Filing # 28320521 E-Filed 06/10/2015 01:47:04 PM

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)

INITIAL BRIEF OF OPPONENT NATIONAL BLACK CHAMBER OF COMMERCE

Susan F. Clark (FBN 179580)
Donna E. Blanton (FBN 948500)
Radey Law Firm
301 South Bronough, Suite 200
Tallahassee, Florida 32301
Telephone: 850-425-6654
Facsimile: 850-425-6694
E-Mail: sclark@radeylaw.com
dblanton@radeylaw.com

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE AND FACTS

On April 24, 2015, pursuant to article IV, section 10 of the Florida Constitution and section 16.061, Florida Statutes,[1] the Attorney General asked this Court for an opinion concerning the validity of an initiative petition. Circulated pursuant to article XI, section 3 of the Florida Constitution and titled "Limits or Prevents Barriers to Local Solar Electricity Supply" ("Solar Initiative"), the petition is sponsored by the political committee Floridians for Solar Choice, Inc. The petition proposes to amend the state constitution by creating a new section 29 in article X.

The Attorney General asks this Court to determine whether the ballot title and summary of the proposed constitutional amendment clearly apprise the voter of the effect of the amendment, as required by section 101.161, Florida Statutes. Additionally, the Attorney General asks this Court to determine whether the proposed amendment complies with article XI, section 3, which requires that any citizens' initiative "embrace but one subject and matter directly connected therewith."

On May 7, 2015, in accordance with section 100.371(5)(a), Florida Statutes, the Financial Impact Estimating Conference provided the Attorney General with a

---

[1] All references to the Florida Statutes are to the 2014 edition unless otherwise stated.

financial impact statement concerning the initiative petition. On May 13, 2015, the Attorney General forwarded the financial impact statement to this Court and sought an advisory opinion as to whether the statement complies with section 100.371, Florida Statutes.

This Court has jurisdiction pursuant to article V, section 3(b)(10) of the Florida Constitution. The Court issued an order on May 21, 2015, consolidating the cases and establishing a schedule for interested persons to submit briefs concerning the questions presented. The Court also set oral argument for September 1, 2015.

IDENTITY OF THIS OPPONENT

The National Black Chamber of Commerce ("NBCC") is a non-profit, non-partisan, non-sectarian organization dedicated to the empowerment of African American communities. The NBCC has approximately 150 affiliated chapters in the United States and regularly advocates on behalf of small and minority-owned businesses at both the federal and state levels concerning a variety of issues, including energy policies. The NBCC is concerned with the substantial, negative impacts the provisions of Solar Initiative may have on small and minority businesses in the form of potential increases in electric service rates and increases in state and local taxes.

SUMMARY OF THE ARGUMENT

The ballot title and summary of the Solar Initiative are misleading. The proposed amendment flies under "false colors" in that the summary does not disclose to voters that the amendment would require a restructuring of Florida's framework for regulating electric utilities. The result of this restructuring would mean that utility customers who do not receive electricity from a local solar electricity supplier would subsidize customers who do contract with a solar supplier.

The Solar Initiative would allow completely unregulated solar providers to supply electricity to customers within the exclusive, defined service territories for electric utilities that now are governed by the state Public Service Commission ("PSC"). However, these new solar customers also would remain as customers of the regulated utility for electricity needs that cannot be provided by the solar supplier. A regulated utility's rates are based on the utility's costs to serve customers. These costs include building, operating, and maintaining electric generating, transmission, and distribution facilities necessary to provide electric service. In order to cover these costs, the utility must sell as much electric power as it anticipates, based on the number of customers in its territory. If the Solar Initiative is adopted, the regulated utility would sell less electricity to those

customers who contract with solar providers. Thus, the costs of maintaining the facilities to be ready to serve those solar customers would be shifted to the remaining customers who do not contract with the solar suppliers. Nothing in the ballot summary discloses this cost-shift.

The ballot title and summary also wrongly imply that solar energy production is now prohibited or severely restricted in Florida. In fact, the use of solar electricity in Florida is growing and is strongly encouraged by both the federal and state governments. The many state statutes promoting solar energy production are left unaddressed in the ballot summary. Instead, both the title and summary imply that "barriers" to the use of solar energy somehow exist in Florida.

The term "barriers" also constitutes the type of emotional language that this Court has said does not belong in ballot titles and summaries. The word "barriers" has a negative connotation and plays on the emotions of voters who may support solar energy in concept and who may wrongly believe that the state has erected barriers to its use. Similarly, the reference to "unfavorable" electric utility rates, charges, or terms of serve in the ballot summary insinuates that electric utility rates, charges, or terms of service are somehow inappropriate or wrong. The terms "barriers" and "unfavorable" in the summary are editorial commentary designed to evoke an emotional response from voters.

The ballot title and summary also are misleading because they conflict with the language of the amendment itself. The title and summary both use the phrase "limits or prevents" when referring to "barriers" to local solar electricity supply. However, section 29(a) of the amendment states that "[t]his section is intended to accomplish this purpose by limiting and preventing regulatory and economic barriers." The text of the amendment is broader than the title and summary, in that the text provides that barriers would be both limited and prevented. By reading just the title and summary, a voter would assume regulatory and economic barriers may be only limited, not fully prevented. This Court in previous cases has found ballot summaries to be misleading when a material difference exists between the summary and the amendment itself.

The Solar Initiative also violates the single-subject requirement in article XI, section 3 of the Florida Constitution. Contrary to the requirements set forth in this Court's precedents for an initiative petition, the proposed amendment would alter the functions of both the legislative and executive branches of state government, as well as local governments. The PSC, part of Florida's legislative branch of state government, substantially and comprehensively regulates electric utilities in Florida. The Solar Initiative would exempt local solar electricity suppliers from not only the PSC's regulatory authority, but also from the regulatory authority of any

local government. The proposed amendment also would affect the executive branch of state government in that any regulations designed to protect the public health, safety, and welfare would be illegal if such regulations "prohibit or have the effect of prohibiting the supply of solar-generated electricity . . . ." Moreover, the many state executive branch agencies that have responsibility for state energy programs could be impacted by the Solar Initiative. Because the Solar Initiative would alter both the legislative and executive branch functions of state government, as well as the functions of both state and local governments, the initiative fails the "functional" test for the single-subject limitation in article XI, section 3, as described in this Court's precedents.

The Solar Initiative also violates the single-subject requirement because the initiative fails to identify the provisions of the state constitution substantially affected by the proposal. The amendment would impact article VIII, section 2(b), relating to the powers of municipalities. The ultimate source of a municipality's authority to operate an electric utility comes from this provision. The Solar Initiative would limit the authority of municipalities to govern their electric utilities by exempting local solar electricity suppliers from local government regulation. The Solar Initiative also would impact article I, section 10, which prevents the impairment of contracts. A provision in the initiative stating the local solar

electricity suppliers would not "be subject to any assignment, reservation, or division of service territory between or among electric utilities" could impair territorial agreements between and among Investor-Owned Utilities ("IOUs"), municipal electric utilities, and rural electric cooperatives.

Finally, the Solar Initiative includes distinct subjects that could appeal to voters with different, conflicting preferences and interests. This constitutes "logrolling" in violation of the single-subject requirement. Section 29(b)(1) of the proposed amendment appears designed to appeal to those who favor limited government interference with business, in that the supply of local solar electricity would be completely deregulated. On the other hand, sections 29(b)(2) and (b)(3) would prohibit electric utilities from imposing rates and requirements on customers who buy solar power from local solar electric suppliers and would require electric utilities to continue to serve those customers without any possibility of recovering the costs that are necessary to maintain the facilities to serve them. The voter who favors limiting government restrictions on businesses under section 29(b)(1) may not be supportive of sections 29(b)(2) and (b)(3), as they impose additional restrictions on both private and public utilities without allowing those utilities to adequately recoup their costs.

Because the Solar Initiative violates section 101.161(1), Florida Statutes, and the single-subject requirement in article XI, section 3 of the Florida Constitution, it does not meet the necessary requirements to appear on the ballot.

ARGUMENT

Standard of Review. This Court's review of the Attorney General's original request for an advisory opinion is limited to two legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary violate the requirements of section 101.161(1), Florida Statutes. *E.g., Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 648 (Fla. 2004). Because no lower court ruling exists for the Court to review, no traditional standard of review applies. *Id*. Thus, this is a *de novo* review by the court. The Court's review of the financial impact statement is "whether the statement is clear, unambiguous, consists of no more than seventy-five words, and is limited to address the estimated increase or decrease in any revenues or costs to the state or local governments." *Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 809 (Fla. 2014), quoting *Advisory Op. to*

Att'y Gen. re Referenda Required for Adoption & Amend. of Local Gov't Comprehensive Land Use Plans, 963 So. 2d 210, 214 (Fla. 2007).[2]

I. THE BALLOT TITLE AND SUMMARY ARE MISLEADING AND DO NOT REFLECT THE TRUE LEGAL EFFECT OF THE PROPOSED AMENDMENT.

Although not disclosed to voters, the proposed amendment would dramatically change Florida's regulatory framework for providing electricity to customers. As explained in more detail in section I.B, the change to the regulatory framework would result in utility customers who do not receive electricity from a local solar electricity provider subsidizing customers who do receive electricity from a solar provider. This is an undisclosed cost shift to non-solar electric utility customers, which would include many small, minority-owned businesspeople and their families.

A. A Ballot Title and Summary Must Provide Fair Notice of the Decision Facing the Voter in Clear, Unambiguous Language.

This Court has long held that the purpose of section 101.161(1), Florida Statutes, is to assure that the electorate is advised "of the true meaning, and ramifications" of a proposed amendment to the state constitution. *Askew v.*

---

[2] This brief addresses only the ballot title and summary and the single-subject issues. The NBCC contends that the financial impact statement is clear and unambiguous and that it fairly and accurately informs the voters of the initiative's fiscal impact.

Firestone, 421 So. 2d 151, 156 (Fla. 1982). Section 101.161(1) provides in relevant part that "[t]he ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the *chief purpose of the measure*. . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." (Emphasis supplied).

This Court has characterized section 101.161(1) as "a codification of the accuracy requirement implicit in article XI, section 5 of the Florida Constitution." *Advisory Op. to Att'y Gen. re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 974 (Fla. 2009); *Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 902 So. 2d 763, 770 (Fla. 2005); *Armstrong v. Harris*, 773 So. 2d 7, 13 (2000). The requirement that ballot titles and summaries be accurate "is of paramount importance" because voters will not have the actual text of an amendment before them when they are casting their ballots. *Armstrong*, 773 So. 2d at 12-13. This accuracy requirement functions as "a kind of 'truth in packaging' law for the ballot." *Id*. at 13. As this Court has explained:

> The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based only

> on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution.

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, 1227 (Fla. 2006), quoting *Additional Homestead Tax Exemption*, 880 So. 2d at 653-54.

A proposed amendment may not "fly under false colors." *Askew*, 421 So. 2d at 156. A ballot summary may be defective not only for what it does say, but for what it does not say. *Id*. In *Askew v. Firestone*, 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, absolute two-year ban on certain lobbying activities by former members of the Legislature and statewide elected officials. Thus, the proposed summary was defective because it did not inform voters of the existing state of the law. The Court reasoned:

> Simply put, the ballot must give the voter fair notice of the decision he must make. We find that the proposed title and summary do not set out the chief purpose of the amendment so as to give the electorate fair notice of the actual change . . . . While the wisdom of a proposed amendment is not a matter for our review, we are reminded that the 'proposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation.'

421 So. 2d at 155, quoting *Crawford v. Gilchrist*, 64 Fla. 41, 54, 59 So. 963, 968 (1912) (other internal citations omitted).

The reason for requiring that a ballot summary state in clear and unambiguous language the chief purpose of the measure is "so that the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." *In re Advisory Op. to Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994); *see also Askew*, 421 So. 2d at 155-56. The Court's responsibility in reviewing a ballot title and summary "is to determine 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).

Ballot titles and summaries also may not include emotional language or political rhetoric. *E.g.*, *Save Our Everglades*, 636 So. 2d at 1342; *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) ("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."). In *Additional Homestead Tax Exemption*, 880 So. 2d at 652-53, this Court found a ballot summary misleading because it stated that the amendment "provides property tax relief" to all Florida homeowners, when in fact, whether the

amendment would ultimately result in "tax relief" was dependent on a number of factors. The Court found the phrase "provides property tax relief" to be "political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment." *Id*. at 653.

Finally, terms and phrases in ballot summaries must be materially consistent with the language in the proposed amendment itself. *E.g., 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, 897 (Fla. 2000) (summary referring to "people" was materially different from amendment's reference to "persons"); *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (use of term "citizens" in ballot summary was different from the phrase "every natural person" in the amendment itself and difference was material and misleading); *Advisory Op. to Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 468-69 (Fla. 1995) (use of word "hotel" in summary was materially different from the phrase "transient lodging establishment" in the proposed amendment). In these cases, this Court found that the inconsistencies between the words in the summaries and in the proposed amendments themselves rendered the summaries misleading.

For the reasons discussed below, the Solar Initiative violates each of these interpretations of section 101.161(1) and, therefore, is not eligible to be placed on the ballot.

B. The Solar Initiative's Ballot Title and Summary Fail this Court's Tests for Disclosing the Chief Purpose of the Proposed Amendment.

The title of the Solar Initiative is "Limits or Prevents Barriers to Local Solar Electricity Supply." The summary provides:

> Limits or prevents government and electric utility imposed barriers to supplying local solar electricity. Local solar electricity supply is the non-utility supply of solar generated electricity from a facility rated up to 2 megawatts to customers at the same or contiguous property as the facility. Barriers include government regulation of local solar electricity suppliers' rates, service and territory, and unfavorable electric utility rates, charges, or terms of service imposed on local solar electricity customers.

1. Voters are Not Informed of the Significant Regulatory Restructuring Encompassed in the Solar Initiative and the Resulting Impact on Non-Solar Electric Utility Customers.

The summary fails to disclose that the proposed amendment upends the regulatory structure governing electric utilities in Florida. The amendment deregulates the local retail sale of electricity for local solar electric suppliers and exempts the customers they serve from any requirement to reimburse the local electric utility for costs the utility must continue to incur to provide electric services to those customers. The effect of this regulatory restructuring will result in

other customers of electric utilities subsidizing the solar power generators' customers. Voters are not told of this impact.

Florida's regulatory scheme for electric utilities is set forth in Chapter 366, Florida Statutes. A summary of the current regulatory structure is provided in the Solar Initiative's Financial Information Statement sent to this Court on May 13, 2015, by the Attorney General. *See* Initiative Financial Information Statement, Limits or Prevents Barriers to Local Solar Electricity Supply, at pp. 5-8 (hereafter "Financial Information Statement"). As explained in the Financial Information Statement, the Florida Public Service Commission ("PSC") has regulatory authority over 58 electric utilities (including five IOUs), 35 municipal utilities, and 18 rural electric cooperatives. *Id*. at p. 5.[3]

Significantly, all electric utilities (IOUs, municipal utilities, and rural electric cooperatives) in the state are part of a coordinated, electric power grid regulated by the PSC. Each utility is required to provide electric power to customers within exclusive, defined service territories established by the PSC.

---

[3] "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." § 366.02(2), Fla. Stat. The IOUs also fall within the definition of "public utility" in section 366.02(1), Fla. Stat. Both are regulated by the PSC, but public utilities are subject to more extensive regulation.

Thus, each of Florida's electric utilities has an exclusive territory where that utility is obligated to provide service to all customers. §§ 366.03, 366.04, Fla. Stat.

The PSC regulates all aspects of the IOUs' operations, including rates and charges, meter and billing accuracy, electric lines up to the meter, reliability of the electric service, new construction safety code compliance for transmission and distribution, territorial agreements and disputes, and the need for additional power plants and transmission lines. §§ 366.04, 366.05, Fla. Stat.

The PSC establishes "fair and reasonable" rates for IOUs based on the utility's cost to serve customers. §§ 366.03, 366.041, 366.06, Fla. Stat. These costs include building, operating, and maintaining electric generating, transmission and distribution facilities necessary to provide electric service. In order to cover these costs, the utility must sell as much electric power as it anticipates, based on the number of customers in its territory. If a utility sells less to customers than it expects, it cannot cover these costs, and its rates must increase. Alternative suppliers of electricity (such as the local solar electricity suppliers contemplated in the Solar Initiative) disrupt this rate-setting structure because the utility still remains obligated to serve these customers (during those times when the sun is not shining and solar power cannot be supplied), but the utility's electricity sales are substantially diminished.

This Court addressed the significant effects on Florida's regulatory structure of allowing an unregulated entity to supply electric power to an industrial complex in *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988):

> The regulation of the production and sale of electricity necessarily contemplates the granting of monopolies in the public interest. Section 366.04(3), Florida Statutes (1985), directs the PSC to exercise its powers to avoid 'uneconomic duplication of generation, transmission, and distribution facilities.' If the proposed sale of electricity by PW Ventures is outside of PSC jurisdiction, the duplication of facilities could occur. What PW Ventures proposes is to go into an area served by a utility and take one of its major customers. Under PW Ventures' interpretation, other ventures could enter into similar contracts with other high use industrial complexes on a one-to-one basis and drastically change the regulatory scheme in this state. The effect of this practice 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 to be reduced.

(Emphasis supplied) (internal citations and footnote omitted).

The drafters of the Solar Initiative propose to accomplish precisely what the Court predicted would happen had PW Ventures been permitted to supply electricity to a major customer outside of Florida's regulatory structure. The Solar Initiative provides that the completely unregulated local solar electricity suppliers can supply electricity to customers in utilities' service territories. Compounding the consequences predicted in *PW Ventures*, these new solar customers will remain customers of the regulated utility for electricity needs that cannot be provided by

the solar supplier, but the regulated utility will sell significantly less to these customers. Thus, the costs of maintaining the facilities to be ready to serve these customers when solar power is limited or unavailable will be shifted to the remaining customers who do not contract with the solar suppliers. Section 29(b)(2) of the Solar Initiative appears to preclude charging the solar customers anything for this supplemental and stand-by service, further ensuring that non-solar utility customers will be forced to subsidize the solar customers.

The ballot title and summary do not inform voters of these consequences that were so clearly described in *PW Ventures*. As in *Askew*, the problem "lies not with what the summary says, but, rather, with what it does not say." 421 So. 2d at 156. The problem is similar to that faced by this Court in *Advisory Op. to Att'y Gen. re Fish and Wildlife Conservation Comm'n: Unifies Marine Fisheries and Game and Fresh Water Fish Commissions*, 705 So. 2d 1351 (1998). The proposed amendment in that case would have unified the Marine Fisheries Commission and the Game and Fresh Water Fish Commission to form the Florida Fish and Wildlife Conservation Commission, which would have exercised regulatory powers of the state concerning both freshwater and marine aquatic life, as well as wild animal life. However, the Court found that the proposal did not explain to voters that the amendment would actually strip the Legislature of its then-current power to regulate marine life:

> The summary does not explain to the reader that the power to regulate marine life lies solely with the legislature, which has delegated that power to not only the Marine Fisheries Commission but also the Department of Environmental Protection and the Department of Agriculture. Though the summary states that the purpose of the amendment is to 'unify' the Marine Fisheries Commission with the Game and Fresh Water Fish Commission, those two entities do not share the same status. Despite the common label 'commission,' the former is a legislative creation while the latter enjoys independent constitutional stature. Thus, the proposed amendment does not unify the two so much as it strips the legislature of its exclusive power to regulate marine life and grants it to a constitutional entity. The summary does not sufficiently inform the public of this transfer of power.

Id. at 1355 (footnote omitted).

Here, the Solar Initiative does not explain the current regulatory structure relating to electric utilities, nor does it inform voters how significantly that structure will change if the proposed amendment is adopted.

The title and summary also suggest that solar energy production is now prohibited or severely restricted in Florida, which is completely false. *See, e.g.,* § 288.041(2), Fla. Stat. ("It is the policy of this state to promote, stimulate, develop, and advance the growth of the solar energy industry in this state."); § 366.91 (promoting the development of renewable energy, including solar energy); § 163.04, Fla. Stat. (Florida Home Owners' Solar Rights Act); Part III, Ch. 377, Fla. Stat. (providing incentives for use of renewable energy, including solar).

As the Financial Information Statement makes clear, the use of solar electricity in Florida is growing and is encouraged by both the federal and state governments. Page 6 of the Financial Information Statement describes the growth in solar power:

> According to the PSC, as of 2013, there were 6,678 customer-owned solar systems in Florida. This number dramatically increased over the previous six years . . . . The increase was primarily due to the rapidly decreasing price of solar energy systems and the availability of state and federal incentives which alleviate substantial up-front costs to customers.

The Financial Information Statement goes on to point out that Florida law already allows utility customers with renewable energy systems, including solar, to pay their utility only for the net energy they use through "net metering." *Id*. at p. 7; *see* R. 25-6.065, Fla. Admin. Code. None of this is disclosed in the Solar Initiative, which instead implies that "barriers" to use of solar energy somehow exist in Florida.

The Solar Initiative ballot title and summary also fail to inform voters of the extent of deregulation that the amendment would bring about and the existing consumer protections that would be lost. Solar energy would become completely deregulated under the proposed initiative, which would even prohibit reasonable health, safety, and welfare regulations if they "prohibit or have the effect of

prohibiting the supply of solar-generated electricity by a local solar electricity supplier . . . ." *See* Solar Initiative, § 29(b)(4).

Finally the ballot title and summary do not disclose that revenues from state and local taxes and fees will be lower if the amendment is adopted as a result of local solar electricity suppliers displacing sales of traditional utilities. *See* Financial Information Statement, p. 1. The taxes and fees that are expected to decrease are state regulatory assessment fees, local government franchise fees, the local Public Service Tax, the state Gross Receipts Tax, and state and local sales and use taxes. *Id*. Additionally, sales of municipal electricity will decrease, resulting in less revenue for cities that operate their own utilities. *Id*.

Although the amount of these reductions is as yet unknown, the report of the Financial Impact Estimating Conference makes clear that revenues to both state and local governments would be reduced and that fee or tax increases may have to be imposed to make up for the lost revenue. *See* Financial Information Statement, pp. 16-18. Voters are not informed by ballot title and summary of the possibility of increased fees or taxes as a result of the lost revenue to governments. Thus, voters have not been provided with "fair notice" of the effect of the proposed amendment. *Advisory Op. to Att'y Gen. re Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

Voters simply are not informed of the true meaning and ramifications of the Solar Initiative. *Askew*, 421 So. 2d at 156. The amendment flies under "false colors" in that it suggests Florida law now imposes barriers to solar energy production, when such is not the case, and it leaves voters unsuspecting of the likely impact of the initiative on small businesses and other utility customers who do not purchase electricity from the new, unregulated suppliers of solar generated power. As predicted in *PW Ventures*, the rates of these customers would rise to offset the revenue loss that utilities would experience as a result of the local solar energy suppliers.

2. The Solar Initiative's Title and Ballot Summary Improperly Include Emotional Language.

Both the title and ballot summary of the Solar Initiative use the term "barriers," which suggests that Florida somehow has erected barriers to the supply of solar electricity. As discussed in the previous section, this suggestion is false and misleading, as numerous statutory provisions exist that encourage the use and production of solar energy. In addition to being misleading, the word "barriers" has a negative connotation and plays on the emotions of voters who may support solar energy in concept and who may wrongly believe that the state has erected barriers to its use.

The summary also states that "[b]arriers include government regulation of local solar electricity suppliers' rates, service and territory, and unfavorable electric utility rates, charges, or terms of service imposed on local solar electricity customers." (Emphasis supplied). The term "unfavorable" not only is vague, but its use insinuates that electric utility rates, charges, or terms of service are somehow inappropriate or wrong. As previously discussed, rates, charges, and terms of service for IOUs are set by the PSC and governed by the Florida Statutes. While some may view these as "unfavorable," others would find, as has the PSC, that they are fair and reasonable, as required by law.

Terms such as "barriers" and "unfavorable" inject emotional language into the ballot summary that misleads voters. In *Advisory Op. to Att'y Gen. re Referenda Required for Adoption and Amendment of Local Govt. Comp. Land Use Plans*, 902 So. 2d 763 (Fla. 2005), this Court found the first sentence of the ballot summary inappropriate because it stated that "[p]ublic participation in local government comprehensive land use planning benefits Florida's natural resources, scenic beauty and citizens." 902 So. 2d at 772. The Court reasoned:

> Because of the broad range of subject matters included in local government comprehensive land-use plans, the first sentence of the ballot summary, which focuses on public participation benefiting 'Florida's natural resources' and 'scenic beauty,' is an editorial comment rather than part of an accurate summary of the amendment. In fact, if the proposed amendment were adopted, there would be a

> substantial number of referenda each year involving issues other than 'scenic beauty' or 'natural resources.' Accordingly, the ballot summary fails to provide an accurate, objective, neutral summary of the proposed amendment.

See also Save Our Everglades, 636 So. 2d at 1341-42; *Homestead Tax Exemption*, 880 So. 2d at 653.

Similarly, the words "barriers" and "unfavorable" in the Solar Initiative ballot summary are editorial commentary designed to evoke an emotional response from voters. They also are misleading, in that the implication that Florida has erected "barriers" to supplying solar electricity is incorrect. Additionally, the proposed amendment would not just limit or prevent "unfavorable" rates, charges, or terms or service "imposed on" local solar electricity customers; the amendment in fact would prevent imposition of both favorable and unfavorable rates, charges, or terms of service. The amendment would essentially limit all regulation relating to the provision of solar electricity, whether favorable or unfavorable.

The ballot title and summary in the Solar Initiative are misleading and violate the directive from this Court in *Evans* that a "ballot summary should tell the voter the legal effect of the amendment, and no more." 457 So. 2d at 1355.

3. Inconsistencies Between Language in the Ballot Summary and the Proposed Amendment Render the Summary Misleading.

The ballot title and summary both employ the phrase "limits or prevents"

when referring to barriers to local solar electricity supply. However, section 29(a) states that "[t]his section is intended to accomplish this purpose by limiting and preventing regulatory and economic barriers . . . ." Thus, the text of the amendment is broader than the title and summary, in that the text ensures that barriers to the supply of solar electricity will both be limited and prevented. By reading just the title and summary, a voter would assume that such regulatory and economic barriers may be only limited, not fully prevented. Thus, the title and the summary are substantively different from the amendment's text.

The distinction between "and" and "or" in a proposed constitutional amendment has been addressed by this Court before. In *Armstrong v. Harris*, this Court struck down an amendment that proposed to link the state constitution's cruel "or" unusual punishment clause in article I, section 17 to the Eighth Amendment's broader cruel "and" unusual punishment clause in the U.S. Constitution. 773 So. 2d at 16. The summary failed to inform voters that the state constitutional provision had been interpreted by this Court to provide greater protections than the U.S. Supreme Court's Eighth Amendment precedent. This Court reasoned:

> [B]y changing the wording of the Cruel or Unusual Punishment Clause to become "Cruel *and* Unusual" and by requiring that our state Clause be interpreted in conformity with its federal counterpart, the proposed amendment effectively strikes the state Clause from the

> constitutional scheme. . . . In the present case, a citizen could well have voted in favor of the proposed amendment thinking that he or she was protecting state constitutional rights when in fact the citizen was doing *the exact opposite* – i.e., he or she was voting to nullify those rights.

Id. at 17-18.

Similarly, here the text of the Solar Initiative is broader than the ballot title and summary, but a voter would have no way of knowing that. Thus, a voter who may support some limits on barriers to local solar electricity supply but who does not support the complete prevention of all barriers will not be put on fair notice of what the amendment actually would accomplish. The difference between "and" in the amendment text and "or" in the ballot summary in this context is material. *Treating People Differently Based on Race in Public Education*, 778 So. 2d at 897; *Health Care Providers*, 705 So. 2d at 566; *Casino Authorization*, 656 So. 2d at 468-69. Thus, the voter is not informed by the title and summary of the proposed amendment's main effect, and the title and summary are misleading in violation of section 101.161(1), Florida Statutes. *Id*. at 18.

II. THE SOLAR INITIATIVE VIOLATES THE SINGLE-SUBJECT PROVISION IN ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION.

Article XI, section 3, which governs constitutional amendments proposed through the citizens' initiative process, requires that proposed amendments

"embrace but one subject and matter directly connected therewith."[4] The primary reason for this limitation is explained in *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984), where the Court noted that citizens' initiatives, unlike other methods of amending the constitution, do not provide the opportunity for public input and debate. The Court explained:

> The single-subject requirement . . . is a rule of restraint. It was placed in the constitution by the people to allow the citizens, by initiative petition, to propose and vote on singular changes in the functions of our governmental structure. . . . The single-subject requirement . . . mandates that the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution. The requirement avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support. An initiative proposal with multiple subjects, in which the public has had no representative interest in drafting, places voters with different views on the subjects contained in the proposal in the position of have to choose which subject they feel most strongly about.

Thus, the single-subject requirement is "a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." *Save Our Everglades*, 636 So. 2d at 1339. The single-subject requirement also "guards against 'logrolling,' a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise

---

[4] An exception exists for proposed amendments limiting the power of government to raise revenue.

unpopular issue." *Id*. The Court uses a "oneness of purpose" standard in evaluating whether a proposal encompasses just one subject. *Id.*, quoting *Fine*, 448 So.2d at 990.

This standard encompasses a "functional test," which involves a determination as to whether a proposal substantially alters or performs the functions of multiple branches of government. *Id*. at 1340. "Where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation . . . ." *Id*. Initiative petitions that substantially affect more than one level of government also may violate the single-subject requirements. *E.g.*, *Advisory Op. to Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494-95 (Fla. 1994) (initiative not only substantially alters the functions of the executive and legislative branches of state government, but has a distinct and substantial effect on each local government entity). Additionally, when a proposed amendment changes more than one government function, "it is clearly multi-subject." *Evans*, 457 So. 2d at 1354.

Finally, when an initiative petition proposes to amend multiple sections of the constitution, "it should identify the articles or sections of the constitution substantially affected." *Fine*, 448 So. 2d at 989. The purpose of this identification is so the public can "comprehend the contemplated changes in the constitution" and avoid "leaving to this Court the responsibility of interpreting the initiative

proposal to determine what sections and articles are substantially affected by the proposal." *Id.*

A. The Solar Initiative Changes the Functions of Two Branches of State Government and Substantially Impacts Both State and Local Government.

The PSC, part of Florida's legislative branch of government, substantially and comprehensively regulates electric utilities in this state. Ch. 366, Fla. Stat. (See discussion in section I.B of this brief, above.) The Solar Initiative substantially modifies this regulatory scheme by exempting local solar electricity suppliers from this authority. Section 29(b)(1) of the initiative provides that "[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." *See also* Solar Initiative, § 29(b)(2) (limiting state lawmaking authority relating to rates, charges, tariffs, classifications, terms or conditions of service, or rulemaking).

Were the initiative to be approved, local solar electricity suppliers would be able to operate free of any regulation in any utility's service territory, cherry picking customers and upending the regulatory scheme designed to efficiently and cost-effectively provide safe and reliable electric service to all Floridians. This upending would likely result in higher rates to non-solar electric utility customers

and possible tax and fee increases, as explained at page 18 in the Financial Information Statement. Additionally, the PSC would incur administrative costs relating to implementing the amendment, particularly associated with rulemaking. *Id*.

The Legislature's ability to protect the public health, safety, and welfare also would be substantially restricted by the Solar Initiative, which provides in section 29(b)(4) that any 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 would be outlawed.[5]

The Solar Initiative also will have a substantial impact on Florida's executive branch of government. For example, the restriction relating to regulations protecting the public health, safety, and welfare (if such regulations prohibit the supply of solar-generated electricity) could extend to numerous executive branch agencies of state government that regularly enact regulations

---

[5] Section 29(b)(4) states: "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." (Emphasis supplied). It is not clear how it would be determined whether a health, safety, or welfare regulation has the effect of prohibiting the supply of solar-generated electricity.

designed to protect the public, such as the Department of Environmental Protection and the Department of Health.

Moreover, numerous executive branch agencies have responsibility for state energy programs that could be impacted by the Solar Initiative. *See, e.g.*, § 377.703(1), which provides in relevant part:

> Recognizing that energy supply and demand questions have become a major area of concern to the state which must be dealt with by effective and well-coordinated state action, it is the intent of the Legislature to promote the efficient, effective, and economical management of energy problems, centralize energy coordination responsibilities, pinpoint responsibility for conducting energy programs, and ensure the accountability of state agencies for the implementation of s. 377.601(2), the state energy policy.

(Emphasis supplied). This statute imposes duties on numerous agencies, including the state Division of Emergency Management (development of an energy emergency contingency plan) and the Department of Agriculture and Consumer Services (for example, performing or coordinating federal energy programs delegated to the state; analyzing energy data collected and preparing long-range forecasts of energy supply; recommending policies for improvement of the state's response to energy supply and demand and its effect of the health, safety, and welfare of the state's residents; and promoting the development and use of renewable energy resources). § 377.703(2), Fla. Stat.

The Department of Agriculture and Consumer Services is specifically directed to coordinate with multiple named state agencies in its efforts relating to renewable energy research, development, and use. § 377.703(2)(h)4., Fla. Stat. The Department of Management Services, in consultation with the Department of Agriculture and Consumer Services, is directed to "coordinate the energy conservation programs of all state agencies and review and comment on the energy conservation programs of all state agencies." *Id*. at § 377.703(2)(i).

The Solar Initiative also has substantial impacts on local governments, as illustrated by the discussion in the Financial Information Statement. Thirty-five municipal electric utilities exist in Florida that are governed by local elected or appointed officials. The Solar Initiative exempts local solar electricity supplies from both state and local regulation. § 29(b)1.

Additionally, local governments are permitted to impose franchise fees on a utility in exchange for the use of rights-of-way and the right to provide electric service within a geographic area. Financial Information Statement, p. 10. The local electric service contemplated by the Solar Initiative would not rely on these rights for the provision of service. Accordingly, there would be no basis for franchise agreements between local solar electricity suppliers and municipalities and, consequently, no basis for payment of franchise fees. Because the franchise fee is calculated as a percentage of the utility's gross revenues within a defined

geographic area, franchise fee revenues are expected to decrease if the Solar Initiative is adopted. *Id*. at p. 13. The Florida League of Cities advised the Financial Impact Estimating Conference as follows: "There are two scenarios that could impact the franchise fee revenues. The first is a reduction in the gross revenues of an electric utility due to increased generation of local small-scale solar-generated electricity. The second is the potential termination or renegotiation of franchise fee agreements." *Id*. The Florida Association of Counties advised the conference that "[f]ranchise fee agreements would likely be terminated, in which case the agreements would have to be re-negotiated, probably at a loss to the affected counties." *Id*.

The Solar Initiative would alter both the legislative and executive branch functions of state government, as well as the functions of both state and local governments. As explained in this Court's precedents, the initiative thus fails the functional test for the single-subject limitation in article XI, section 3 of the Florida Constitution. *E.g.*, *Save Our Everglades*, 636 So. 2d at 1340; *Tax Limitation*, 644 So. 2d at 494-95.

B. The Solar Initiative Fails to Identify the Provisions of the Constitution Substantially Affected by the Proposal.

The Solar Initiative proposes to create a new section 29 of article X. That is the only provision of the state constitution referenced in the proposal. However, "it

is imperative that an initiative identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations." *Health Care Providers*, 705 So. 2d at 565-66. The proposed initiative substantially affects a number of undisclosed provisions of the Florida Constitution.

First, the Solar Initiative substantially impacts article VIII, section 2(b), relating to the powers of municipalities. This section grants municipalities "governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services." Municipalities also may "exercise any power for municipal purpose except as otherwise provided by law." The ultimate source of a municipality's authority to operate an electric utility comes from this constitutional provision.

The Solar Initiative limits the authority of municipalities to govern their electric utilities by exempting local solar electricity suppliers from local government regulation. As explained in the Financial Information Statement, the impact on municipalities from the Solar Initiative could be significant. Nothing in the Solar Initiative alerts voters to this likelihood, which violates article XI, section 3.

Second, the proposed initiative impacts article I, section 10, which prevents the impairment of contracts. The Solar Initiative provides that local solar electricity suppliers would not "be subject to any assignment, reservation, or division of service territory between or among electric utilities." Solar Initiative, § 29(b)1. This provision has the effect of impairing any number of territorial agreements between and among IOUs, municipal electric utilities, and rural electric cooperatives. These utilities enter into these contracts based on the expectation that each utility has the exclusive right to provide service within its territory, and the PSC, pursuant to statutory authority, has approved these agreements. §§ 366.04(2)(d), (e).

C. The Solar Initiative Violates the Prohibition Against "Logrolling."

The Solar Initiative includes distinct subjects that that could appeal to voters with different, conflicting preferences and interests. This constitutes "logrolling" in violation of the single-subject requirement. The measure "forces the voter who may favor or oppose one aspect of the ballot initiative to vote . . . in an 'all or nothing' manner," which is contrary to article XI, section 3. *Health Care Providers*, 705 So. 2d at 566.

The Solar Initiative prohibits government regulation of local solar electricity suppliers. Solar Initiative, § 29(b)(1) ("A local solar electricity supplier, as defined by 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."). This provision may appeal to those who favor limited government interference with business, in that an entire industry would become completely deregulated.

However, the Solar Initiative also prohibits electric utilities from imposing rates and requirements on customers who buy solar power from local solar electric suppliers and requires electric utilities to continue to serve those customers without any possibility of recovering the costs that are necessary to maintain the facilities to serve them. §§ 29(b)(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 rate 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."); § 29(b)(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.").

The voter who favors limited government restrictions on business under section 29(b)(1) may not be supportive of sections 29(b)(2) and (b)(3), as they

impose additional restrictions on both private and public utilities[6] without allowing those utilities to adequately recoup their costs. Equally significantly, the voter who favors increased use of solar electricity but who doesn't want customers who don't use it to pay for it (the effect of the above-referenced provisions) is also left with a conundrum.

As the Court in *Fine* stated: "The purpose of the single-subject requirement is to allow the citizens to vote on singular changes in our government that are identified in the proposal and to avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support." Because the Solar Initiative includes multiple subjects that do not meet the "oneness of purpose" test required by *Fine* and other precedents of this Court, the proposed amendment must not be allowed to appear on the ballot.

CONCLUSION

The Solar Initiative violates both section 101.161(1), Florida Statutes, and the single-subject requirement in article XI, section 3 of the Florida Constitution. The title and ballot summary are misleading, as they fail to inform voters of the

---

[6] Notably, the broad definition of "electric utility" in section 29(c)(3) of the Solar Initiative also implicates logrolling in that it encompasses private utility companies, municipal electric utilities, and rural electric cooperatives. It's reasonable to assume that some voters may favor increased restrictions on one or more types of electric utilities, but not on all of them.

chief purpose of the measure, and they do not provide voters fair notice of the decision voters must make. The Solar Initiative violates the single-subject requirement because it substantially alters the functions of more than one branch of state government and substantially affects both state and local government. The proposed amendment also does not disclose existing provisions of the state constitution that it affects. Finally, the multiple subjects in the Solar Initiative meet the definition of "logrolling" described in this Court's precedents. For all of these reasons, the Solar Initiative does not meet the necessary requirements to appear on the ballot.

Respectfully submitted this 10th day of June, 2015.

/s Donna E. Blanton
Susan F. Clark (FBN 179580)
Donna E. Blanton (FBN 948500)
Radey Law Firm
301 South Bronough, Suite 200
Tallahassee, Florida 32301
Telephone: 850-425-6654
Facsimile: 850-425-6694
E-Mail: dblanton@radeylaw.com
sclark@radeylaw.com
Counsel for Opponents, National Black Chamber of Commerce

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 10th 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.

/s Donna E. Blanton
Susan F. Clark (FBN 179580)
Donna E. Blanton (FBN 948500)
Radey Law Firm
301 South Bronough, Suite 200
Tallahassee, Florida 32301
Telephone: 850-425-6654
Facsimile: 850-425-6694
E-Mail: sclark@radeylaw.com
dblanton@radeylaw.com

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.

/s Donna E. Blanton
Donna E. Blanton