IN THE SUPREME COURT OF FLORIDA

Case Nos. SC15-780, SC15-890

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: LIMITS OR PREVENTS BARRIERS TO LOCAL SOLAR ELECTRICITY SUPPLY
and
ADVISORY OPINION TO THE ATTORNEY GENERAL RE: LIMITS OR PREVENTS BARRIERS TO LOCAL SOLAR ELECTRICITY SUPPLY (FIS)

ANSWER BRIEF OF OPPONENT NATIONAL BLACK CHAMBER OF COMMERCE

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SUMMARY OF THE ARGUMENT

The proposed constitutional amendment violates the single subject provision in article XI, section 3 of the Florida Constitution, and the ballot title and summary do not comply with section 101.161(1), Florida Statutes.

The proposed amendment lacks a "logical and natural oneness of purpose." It encompasses numerous disparate subjects, and voters would be put in the position of supporting some aspects of the proposal while opposing others. Thus, the different subjects amount to "logrolling." The proposal also alters the functions of both the legislative and executive branches of state government and substantially affects local governments.

Additionally, voters are not informed through the ballot title and summary of the chief purpose of the proposal, which is to create a class of electricity providers that are exempt from regulation. The effect of creating this new unregulated class of "local solar electricity providers" is that utility customers who do not buy solar power from these new providers will be forced to subsidize the solar providers' new customers, who will no longer be paying their fair share of costs to maintain the electric grid.

ARGUMENT

I. THE PROPOSAL VIOLATES THE SINGLE-SUBJECT REQUIREMENT BECAUSE IT LACKS A LOGICAL AND NATURAL ONENESS OF PURPOSE, AND IT ALTERS THE FUNCTIONS OF MULTIPLE BRANCHES OF GOVERNMENT.

The sponsor of the proposed amendment, Floridians for Solar Choice, takes an overly broad and unreasonable view of this Court's directive that constitutional amendments proposed by initiative must have "a logical and natural oneness of purpose." *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984). The "oneness of purpose" standard is met when a 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 Independent Nonpartisan Comm'n to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1225 (Fla. 2006), quoting *Fine*, 448 So. 2d at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)). Contrary to the proponents' arguments, the proposed amendment clearly fails to meet this standard.

The proponents describe the amendment's purpose as "to limit or prevent the imposition of government and electric utility-imposed barriers that impede the

ability of limited-scale distribution of solar electricity supply to customers located on site with, or on contiguous property to, a solar electricity generating facility, thereby making such supply infeasible or uneconomical." Initial Brief of Sponsor at pp. 10-11. The proponents then contend that the many ways this objective would be accomplished "are a logical part of a single dominant plan . . . ." *Id*. at p. 13.

To the contrary, the proposed amendment constitutes disparate elements that are so separate and distinct as to constitute the prohibited practice of "logrolling." *See, e.g., Advisory Op. to Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient*, 880 So. 2d 659, 662 (Fla. 2004); *Advisory Op. to Att'y Gen. re Limited Casinos*, 644 So. 2d 71, 73 (Fla. 1994) (logrolling is a "practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed").

First, the proposed amendment creates a new class of constitutionally protected, unregulated solar power providers known as "local solar electricity suppliers" who would be allowed to sell power within electric utilities' established territories. The proposal then requires electric utilities to continue to serve these solar provider customers, but prohibits the electric utilities from imposing certain rates and other requirements on customers who buy solar power from these new providers. Thus, the utilities are prevented from recovering the costs to serve these

solar provider customers. The effect of these provisions is that non-solar customers would subsidize solar customers. *See PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988).

The proposed amendment also would force voters to accept disparate objectives that are served by these differing and distinct subjects: If voters wanted to support the sale of solar electricity by local suppliers, they also would have to support shifting to non-solar customers much of the costs that electric utilities continue to incur to serve solar customers. Additionally, voters who favor limited government interference with business may favor an unregulated local solar electricity supply system but oppose the proposed amendment's restrictions on existing utilities that prohibit them from recovering their costs. Voters would be required "to accept part of a proposal which they oppose in order to obtain a change which they support." *Fine*, 448 So. 2d at 993.

The proposed amendment also imposes limitations on both public and private entities. Both local and state governments would be prohibited from regulating local solar electricity suppliers, and private utility companies would be prohibited from imposing appropriate rates and charges on customers of local solar electricity suppliers. This Court has previously found a single subject violation when an initiative proposed to combine both public and private regulation. *See*

Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998), where the Court stated:

> The proposed amendment combines two distinct subjects by banning limitations on health care provider choices imposed by law and by prohibiting private parties from entering into contracts that would limit health care provider choice. The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the health care provider issue in an 'all or nothing' manner. Thus, the proposed amendment has a prohibited logrolling effect and fails the single-subject requirement.

Here too, a voter may prefer restrictions on government regulation but oppose restrictions on private businesses. Such a choice constitutes impermissible logrolling.

The proposed amendment's disparate objectives do not satisfy "oneness of purpose" standard established in *Fine.* Thus, the proposed amendment violates the single-subject provision in article XI, section 3, and it should not be permitted to appear on the ballot.

A second reason the proposed amendment violates the single-subject requirement is because it alters or performs the functions of multiple branches of government. *See, e.g., Advisory Op. to Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353-54 (Fla. 1998) ("A proposal that affects several branches of government will not automatically fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates

the single-subject test."). Although the proponents of the proposed amendment concede that the proposal "may limit the regulatory authority of the Legislature," they insist that the proposal "has no substantial effect on the function of any other branch or level of government, including local governments." Initial Brief of Proponents at p. 17. The proponents are incorrect.

As explained in detail in the Initial Brief of the National Black Chamber of Commerce, electric utility regulation in Florida is comprehensive and extensive and involves both the legislative and executive branches of government. Initial Brief of National Black Chamber of Commerce at pp. 15-17 and 29-33. The proposed amendment substantially modifies this regulatory scheme by exempting local solar electricity suppliers from virtually any regulatory authority, including even health, safety, and welfare regulations that "prohibit or have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier . . . ." Proposed Art. X, § 29(b)(4).

In addition to eliminating the Legislature's regulatory authority over local solar electricity suppliers, the proposed amendment would limit the ability of Florida's executive-branch agencies to protect the public health, safety, and welfare if those regulations could be construed as having the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier. Further, state energy programs governed by the Department of Agriculture and

Consumer Services, as well as other agencies, would be affected. Initial Brief of National Black Chamber of Commerce at pp. 30-33. Local governments likewise would be affected with respect to the operation of municipal utilities. Proposed Art. X, § 29(a).

Numerous Florida Supreme Court cases hold that initiatives that substantially alter the functions of more than one branch of government, or that substantially affect more than one level of government, violate the single-subject requirement. For example, in *Advisory Op. to Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494-95 (Fla. 1994), this Court removed from the ballot an initiative that provided owners with full compensation when government action damaged the value of their vested property rights. The Court stated: "This initiative not only substantially alters the functions of the executive and legislative branches of state government, it also has a very distinct and substantial [e]ffect on each local government entity."

Similarly, in *Advisory Op. to Att'y Gen. re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (Fla. 2000), this Court invalidated four proposed amendments that, variously, addressed race and sex discrimination by the "state" in connection with education, employment, and contracting. The "state" was broadly defined to include cities, counties, districts, public colleges and universities and any other political

subdivision or governmental entity. *Id* at 889-90. This Court stated: "[T]he proposed amendments' substantial effect on local government entities, coupled with its curtailment of the powers of the legislative and judicial branches, renders it fatally defective and violative of the single-subject requirement." *Id*. at 896. *See also, e.g., Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984) (invalidating proposed amendment because it performed both legislative and judicial functions); *In re Advisory Op. to Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336, 1340-42 (1994) (invalidating proposed amendment purporting to restore Everglades through a tax on the sugar industry because it performed the functions of all three branches of government).

The proponents' assertion that the proposed amendment has a "a logical and natural oneness of purpose" cannot obscure the reality that it constitutes logrolling, it alters or performs the functions of the legislative and executive branches of state government, and it also has a substantial impact on local government. For each of those reasons, it violates the single-subject requirement in article XI, section 3 and must not be permitted to appear on the ballot.

II. THE BALLOT TITLE AND SUMMARY DO NOT DISCLOSE THE RAMIFICATIONS OF THE PROPOSAL.

The proponents assert that "[t]here is nothing either expressed or implicit in the summary that would mislead a voter as to the contents of the Solar

Amendment's text." Sponsor's Initial Brief, p. 27. Even assuming such an assertion is correct, which it is not, the far bigger problem with the proposed amendment's ballot title and summary is what they do not say. The proposal flies under "false colors" because it fails to inform the voter that it would dramatically change Florida's regulatory framework for providing electricity to customers. *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). The effect of this change would be that customers who do not receive electricity from a local solar electricity provider would subsidize those customers who do receive electricity from a solar provider. Voters are told nothing about this cost shift, an omission that renders the title and summary defective.

Section 101.161(1), Florida Statutes, requires that voters be advised "of the true meaning, and ramifications" of a proposed amendment to the Florida Constitution. *Id.* In *Askew*, the Court found a ballot summary misleading because it left the impression that the amendment's chief purpose was to impose restrictions on lobbying, when in fact the amendment would have removed an existing, two-year ban on lobbying. "The problem, therefore," this Court stated, "lies not with what the summary says, but, rather, with what it does not say." *Id*.

This Court applies a "truth in packaging" law when reviewing ballot titles and summaries pursuant to section 101.161(1). *Advisory Op. to Att'y Gen. re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 974 (2009). The

statute requires a ballot summary "to provide 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 Op. to Att'y Gen. re Fee on Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996).

The most glaring omission in the ballot summary is any reference to the Florida Public Service Commission ("PSC") and its comprehensive regulation of public utilities in this state.[1] *See generally* Chs. 350, 366, Fla. Stat. The PSC is part of Florida's legislative branch of government and is charged with supervising and regulating each public utility in the state. §§ 350.001, 366.04(1), Fla. Stat. In addition to establishing rates for public utilities, the PSC is responsible for a coordinated electric power grid and approving territorial service agreements between public utilities and all other electric utilities in Florida, including municipal electric utilities and rural electric cooperatives. §§ 366.04(1), (2), Fla. Stat. The proposed amendment would exempt an entire class of electricity sellers

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[1] Public utilities are defined in section 366.02(1), Florida Statutes. The definition includes entities supplying electricity or gas within Florida, although it does not include municipally owned utilities or rural electric cooperatives. All of Florida's investor-owned utilities are "public utilities." Municipally owned electric utilities and rural electric cooperatives are regulated by the PSC as "electric utilities." § 366.02, Fla. Stat.

from PSC jurisdiction, leaving "local solar electricity suppliers" unregulated as to rates, service, and territory. Proposed Art. X, § 29(a).[2]

Voters are not told that this extensive regulatory scheme that now applies to electricity providers, including those selling solar power, would no longer apply to "local solar electricity providers" as defined in the proposed amendment. Instead, voters are told in the ballot summary only that the proposal will limit or prevent "barriers" to supplying local solar electricity. Voters are not told of the complete deregulation of local solar providers as to rates, service, and territory, and the effect that would have on other electric utility customers.

As explained in detail in the Initial Brief of the National Black Chamber of Commerce, utilities' costs for providing electricity services are fixed by the PSC and will not be reduced if the proposed amendment passes. Initial Brief of National Black Chamber of Commerce at pp. 15-18. However, the amount of electricity utilities sell to the customers of the new unregulated solar providers will be reduced, thereby reducing revenue to the utilities. In order to meet their statutory duty to serve, the utilities will have no choice but to make up this lost revenue from

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[2] Indeed, the local solar electricity suppliers would be exempt not only from regulation as to rates, service, and territory, but from <u>any</u> state or local regulation that has the effect of "prohibiting the supply of solar-generated electricity by a local solar electricity supplier . . . ." Proposed Art. X, § 29(b)(4).

their other customers, i.e., those who do not purchase electricity from the local solar electricity providers.

This Court explained this situation in *PW Ventures*, when a seller of electricity sought to avoid PSC jurisdiction by arguing that it would not sell "to the public" because it would just provide service to one large industrial complex. 533 So. 2d at 282-83. This Court rejected that argument, reasoning that PW Ventures sought "to go into an area served by a utility and take one of its major customers." *Id*. at 283. The effect would be that "revenue that otherwise would have gone to the regulated utilities which serve the affected areas would be diverted to unregulated producers. This 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." *Id*. Thus, the Court held that PW Ventures, even if it just sold to one customer, would be subject to PSC jurisdiction. *Id*. at 284.

The effect of the proposed amendment would be to overturn *PW Ventures* and create an unregulated category of electricity providers. Voters are not informed by the ballot title and summary of these effects. Nor are they told that the costs associated with removing a group of electricity providers from the regulatory framework will result in other customers paying higher rates. For this reason, the ballot title and summary are misleading, and the proposed amendment must not be permitted to appear on the ballot. *Askew*, 421 So. 2d at 155-56.

CONCLUSION

Because the proposed amendment violates the single-subject requirement in article XI, section 3 of the Florida Constitution, and because the ballot title and summary are misleading, the proposed amendment should not be allowed to appear on the ballot.

Respectfully submitted this 30th day of June, 2015.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing document was filed Electronically and E-Served by the Florida Court's E-Filing Portal Electronic Service List, this 30th day of June, 2015. The foregoing document has also been sent from the undersigned counsel by E-Mail to Attorney General Pamela Jo Bondi at pam.bondi@myfloridalegal.com, and to counsel for the Proponent, Gregory T. Stewart, at gstewart@ngnlaw.com.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I CERTIFY that this Brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced and in compliance with Florida Rule of Appellate Procedure 9.210.

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