IN THE SUPREME COURT OF FLORIDA

Case Nos. SC15-2150, SC16-12

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: RIGHTS OF ELECTRICITY CONSUMERS REGARDING SOLAR ENERGY CHOICE

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

ANSWER BRIEF OF
The Florida Electric Cooperatives Association, Inc.
(Filed in Support of the Initiative Petition)

HOLLAND & KNIGHT LLP
D. Bruce May, Jr. (FBN 354473)
Tiffany A. Roddenberry (FBN 92524)
P.O. Drawer 810
Tallahassee, FL 32302
Ph. (850) 224-7000

FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.
William B. Willingham (FBN 879045)
Michelle L. Hershel (FBN 832588)
2916 Apalachee Parkway
Tallahassee, FL 32301
Ph. (850) 877-6166

Counsel for Proponent,
The Florida Electric Cooperatives Association, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Regulations

Florida Constitution

Other Authorities

INTRODUCTION

The Florida Electric Cooperatives Association, Inc. ("FECA") submitted an initial brief supporting the Solar Rights Amendment on January 11, 2016, and hereby responds to the arguments raised in the three initial briefs filed in opposition to the Amendment: one by Floridians for Solar Choice, Inc. ("FSC"); one by Florida Solar Industries Association ("FSIA"); and a joint brief by Progress Florida, Inc., Environment Florida, Inc., and Environmental Coalition of Southwest Florida, Inc. ("Environmental Group"). For the following reasons, this Court should approve the Amendment for placement on the ballot.

The Solar Rights Amendment satisfies the single subject requirement of Article XI, Section 3 of the Florida Constitution because it does one thing — it establishes a carefully balanced constitutional framework of rights to protect the public, including *all* electricity consumers, regarding the use of solar generating equipment. All aspects of the Amendment are directly connected to that purpose and designed to implement this single goal in a defined and understandable way.

The title and summary of the Amendment also meet the requirements of section 101.161, Florida Statutes, because they fairly and accurately disclose the chief purpose of the Amendment. In the 75 words allotted, the ballot summary quotes the Amendment's operative provisions almost verbatim, effectively foreclosing any reasonable claim that it hides the proverbial ball. The summary

accurately says what the Amendment does and the Amendment does what the summary says.

STANDARD OF REVIEW

The Court "applies a deferential standard of review to the validity of a citizen initiative petition" and thus is "reluctant to interfere with Florida citizens' right to formulate 'their own organic law' by self-determination." *See In re Advisory Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply ("Limits or Prevents Barriers")*, 177 So. 3d 235, 241 (Fla. 2015) (quoting *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses*, 818 So. 2d 491, 494 (Fla. 2002)). The Court's review is limited to two issues: first, whether the amendment itself "embrace[s] but one subject and matter directly connected therewith" as required by Article XI, Section 3 of the Florida Constitution; and second, whether the ballot title and summary meet the requirements of section 101.161(1), Florida Statutes, which limits their length and requires that they state the "chief purpose" of the measure in "clear and unambiguous language." *See also Advisory Op. to the Att'y Gen. re Protect People, Especially Youth from Addiction, Disease, & Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1190 (Fla. 2006) (citing *Advisory Op. to the Att'y Gen. re Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 890-91 (Fla. 2000)).

The Court sets a "high threshold" for invalidating a ballot initiative, and its "duty is to uphold the proposal unless it can be shown to be 'clearly and conclusively defective.'" *Limits or Prevents Barriers*, 177 So. 3d at 246. It is the opponents' burden to show that the proposed amendment is "clearly and conclusively defective." *See, e.g.*, *id.* at 246 (approving an amendment because "[t]he proposal has not been shown to be 'clearly and conclusively defective'"); *In re Advisory Op. to the Att'y Gen. Re Use of Med. Marijuana for Certain Med. Conditions ("Medical Marijuana I")*, 132 So. 3d 786, 791 (Fla. 2014) (opponents failed to show ballot title and summary are "clearly and conclusively defective"). The opponents have not met their burden.

ARGUMENT

I. THE AMENDMENT COMPLIES WITH THE SINGLE SUBJECT REQUIREMENT.

The single subject requirement is satisfied if the proposed amendment "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." *Advisory Op. to Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions & Exclusions Serve a Pub. Purpose*, 880 So. 2d 630, 634 (Fla. 2004) (internal quotation marks omitted).

The Solar Rights Amendment satisfies the single subject requirement because it is carefully designed to achieve one dominant objective: the establishment of a

constitutional framework to protect the public, including *all* electricity consumers, regarding the use of solar generating equipment. Opponents' arguments that the Amendment addresses three separate subjects are wrong and reflect a fundamental misapprehension of what the Amendment does. To be sure, there are three components to the Amendment, but all are naturally related and logically connected to the Amendment's dominant plan. Those three inter-related components:

1. Create a constitutional right for consumers to own or lease solar equipment installed on their property to generate electricity for their own use;

2. Ensure the State and local governments retain their powers to protect the public health, safety, and welfare with respect to that solar equipment; and

3. Confirm the powers of the State and local governments to ensure that consumers who do not choose to install solar generating equipment are not required to subsidize the costs of backup power and electric grid access for those who do.

These components work together like a three-legged stool to advance solar initiatives in Florida without harming consumers — both those who use solar equipment and those who do not. The components have a "natural relation and connection," *see id.*, because a consumer's decision to own or lease solar generating equipment potentially affects the health, safety, and welfare of the general public and the electric rates of other consumers that chose *not* to use such equipment.

For example, there are real safety concerns to be addressed when solar generating equipment is installed or operated, including the risk of injury due to

electric shock or arc-flash, and the risk that the equipment will become flying debris during a hurricane or other windstorm event. To address these safety issues, the State has adopted numerous statutes, codes, and regulations that protect the public from the dangers presented when an individual electricity consumer installs solar generating equipment for their own use, and local governments are responsible for enforcing those codes.[1] There is no doubt that the ability of the State and local governments to continue to regulate the risks of solar use is directly related to a consumer's right to possess solar generating equipment.

A consumer's decision to own or lease solar generating equipment also has the potential to affect the electric rates of other consumers who, for economic or other reasons, chose not to purchase and install such equipment as it could result in lost sales for the utility as well as underutilized or stranded assets for which the other consumers must pay. This Court has acknowledged the responsibility of ensuring electric rates are fair to *all* electricity consumers, not just to consumers that self-

[1] *See, e.g.*, § 377.705(2)(b), Fla. Stat. (requiring the Florida Solar Energy Center to develop standards for solar energy systems sold within the State that "ensure that solar energy systems manufactured or sold within the state are effective and represent a high level of quality of materials, workmanship, and design"); § 553.73(7)(a), Fla. Stat. (requiring the Florida Building Code to be updated every three years to reflect the most current edition of the National Electric Code and other foundation codes); Fla. Admin. Code r. 25-6.065(3) (requiring investor-owned electric utilities to follow standards developed by the Institute of Electric and Electronic Engineers, Inc. when interconnecting customer-owned renewable generation).

generate in connection with renewable energy programs. *See, e.g., C.F. Indus. v. Nichols*, 536 So. 2d 234, 238 (Fla. 1988) ("In setting rates, the PSC has a two-pronged responsibility: rates must not only be fair and reasonable to the parties before the PSC, they must also be fair and reasonable to other utility customers who are not directly involved in the proceedings at hand. Standby rates [for self-generating customers] which did not recover the cost-of-service would unfairly discriminate . . . ."). If rates are not set correctly, a consumer's decision to self-generate a significant portion of their power requirements could result in that consumer paying less than the utility's actual cost of keeping the consumer connected to the grid and ensuring that power is available whenever the solar generation is not sufficient to fulfill the consumer's power needs. In other words, a consumer's decision to self-generate could result in the utility receiving insufficient revenues to cover its fixed costs to serve the customer. This Court has recognized that this type of lost revenue "would have to be made up by the remaining customers of the regulated utilities since the fixed costs of the regulated systems would not have been reduced." *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988). It is certainly reasonable for State and local governments to retain the power to regulate electric rates to protect consumers who chose not to install solar generating equipment from having to pay higher electric rates in order to subsidize another consumer's decision to have solar electricity.

In sum, an individual consumer's decision to generate their own electricity with solar equipment or any other type of self-generation could have impacts that extend well beyond that consumer. Preserving the powers of the State and local government to protect consumers and the general public's health, safety, and welfare from those impacts is "incidental and reasonably necessary to effectuate the purpose of the proposed amendment." *See Advisory Op. to the Att'y Gen. Re Ltd. Casinos*, 644 So. 2d 71, 74 (Fla. 1994). In analyzing another recent solar-related initiative petition, this Court noted: "Although the proposed amendment contains a number of provisions — some dealing with economic barriers to supply of electricity and others dealing with government regulation" — "the logical and natural oneness of purpose of the amendment remains the same." *Limits or Prevents Barriers*, 177 So. 3d at 243. In similar fashion, the Solar Rights Amendment manifests a "logical and natural oneness of purpose," and there is no "logrolling." *In re Advisory Op. to Att'y Gen. re Fla.'s Amend. to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (quoting *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)); *see also Limits or Prevents Barriers*, 177 So. 3d at 243.

II. THE AMENDMENT'S BALLOT AND TITLE SUMMARY CLEARLY AND ACCURATELY DESCRIBE THE PURPOSE OF THE AMENDMENT AND PROVIDE VOTERS WITH SUFFICIENT INFORMATION TO MAKE AN INFORMED DECISION.

In reviewing a ballot title and summary, this Court focuses on two questions: (1) whether the title and summary "fairly inform the voter of the chief purpose of the amendment"; and (2) "whether the language of the title and summary, as written misleads the public." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008). The main thrust of the opponents' arguments is that the ballot summary misleads the public.

FSC claims that the summary is misleading because it purports to create a constitutional right that already exists in Article I, Section 2 of the Florida Constitution. *See, e.g.*, FSC's Initial Br. at 11. That claim is based on the false premise that Article I, Section 2 already gives electricity consumers the constitutional right to acquire and install solar equipment on their property for the purpose of generating electricity for their own use. It does not.

Although Section 2 confers a general right to "acquire, possess and protect property," that general property right is not absolute. *See Shavers v. Duval Cnty.*, 73 So. 2d 684, 690 (Fla. 1954) ("The right to own and enjoy property is no higher in the constitutional sense than the right of liberty. Absolute freedom or liberty of the individual without limitation and restraint by law would result in anarchy. Absolute

freedom and liberty to own or acquire property would ignore the police power which restrains the use of property . . . .”). The Amendment here goes much further than just confirming electricity consumers’ general right to own solar equipment — it establishes a framework of new constitutional rights for all electricity consumers that not only includes the right to own solar equipment, but also the right to lease that equipment and to operate the equipment to generate electricity for their own use. The summary clearly notifies voters that the Amendment establishes a new constitutional right, and there is nothing obscure or ambiguous about it.

Citing *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984), Environmental Group argues the summary is misleading because it fails to disclose that the Amendment would “constitutionalize” an existing statutory right to “install solar panels,” which that opponent claims is found in section 163.04, Florida Statutes. That argument fails for at least two reasons. First, the opponent’s reliance on *Evans* is misplaced. The Court in *Evans* found a ballot summary — which broadly stated that the amendment “establishes citizen’s rights in civil actions” — to be “inaccurate” when the specific rights in the amendment already existed in the Florida rules of civil procedure. *Evans*, 457 So. 2d at 1355. In contrast, the ballot summary here does not say that the Amendment establishes a right in general, but rather it “establishes a right *under Florida’s constitution*.” Moreover, the constitutional right established by the Amendment actually expands the protections of existing law.

Environmental Group's argument also fails because it rests on a false premise: that the Amendment and section 163.04 replicate each other and confer the same right. They do not. Section 163.04 does not expressly create a *right* to install solar panels nor does it grant anything as broad as proposed in the Amendment. Instead, that statute simply limits the power of local governments and homeowner associations (but not the Legislature) to prohibit installation of "solar collectors, clotheslines, or other energy devices." § 163.04(1), (2), Fla. Stat. The statute also limits its own application in certain circumstances. *Id.* § 163.04(4). The Amendment, on the other hand, is much more expansive. It clarifies that all electricity consumers have the constitutional right to own or lease solar generating equipment, and it gives those consumers the constitutional right to use that equipment to generate electricity for their own use. While section 163.04 may limit the power of certain entities to restrict the installation of solar collectors, that Florida statute creates no clear right to install solar equipment and to use that equipment to generate electricity. Furthermore, whatever right is implied by that statute is not engrained and embedded in the organic law of Florida's Constitution.

Opponents also cite *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1992), and *Advisory Opinion to the Attorney General re Casino Authorization, Taxation & Regulation*, 656 So. 2d 466 (Fla. 1994), for the proposition that the ballot summary is misleading. However, those cases are readily distinguishable. The Court itself

distinguished both of those cases in *Advisory Opinion to Attorney General re: Public Protection from Repeated Medical Malpractice*, 880 So. 2d 667, 673 (Fla. 1973):

> [T]he summaries [in *Askew* and *Casino*] flew under false colors because they suggested that the proposed amendments would result in new limitations or impose stricter limitations with regard to certain activities than had prior law, when in fact, the chief purposes of the proposed amendments were to create exceptions to the preexisting limitations on those activities.

Simply stated, *Askew* and *Casino* stand for the proposition that a summary is defective if it disguises the real ramifications of an amendment by pretending the amendment will "provide greater citizen protection than current law, when in fact it would provide less protection than the Constitution or law currently provided." *See id*. (Pariente, C.J., concurring). The summary here does nothing to disguise the true impact of the Amendment, which creates a brand new constitutional framework of rights that does not limit existing constitutional protections or interfere with the statutory support for solar power which currently exists in Florida. *See, e.g.*, §§ 163.04, 288.041(2), Fla. Stat.

The primary purpose of the Amendment — the creation of a constitutional framework of rights to protect the public, including *all* electricity consumers, regarding the use of solar generating equipment balanced with the retained police power of the State and local governments to regulate that generating equipment — is explicitly disclosed in the ballot title and summary. It is difficult to imagine how the ballot summary could be any clearer. In the 75 words allotted, it quotes the

operative provisions of the Amendment almost verbatim and it does so without hiding the proverbial ball. The summary accurately says what the Amendment does and the Amendment does what the summary says. Nothing is hidden from the voter.

Opponents unleash numerous attacks as to the merits and wisdom of the Amendment, many thinly disguised as arguments that the ballot title and summary are misleading. *See, e.g.*, Environmental Group Initial Br. at 1 (claiming that "[s]olar users could end up paying twice as much as other customers pay to buy power from the utilities"); *id.* at 7-12 (contending that use of terms "backup power," "electric grid access," and "subsidize" are misleading because "[r]esidential customers are not charged different rates depending on the amounts of electricity they use at different times of day"); FSIA Initial Br. at 24 (arguing that the Amendment would "gut[] a favorable net metering policy for consumers"). Those arguments are unavailing.

First, merits arguments have no place in this Court's review, as "this Court does not rule on the merits or wisdom of the proposal" in assessing the propriety of an initiative. *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 565 (Fla. 1998); *see also In re Advisory Op. to Att'y Gen. ex rel. Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 600 (Fla. 2002) (Pariente, J., concurring) ("[T]he merits or wisdom of the proposal is irrelevant to whether the proposed amendment may be placed on the

ballot. Thus, our approval of the amendment should not be construed as an expression on the merits or wisdom of the proposed constitutional amendment or whether the subject matter of the proposed amendment is one more appropriately addressed by the Legislature for inclusion in the statutory law of this State.").

Second, opponents' contentions are simply false. For example, Environmental Group claims that "[r]esidential customers are not charged different rates depending on the amounts of electricity they use at different times of day." Environmental Group Initial Br. at 12. Not true. Half of Florida's distribution cooperatives and numerous other utilities offer Time-of-Use rates for residential consumers. *See, e.g.*, Florida Power & Light Index of Rate Schedules, www.fpl.com/rates/pdf/electric-tariff-section8.pdf; Gulf Power Rate Schedule Residential Service Time-of-Use, www.gulfpower.com/pdf/rates/rate-schedule.pdf. The Court should ignore opponents' merit-based arguments since such contentions are neither relevant to this Court's analysis nor are they accurate.

CONCLUSION

Opponents have not come close to meeting their burden of showing that the Solar Rights Amendment is clearly and conclusively defective. The Court should approve the Amendment for submission to the voters.

Respectfully submitted on February 1, 2016.

/s/ D. Bruce May, Jr.
D. Bruce May, Jr.
Florida Bar No. 354473
bruce.may@hklaw.com
Tiffany A. Roddenberry
Florida Bar No. 92524
tiffany.roddenberry@hklaw.com
Holland & Knight LLP
P.O. Drawer 810
Tallahassee, FL 32302
Telephone: (850) 224-7000

William B. Willingham
Florida Bar No. 879045
fecabill@embarqmail.com
Michelle Hershel
Florida Bar No. 832588
mhershel@feca.com
Florida Electric Cooperatives Assoc.
2916 Apalachee Parkway
Tallahassee, Florida 32301
Telephone: (850)877-6166
Facsimile: (850)656-5485

Attorneys for Florida Electric Cooperatives Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 1, 2016, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal with notice furnished to all registered users, as indicated below:

Tim Cerio
Executive Office of the Governor
State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001
tim.cerio@eog.myflorida.com

Matthew Carson
General Counsel
Florida House of Representatives
420 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300
matthew.carson@myfloridahouse.gov

Adam S. Tanenbaum
General Counsel
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
adam.tanenbaum@dos.myflorida.com

George T. Levesque
General Counsel
The Florida Senate
409 The Capitol
404 S. Monroe Street
Tallahassee, Florida 32399-1100
levesque.george@flsenate.gov

Amy J. Baker
Coordinator
Financial Impact Estimating Conference
Office of Economic and Demographic Research
111 West Madison Street, Suite 574
Tallahassee, Florida 32399-6588
baker.amy@leg.state.fl.us

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
oag.civil.eserve@myfloridalegal.com
allen.winsor@myfloridalegal.com
gerry.hammond@myflorida.com

Director
Division of Elections
Florida Department of State
R.A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250

DivElections@dos.myflorida.com

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

Raoul G. Cantero
T. Neal McAliley
Quinshawna Landon
White & Case, LLP
Southeast Financial Center
200 South Biscayne Boulevard
Suite 4900
Miami, Florida 33131
rcantero@whitecase.com
nmcaliley@whitecase.com
quin.landon@whitecase.com

Ennis Leon Jacobs, Jr.
Law Office of Ennis Leon Jacobs, Jr.
P.O. Box 1101
Tallahassee, Florida 32302
jacobslawfla@gmail.com

Warren L. Rhea
Florida Energy Freedom, Inc.
10104 Southwest 17th Place
Gainesville, Florida 32601
warren.rhea@floridaenergyfreedom.org

Daniel E. Nordby
Shutts & Bowen LLP
215 S. Monroe St., Suite 804
Tallahassee, Florida 32301
DNordby @shutts.com
MPoppell@shutts.com

Bradley Marshall
David Guest
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, Florida 32301
bmarshall@earthjustice.org
dguest@earthjustice.org

William C. Garner
Robert L. Nabors
Carly J. Schrader
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
bgarner@ngn-tally.com
rnabors@ngn-tally.com
cschrader@ngn-tally.com

/s/ D. Bruce May, Jr.
ATTORNEY

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.210(a), I certify that this Answer Brief in Support of the Initiative Petition was generated using Times New Roman, a proportionately spaced font, and has a typeface of 14 points.

/s/ D. Bruce May, Jr.
ATTORNEY