all. From the utility's point of view – because it must be ready to provide a customer's full requirements whenever such service is demanded – a customer reducing its demand for utility-produced electricity by generating its own electricity from solar panels is no different from a customer that reduces its demand by installing more efficient appliances, or by living on the served premises part-time, such as how a part-time Florida resident might demand electricity. Therefore, a customer who installs solar panels and thereby reduces his or her demand for utility-produced electricity would be "subsidized" in the same manner as any other customer who reduces demand by deciding to live part time out-of-state, or who chooses to install a new more efficient HVAC system.

The Proposed Solar Amendment also fails to explain how State and local governments can address such subsidies, and it fails to inform the voter that his or her vote for the amendment will make absolutely no difference in the ability of state and local governments to address such subsidies because the precise legal effect of the amendment is to maintain the status quo by enshrining current law into the Florida Constitution. Florida residents currently enjoy both constitutional and statutory rights to own or lease the solar equipment that they install on their own property to generate electricity for their own use, and the government currently has the authority to address such an eventuality. In fact, the Florida Public Service Commission, the Boards of Trustees of rural electric cooperatives, and the relatively few municipalities responsible for electric utilities which they own all have, under current law, both the authority and the legal obligation to set rates that are "fair, just and reasonable" and to structure rates in a non-discriminatory manner. *See* §§ 366.06, 366.07, Fla. Stat.; *See also Mohme v. Cocoa*, 328 So. 2d 422, 424-425 (Fla. 1976).

The summary not only fails to inform the voter of the actual legal effect of the amendment, but it uses subjective political rhetoric to evoke an emotional response from the voter. This Court was confronted with a similar set of facts in *Mangat*, 43 So. 3d at 648, where the ballot summary contained a statement about "mandates that don't work" which could arguably have had a relationship to the

text of the amendment, which was intended to prevent mandated participation in any health care system. Neither the summary nor the amendment text for the Health Care Services Amendment at issue in *Mangat* identified what mandates were at issue, explained how mandates do not work, or specified for whom they do not work. The Court therefore found the statement that "mandates don't work" to be ambiguous, an apparent reference to the federal healthcare mandate, and "the type of political rhetoric that this Court has condemned in other cases." *Id.* at 648 (citations omitted).

2. The Statement That State And Local Governments Will Retain The Right To Protect Consumer Rights And Public Health, Safety And Welfare Is Politically Charged And Misleading.

The Proposed Solar Amendment's ballot summary tells voters that if the amendment is adopted, State and local governments "shall retain their abilities to protect consumer rights and public health, safety and welfare." As demonstrated above, consumers currently have such a right protected by Article I, Section 2 of the Florida Constitution, and the right to use the equipment to generate electricity for the owner's or lessee's own use is afforded by current Florida law.[6] Florida's State and local governments are nevertheless uninhibited by the existence of these

[6] § 366.91, Fla. Stat.; Fla. Admin. Code R. 25-6.065.

rights in their exercise of police powers for the protection of the public health, safety and welfare, including the protection of consumers and their rights.

Nothing in the Proposed Solar Amendment or in its ballot summary presents a change in the law that would put at risk State or local governments' abilities to protect the public health, safety or welfare, or consumers' rights. The ballot language misleads by falsely suggesting that government's authority to guard consumers' rights and health, safety and welfare of the public is at risk due to ownership or leasing of solar electricity generating equipment and must be protected by the adoption of the Proposed Solar Amendment. A voter confronted with this manufactured specter, that is, the loss of "consumer rights" or a threat to the public's health, safety, or welfare, may feel emotionally compelled to vote in favor of the Proposed Solar Amendment, although its passage would have no practical effect, and is unnecessary for the ongoing protection of the public in these regards.

As set forth above in the discussion regarding the use of the subjective term "subsidies," this is precisely the type of political or emotional rhetoric this Court has prohibited in drafting citizen initiative ballot summaries. The reasoning of this Court's decision in *Mangat* has equal application to the language contained in the Proposed Solar Amendment ballot summary regarding the retention of State and local government's abilities to protect consumers' rights and the health, safety and

welfare of the public. Although the summary has a relationship to what is stated in the text of the Proposed Solar Amendment, neither the summary nor the text informs the voter what is meant by "consumers' rights" or the "health, safety and welfare" of the public, how the ability of State and local governments to provide such protections might be at risk, and whether State and local governments currently have such abilities. Because the meaning of the summary and the amendment are ambiguous, these statements are nothing more than political rhetoric, and do not comply with the requirements of section 101.161(1), Florida Statutes. *See Mangat*, 43 So. 3d at 648.

III. THE PROPOSED SOLAR AMENDMENT VIOLATES THE SINGLE SUBJECT REQUIREMENT.

Article XI, Section 3, Florida Constitution, reserves to the people the power to propose amendments or revisions to their Constitution.[7] However, the single subject requirement contained within that provision limits such citizen initiatives to one subject and those matters directly connected therewith. The single subject requirement is intended to prevent a proposed amendment from engaging in

[7] Article XI, Section 3, Florida Constitution provides:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith.

logrolling. *Advisory Op. to the Att'y Gen. re Water and Land Conservation*, 123 So. 3d 47 (Fla. 2013).

As stated by this Court, in *Advisory Op. to Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose* (Fairness Initiatives), 880 So. 2d 630, 634 (Fla. 2004):

> A proposed amendment meets this test when it may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test.

See also Water and Land Conservation, 123 So. 3d at 47.

The Court in *Advisory Opinion to the Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, held that the Approved Solar Amendment had a logical and natural oneness of purpose:

> We conclude that the proposed amendment has a "logical and natural oneness of purpose" to remove legal and regulatory barriers to local solar electricity suppliers who seek to supply and sell up to 2 megawatts of solar generated electricity to purchasers on the same or contiguous property to the supplier. This is the dominant plan or scheme that the various provisions of the amendment accomplish by exempting such a local solar electricity supplier from state or local government regulation with respect to rates, service, or territory, and by removing or limiting other regulatory barriers to provision of the solar generated electricity provided for in the proposal. The provisions "encompass a single plan and merely enumerate various elements necessary to accomplish the plan." *Use of Marijuana for Certain Med. Conditions*, 132 So. 3d at 796 (quoting *Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 182 (Fla. 2009)).

177 So. 3d at 243-244.

In contrast, the Proposed Solar Amendment addresses the following multiple subjects:

1. Purported Establishment of constitutional right for electric customers to own or lease solar equipment installed on their property to generate electricity for their own use.
2. Constitutional protection of ability of State and local governments to ensure that customers who do not choose to install solar are not required to subsidize the cost of backup power and electric grid access to those who do.
3. Constitutional protection of ability of State and local governments to protect consumer rights and public health, safety and welfare.

Such multiple and disparate subjects do not manifest any logical and natural oneness of purpose. Each serves a distinct purpose separate from the subject advanced by the other.

This Court in *Advisory Opinion to the Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply* recognized that a direct connection of disparate rights to the regular purpose of a proposed amendment is a fundamental requirement of single-subject matter compliance:

> We recognize that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." *Advisory Op. to Att'y Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994) (quoting *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984)). In *Evans*, we struck an initiative from the ballot that proposed to establish citizens' rights in civil actions for several reasons, including that one of the provisions was not "directly connected" to the other two provisions. 457 So. 2d at 1354. However, we find that the various provisions of the proposed amendment in this case are not "disparate subjects" and instead are directly connected to the purpose of the amendment and to each other.

177 So. 3d at 244.

One purpose of the Proposed Solar Amendment purports to establish a constitutional right for an electric solar customer to generate electricity for their own use which right already exists. A separate and disparate purpose of the Proposed Solar Amendment grants constitutional protection for the ability of State and local government to ensure that customers who do not install solar energy are not required to subsidize costs for those who do. Finally, another separate and disparate purpose of the Proposed Solar Amendment grants constitutional protection for the retention by the State and local government of their ability to protect consumer rights and public health, safety and welfare. Neither proposal is necessary or essential to advance and maintain the other. Nor does the proposal articulate a single dominant plan or scheme which relies on or is supported or advanced in some way by these disparate provisions.

CONCLUSION

The Proposed Solar Amendment's ballot title and summary create a false impression that the Amendment creates new rights when such rights already exist; the title misleads the voter by suggesting that he or she is voting in favor of "Solar Choice" when no choice is created or addressed by the amendment which virtually enshrines the status quo into the Florida Constitution; the summary misleads the voter by creating the impression that the amendment will allow local governments to "retain" powers that they do not currently have; and the summary also improperly uses emotional or political rhetoric. Further, the Proposed Solar Amendment violates the single-subject rule because it is guilty of logrolling. Respectfully, the Court should, therefore, strike the Proposed Solar Amendment from the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following parties, this 11th day of January, 2016.

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CERTIFICATE OF FONT SIZE COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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