

SUPREME COURT OF FLORIDA

Case No. SC16-

**FLORIDA SOLAR ENERGY
INDUSTRIES ASSOCIATION and
FLORIDIANS FOR SOLAR CHOICE, Inc.,
Petitioners,**

versus

**KEN DETZNER,
in his official capacity as
Secretary of State, State of Florida,
Respondent.**

**PETITION FOR WRIT OF MANDAMUS DIRECTING RESPONDENT TO
REMOVE PROPOSED CONSTITUTIONAL AMENDMENT 1 (SOLAR
AMENDMENT) FROM GENERAL ELECTION BALLOT (NOVEMBER 8,
2016) AND TO EMBARGO AND NOT CANVASS THE ELECTION
RESULTS**

Florida Solar Energy Industries Association (“FlaSEIA”) and Floridians for Solar Choice, Inc. (“Floridians for”), pursuant to Article V, §3(b)(8) of the Florida Constitution, and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, petition for a writ of mandamus directed to Florida Secretary of State Ken Detzner as respondent. This original proceeding asks this Court to direct respondent Secretary Detzner to remove from the November 8, 2016 general election ballot proposed constitutional Amendment 1 (Solar Amendment) and to order that all ballots cast for Amendment 1 not be canvassed.

I. BASIS FOR INVOKING JURISDICTION.

This Court has original jurisdiction to issue writs of mandamus pursuant to Article V, §3(b)(8) of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure. *See, e.g., Florida League of Cities v. Smith*, 607 So.2d 397, 398 (Fla. 1992) (accepting original jurisdiction to consider legality of ballot summary of proposed constitutional amendment); *Greenbaum v. Firestone*, 455 So.2d 368, 369 (Fla. 1984) (accepting original jurisdiction regarding Secretary of State's certification of judicial candidate). Importantly, this Court has “exclusive jurisdiction to consider the validity of citizen-initiative petitions.” *Roberts v. Brown*, 43 So. 3d 673, 679 (Fla. 2010); *Advisory Op. to Att’y Gen. re Stop Early Release of Prisoners*, 661 So.2d 1204, 1205 (Fla. 1995); *Advisory Op. to Att’y Gen. re Stop Early Release of Prisoners*, 642 So.2d 724, 725 (Fla. 1994).

II. INTRODUCTION.

This petition asks this Court to revisit its finding in *Advisory Opinion to Atty. Gen. re Rights of Electricity Consumers Regarding Solar Energy Choices*, 188 So. 3d 822 (Fla. 2016), that Amendment 1 did not contain a ballot title and summary that failed to advise voters of the amendment’s chief purpose and effect. This request is made in light of recent revelations uncovered by the *Miami Herald* two weeks ago that the sponsors of Amendment 1 “attempted to deceive voters into supporting

restrictions on the expansion of solar by shrouding Amendment 1 as a pro-solar amendment.” (Appendix 1).

The *Herald* article exposes an October 2, 2016 recorded speech by Sal Nuzzo of the James Madison Institute at the State Energy/Environment Leadership Summit in Nashville, Tennessee (Appendix 7-11). At the summit, Mr. Nuzzo discussed his Institute’s partnership with Amendment 1 sponsor Consumers for Smart Solar and others in the utilities industry to craft a constitutional ballot initiative that appears favorable to solar power, but is in fact designed to stymie the growth of solar power in Florida. To be sure, the President and CEO of Gulf Coast (a sponsor of Amendment 1) is a member of JMI’s Board of Directors.¹

This recording makes it abundantly clear that Amendment 1’s ballot title and summary confuses and misleads voters. It masquerades as a “pro-solar” energy initiative when its chief purpose and intent is to curtail the expansion of solar energy rights. As Justice Pariente noted, “This ballot initiative is the proverbial ‘wolf in sheep's clothing.’” *Solar Energy Choice*, at 835 (Pariente, J., dissenting). Nuzzo’s speech removes the sheep’s clothing, and reveals the wolf behind Amendment 1. Indeed, just as Justice Pariente observed without having the benefit of any of the

¹ See James Madison Institute’s Board of Directors (Available at <http://www.jamesmadison.org/team/detail/stan-connally>).

secretive plans orchestrated by the proponents, the ballot language fails to “clearly and unambiguously set forth the chief purpose of the proposed amendment—to maintain the status quo favoring the very electric utilities who are the proponents of this amendment.” *Id.* This newly discovered and published revelation confirms that disguised fact.

III. PARTIES.

Floridians for Solar Choice, Inc. is the sponsor of the amendment proposed by citizens’ initiative approved by the Supreme Court for placement on the general election ballot, and which is expected to be placed on the 2018 ballot (the “Approved Solar Amendment”). *See Advisory Opinion to the Attorney General re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235 (Fla. 2015). Floridians for Solar Choice is an interested party in matters concerning constitutional amendments governing solar energy choices and governance, and was an interested party in this Court’s consideration of Amendment 1 in Case Nos. SC15-2150 & SC16-12.

The Florida Solar Energy Industries Association (FlaSEIA) is a Florida nonprofit professional association, consisting of companies with a shared mission to advance energy policy in the State of Florida through the integration of solar energy as an economic, meaningful and sustainable part of the state's energy portfolio.

FlaSEIA members include solar photovoltaic and solar thermal contractors, installers, manufacturers, distributors, consultants, engineers, and designers. Since 1977, the organization has actively promoted the common business interests of persons engaged in business of solar energy by educating consumers, business owners and political leaders and, by supporting beneficial solar policy initiatives. FlaSEIA is qualified and knowledgeable to appear in proceedings before this Court concerning the constitutional validity of a proposed amendment to the Florida Constitution that purports to advance solar policy in Florida. FlaSEIA was an interested party in this Court's consideration of Amendment 1 in Case Nos. SC15-2150 & SC16-12.

IV. NATURE OF THE RELIEF SOUGHT.

Petitioners seek this mandamus action against a constitutional officer in order to remove proposed Amendment 1 from the ballot because the ballot title and summary are materially deceptive and misleading, and to order that the votes cast for Amendment 1 not be canvassed. Petitioners appreciate that this Court's jurisdiction to consider an original petition for writ of mandamus is discretionary, and that, in ordinary circumstances, such a petition is more appropriately initiated in a lower court. However, due to the exceptional importance of the issues and the need for a prompt, final resolution, acceptance of jurisdiction in this case is both proper

and consistent with prior precedent. *See Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992); *Republican State Exec. Comm. v. Graham*, 388 So. 2d 556, 559 (Fla. 1980) (“The time constraints imposed by the date of the general election is sufficiently critical that we find a mandamus proceeding in this Court to be an appropriate remedy.”). Furthermore, this Court has “exclusive jurisdiction to consider the validity of citizen-initiative petitions.” *Roberts v. Brown*, 43 So. 3d 673, 679 (Fla. 2010); *Advisory Op. to Att’y Gen. re Stop Early Release of Prisoners*, 661 So.2d 1204, 1205 (Fla. 1995); *Advisory Op. to Att’y Gen. re Stop Early Release of Prisoners*, 642 So.2d 724, 725 (Fla. 1994).

V. NO ISSUES OF FACT NEED DETERMINATION.

This petition addresses issues of law, not fact. It involves a legal interpretation of Florida’s Constitution and laws and their effect on proposed Amendment 1. This case does not involve fact-finding functions and does not require an evidentiary hearing. This case raises no “substantial issues of fact” that might otherwise undermine this Court’s exercise of original jurisdiction. *See Republican State Exec. Comm. v. Graham*, 388 So. 2d at 559; *Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 562-563 (Fla. 1980).

VI. PROCEDURAL AND FACTUAL STATEMENT

Petitioner addresses the two competing ballot initiatives at the center of

Nuzzo's stunning admission. The language of Amendment 1 was proposed by a coalition of the major investor-owned electric utilities, Florida Power & Light Co., Duke Energy Florida, Gulf Power Company, and Tampa Electric Company. The Amendment language purports to create a right to generate solar power for one's own use:

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.

(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.

(c) **DEFINITIONS.** For purposes of this section, the following words and

terms shall have the following meanings:

(1) “consumer” means any end user of electricity regardless of the source of that electricity.

(2) “solar equipment,” “solar electrical generating equipment” and “solar” are used interchangeably and mean photovoltaic panels and any other device or system that converts sunlight into electricity.

(3) “backup power” means electricity from an electric utility, made available to solar electricity consumers for their use when their solar electricity generation is insufficient or unavailable, such as at night, during periods of low solar electricity generation or when their solar equipment otherwise is not functioning.

(4) “lease,” when used in the context of a consumer paying the owner of solar electrical generating equipment for the right to use such equipment, means an agreement under which the consumer pays the equipment owner/lessor a stream of periodic payments for the use of such equipment, which payments do not vary in amount based on the amount of electricity produced by the equipment and used by the consumer/lessee.

(5) “electric grid” means the interconnected electrical network, consisting of power plants and other generating facilities, transformers, transmission lines, distribution lines and related facilities, that makes electricity available to consumers throughout Florida.

(6) “electric utility” means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

(d) EFFECTIVE DATE. This section shall be effective immediately upon voter approval of this amendment.

By contrast, the solar amendment advanced by the Floridians for Solar Choice initiative, provides businesses and individuals with a constitutional right to produce

up to two megawatts of solar power and sell that power directly to others at the same or contiguous property. This Court already approved its language, and the measure is likely to appear on the 2018 ballot. It provides (excluding definitions and effective date) as follows:

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 circumstances concerning proposed Amendment 1 appear in this Court's earlier advisory opinion issued pursuant to Article IV, Section 10 of the Florida Constitution. *Advisory Opinion to Atty. Gen. re Rights of Electricity Consumers Regarding Solar Energy Choices*, 188 So. 3d 822 (Fla. 2016). In that 4-3 decision, the Court advised that Amendment 1 did not violate the single subject requirement of the Constitution, did not contain a ballot title and summary that failed to advise voters of the amendment's effect, and did not offend the requirements for a Financial Impact Statement. *Id.*, at 834.

VII. ARGUMENT.

It should not surprise the Court that the utilities-backed Amendment 1 was not actually intended to promote solar power. While not known at the time this Court issued its March 31, 2016 Advisory Opinion affirming the legal sufficiency of Amendment 1, it is now clear that the amendment's proponents affirmatively withheld the actual and intended purpose of the amendment, to inhibit the expansion

of solar power in Florida.² This omission prevented this Court from ruling on a vital issue necessary to determine the constitutional validity of Amendment 1. In truth, the newly discovered revelations confirm the statewide editorials opposing Amendment 1 that hint at what we now know to be the case. (Appendix 12-133).

Thus, notwithstanding this Court's earlier 4-3 decision approving the amendment, renewed litigation is permissible because this is a "truly extraordinary case[]," involving a circumstance where a "vital issue was not addressed in the earlier opinion." *Ray v. Mortham*, 742 So. 2d 1276, 1284-85 (Fla. 1999); *Advisory Opinion to Attorney Gen. re Tax Limitation*, 673 So. 2d 864, 865-66 (Fla. 1996); *Florida League of Cities v. Smith*, 607 So. 2d 397, 398-99 (Fla. 1992) ("Renewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion."). This new revelation of the proponent's true intent to clear the way for restrictions on the

² Indeed, basic principles of statutory construction support Mr. Nuzzo's claim that the amendment's true intent and effect is to combat the efforts of organizations like Floridians for Solar Choice who aim to expand solar energy usage in Florida. "Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another." *Young v. Progressive Se. Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000); *Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1258 (Fla. 2008); *Le Scampi Condo. Ass'n, Inc. v. Hall*, 41 Fla. L. Weekly D1582 (Fla. 2d DCA July 8, 2016). The proposed amendment gives Floridians the right to solar energy for their own use but not the right to generate solar energy for the use of someone else. By granting a right of personal use, the amendment impliedly excludes the right to share excess power with one's neighbor, a policy specifically advanced by Floridians for Solar Choice. This important consequence is absent from the initiative's summary and title.

expansion of solar power is not revealed in the ballot title. Nor is it included in the summary. It must accordingly be removed from the ballot.

This Court has long recognized that “section 101.161 requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure.” *Askew v. Firestone*, 421 So.2d 151, 154-55 (Fla. 1982). Section 101.161 ensures “fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.” *Advisory Opinion to Attorney Gen. Fee on Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996); *Advisory Opinion to the Attorney General re Stop Early Release of Prisoners*, 661 So.2d 1204, 1206 (Fla. 1995). As such, this Court has made wordsmithing and political “jiu-jitsu” unacceptable in the promulgation of citizen-initiated ballot measures:

In recent years, advantageous but misleading “wordsmithing” has been employed in the crafting of ballot titles and summaries. Sponsors attempt to use phrases and wording techniques in an attempt to persuade voters to vote in favor of the proposal. When such wording selections render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot-regardless of the substantive merit of the proposed changes.

Florida Dept. of State v. Slough, 992 So. 2d 142, 149 (Fla. 2008); *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 815 (Fla. 2014); *Ford v. Browning*, 992 So. 2d 132, 142 (Fla. 2008).

Petitioners submit to the Court that the newly revealed circumstances

concerning the actual purpose and intent of Amendment 1 demonstrate the basic purpose of the proposal is not reasonably explained in the ballot title and summary as required by Florida law. The avowed purpose of the Amendment, unknown to the Court and not reasonably discoverable during the prior advisory proceedings, was first revealed by the *Miami Herald* two weeks ago, on October 18, 2016, in an article titled “Insider reveals deceptive strategy behind Florida’s solar amendment” (attached as Appendix 1-6). That news article disclosed that the sponsors of Amendment 1 “attempted to deceive voters into supporting restrictions on the expansion of solar by shrouding Amendment 1 as a pro-solar amendment.” (Appendix 1). The *Herald* article confirmed an October 2, 2016, recorded speech by Sal Nuzzo of the James Madison Institute at the State Energy/Environment Leadership Summit in Nashville, Tennessee. The James Madison Institute, admitted by Mr. Nuzzo, partnered with amendment sponsor Consumers for Smart Solar and the utilities industry to research and develop a constitutional ballot initiative that was intended to appear to be favorable for solar power, but was really designed to negate the pro-solar effort of the Coalition for Solar Choice. Transcript excerpts of Mr. Nuzzo’s speech were published by the Center for Media and Democracy in October 18, 2016, and are incorporated at Appendix 7-11.

No part of this basic purpose was disclosed by the amendment’s proponents in the original advisory proceedings. Nor did proponents inform the Court that the

ballot title and summary were intended to affirmatively mislead voters and thus deny the electorate the ability to cast an intelligent and informed ballot. Although petitioners argued that the ballot title and summary were incomplete and misleading, that contention was disputed by the proponents. Now, armed with the actual purpose and intent of Amendment 1 to undermine petitioner's Approved Solar Amendment when it appears on the 2018 ballot, it is incumbent upon this Court to evaluate the propriety of the Amendment 1 ballot language against Florida's requirement that the ballot title and summary be complete, identify the chief purpose of the amendment, and not be misleading.

Likewise, the ballot summary and title do not disclose the amendment's intent and purpose to restrict the expansion of solar power in Florida. "[A] voter must be directly informed of such an important consequence." *In re Advisory Opinion to the Atty. Gen. re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions & Exclusions Serve a Pub. Purpose*, 880 So. 2d 630, 636 (Fla. 2004); *Advisory Opinion to the Attorney Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994); *Advisory Opinion to the Atty. Gen.*, 642 So. 2d 724, 726 (Fla. 1994). A "Ballot Summary is certainly misleading and confusing when it fails to address . . . problematic consequence[s] of passage of the proposed amendment." *Elected County Mayor Political Comm., Inc. v. Shirk*, 989 So. 2d 1267, 1276 (Fla. 2d DCA 2008); *Kainen v. Harris*, 769 So. 2d 1029, 1031 (Fla. 2000). Had the avowed purpose

of this amendment been identified in proceedings before this Court, the lack of clarity and the incompleteness of the ballot title and summary would have been evident. It is now evident and this Court must find the ballot summary and title are defective.

VIII. CONCLUSION.

This Court should issue a writ of mandamus directing the Florida Secretary of State Ken Detzner to remove from the November 8, 2016, general election ballot proposed constitutional Amendment 1 (Solar Amendment) and to order that all ballots on the question of Amendment 1 not be canvassed.

IX. CERTIFICATE OF COMPLIANCE

I certify this petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.

Respectfully submitted,

S/ Benedict P. Kuehne

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