

**IN THE SUPREME COURT OF FLORIDA**

**Case No. SC15-2150**

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

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**ANSWER BRIEF OF OPPONENT  
FLORIDIANS FOR SOLAR CHOICE, INC.**

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## **SUMMARY OF THE ARGUMENT**

The Proposed Solar Amendment violates the single-subject requirement of Article XI, section 3 of the Florida Constitution because it enfolds disparate concepts under the broad generality of “rights of electricity consumers regarding solar energy choice.” One subject contained in the amendment is the enumeration in the Constitution of a consumer’s right to own or lease solar equipment. The remaining subjects concern the power of government to regulate the use of solar equipment. The purpose of each provision in the amendment is separate and distinct from the others.

The ballot title and summary misleads the voter as to the amendment’s true legal effects because it creates a false impression that the amendment establishes a new right that does not currently exist and it fails to clearly and unambiguously articulate the chief purpose of the amendment. Additionally, it suggests that the amendment concerns a consumer’s solar energy choice when nothing in the text of the amendment creates or gives any person or consumer a “Solar Energy Choice.”

## ARGUMENT

**I. UNDER THE NATURAL ONENESS OF PURPOSE DOCTRINE AN INITIATIVE CAN MEET THE CONSTITUTIONAL SINGLE SUBJECT TEST IF ITS DISPARATE PROVISIONS ARE LOGICALLY RELATED TO THE COMMON PURPOSE ADVANCED. HERE THE STATED ONENESS OF PUPROSE IS SO BROAD AS TO BE MEANINGLESS AND THE DISPARATE PROVISIONS HAVE NO LOGICAL RELATIONSHIP TO EACH OTHER AND NO NATURAL ONENESS OF PURPOSE AND THUS CONSTITUTE CLASSIC LOGROLLING.**

Article XI, section 3, Florida Constitution, empowers the people to propose an amendment or revision to their Constitution by petition, and places a restriction upon that right requiring that such a proposed amendment by petition “embrace but one subject and those matters directly connected therewith.”

A proposed amendment with multiple provisions meets this Court’s test for embracing but a single subject “when it may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test.” *Advisory Op. to Att’y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Pub. Purpose* (Fairness Initiatives), 880 So. 2d 630, 634 (Fla. 2004); *See also Advisory Op. to Att’y Gen. re Water and Land Conservation*, 123 So. 3d 47 (Fla. 2013).

The Court upholds a proposed amendment as meeting this test when its multiple provisions “encompass a single plan and merely enumerate various

elements necessary to accomplish the plan.” *Advisory Op. to Att’y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014)(quoting *Advisory Op. to Att’y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 182 (Fla. 2009)); *See also Advisory Op. to the Att’y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 244 (Fla. 2015).

Conversely, when a proposed amendment seeks to “enfold disparate subjects within the cloak of a broad generality,” the Court strikes it because it fails to satisfy the single-subject requirement. *See Advisory Op. to the Att’y Gen. re Requirement for Adequate Pub. Educ. Funding*, 703 So. 2d 446, 449 (Fla. 1997); *In re: Advisory Op. to the Att’y Gen. – Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994); *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984)(*Citing Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984)).

In *Evans v. Firestone*, the Court found the single articulated subject – “citizen’s rights in civil actions” – to be “so broad as to fail to delineate the subject or subjects of [the] amendment in any meaningful way. In that case, the Court considered an amendment that did three things: 1) It limited the potential payment of damages by a party to a civil action to his or her percentage of liability; 2) it required a court to grant summary judgment on the motion of any party when the court finds that no genuine dispute exists concerning material facts of the case; and

3) it limited the award of non-economic damages to a maximum of \$100,000 against any party.

The Court in *Evans* said further:

“Where separate provisions of a proposed amendment are an ‘aggregation of dissimilar provisions [designed] to attract support of diverse groups to assure its passage,’ the defect is not cured by either application of an over-broad subject title or by virtue of being self-contained.”

*Evans*, 457 So. 2d 1351 at 1354 (quoting *Fine*, 448 So. 2d at 988). The Court in *Evans* found the proposed amendment affected legislative as well judicial functions, but also found that the summary judgment provision was not “directly connected” to the other two provisions. The Court explained that the general effect of provisions 1 and 3 were to limit the amount of damages for which a defendant would be liable, while provision 2 addressed summary judgment, a procedural mechanism whereby liability and damages could be adjudicated when material facts are undisputed. The Court reasoned that the existence of the summary judgment mechanism in no way limited the generalized concepts of liability or damages, and so were not directly connected, despite falling within the overbroad umbrella of “citizen’s rights in civil actions.” *Id.* at 1354.

Similarly, in *Fairness Initiatives*, 880 So. 2d 630 (Fla. 2004), proponents argued that the amendment at issue dealt with the single subject – sales tax reform. That proposed amendment would have done three things: create a scheme for

review and possible sunset of legislative exemptions to the sales tax; create a new sales tax on services that did not yet exist; and limit the Legislature's ability to create or continue exemptions and exclusions from the sales tax.

The Court opined that while all three of the goals arguably related to sales taxes, together they constitute impermissible logrolling and violate the single-subject requirement of Article XI, section 3, of the Florida Constitution, because the inclusion of the three subjects with disparate impact required the voter to "choose all or nothing" among the three apparent effects of the amendment. *Id.* at 635.

The Proposed Solar Amendment suffers the same defects as the amendments considered in *Evans* and in *Fairness Initiatives* by attempting to enfold multiple subjects under the broad generality of electricity consumers' rights regarding solar energy choice. It provides:

(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.

Thus, the amendment consists of the following multiple subjects:

1. Purported establishment of a constitutional right for electric customers to own or lease solar equipment installed on their property to generate electricity for their own use.

2. Constitutional protection of State and local governments' ability to ensure that customers who do not choose to install solar are not required to subsidize the cost of backup power and electric grid access to those who do.

3. Constitutional protection of State and local governments' ability to protect consumer rights.

4. Constitutional protection of State and local governments' ability to protect public health, safety and welfare.

Each of these multiple provisions are advanced under the ballot title "Rights of Electricity Consumers Regarding Solar Energy Choice" which imparts to the voter a belief that the overarching purpose of the amendment concerns, obviously, the rights of electricity consumers regarding solar energy choice. Although each provision may relate in a very general way to solar energy and effects on electricity consumers, the purpose of each provision is distinct from the others. Only the first provision relates to an electricity consumer's rights regarding solar energy. The others concern the power of government to regulate the use of solar equipment.

By enfolded under the broad generality of "rights of electricity consumers regarding solar energy choice" the disparate concepts of establishing a constitutional right and preserving specified government powers, the Proposed Solar Amendment fails the tests set forth in *Evans* and *Fairness Initiatives* and is

guilty of logrolling, forcing a voter into the “all or nothing” proposition of voting for a provision he or she does not like in order to obtain the provision he or she does like.

**II. THE BALLOT TITLE AND SUMMARY CREATE A FALSE IMPRESSION THAT THE INITIATIVE ESTABLISHES A CONSTITUTIONAL RIGHT WHEN THE RIGHT ALREADY EXISTS, FAILS TO INFORM THE VOTER OF THE CHIEF PURPOSE OF THE AMENDMENT AND MISLEADS THE VOTER THAT THE INITIATIVE CREATES A SOLAR CHOICE WHEN IT DOES NOT.**

The test for determining the legality of an initiative’s ballot title and summary is well settled by the precedents of this Court.

- The title and summary must inform the average voter of the chief purpose of the amendment without misleading the voter as to important effects of the initiative, but need not enumerate or describe every detail or ramification.
- The title and summary must be evaluated by reading them together.

The purpose of these tests is to allow voters to make an informed decision and to allow citizens to have reasonable access to the ballot through initiative.

**A. The Ballot Title and Summary Create a False Impression That the Initiative Establishes a Constitutional Right When the Right Purportedly Established Already Exists.**

The Proposed Solar Amendment’s ballot summary is misleading because it states that the amendment “*establishes* a right under Florida’s constitution for consumers to own or lease solar equipment.” Because such a right already exists

under Florida's constitution, the summary's assertion that the amendment *establishes* the right, gives a voter the false impression that he or she must vote in favor of the amendment in order to have a new constitutional right that does not already exist.

Article I, section 2 of Florida's Constitution protects a person's "basic right" to acquire, possess and protect property, subject only to the reasonable exercise of the State's police power for the protection of the public health, safety and welfare. Thus, by protecting a person's right to acquire, possess and protect property, Florida's Constitution protects the right of a person to own or lease solar equipment, subject to the reasonable exercise of police powers. The Proposed Solar Amendment expressly provides that "State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare... ." In other words, the amendment provides that the State will retain its ability to reasonably exercise police powers as they pertain to ownership or leasing of solar equipment. The Proposed Amendment, therefore, neither establishes a new right nor expands upon an existing one. By failing to inform the voter of this fact, the Proposed Solar Amendment's ballot title and summary mislead by creating a false impression that a vote in favor of the amendment is necessary for the voter to have a right which already exists.

**B. The Ballot Title and Summary is Confusing and Fails to Inform the Voter of the Chief Purpose of the Amendment.**

The true purpose of the Proposed Solar Amendment, as articulated by the Co-Chair for the amendment's sponsor, is to "kill" the Approved Solar Amendment put forth by Floridians For Solar Choice, Inc.<sup>1</sup> As such, the provisions included within the Proposed Solar Amendment are tailored specifically toward addressing arguments raised by its sponsor Consumers for Smart Solar, Inc., against the Approved Solar Amendment, while having no practical and negligible legal effect. It is, therefore, unsurprising that the ballot title and summary for the Proposed Solar Amendment fails to clearly articulate to the voter the chief purpose of the amendment now before this Court.<sup>2</sup>

The parties to this cause appear to share confusion as to the Proposed Solar Amendment's chief purpose, which has been described variously as follows:

- 1) Establishment of rights of electricity consumers regarding solar energy choice.<sup>3</sup>

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<sup>1</sup> Approved in *Advisory Opinion to the Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 244 (Fla. 2015).

<sup>2</sup> "Candidly, says Dick Batchelor, a Democratic former state legislator who's co-chairing the utility-backed campaign, 'the purpose is to kill their amendment (referring to the amendment sponsored by Floridians for Solar Choice, Inc.) and to pass ours.'" Amy Martinez, *Duel Over the Sun*, Florida Trend, Nov. 2015, at 83.

<sup>3</sup> The ballot title, as referenced by Floridians for Solar Choice, Inc., in this Answer Brief at p. 5, above.

- 2) “To establish in the Constitution a framework of rights to protect all electricity consumers regarding the use of solar equipment.”<sup>4</sup>
- 3) “To help ensure support for the continuing, orderly development and expansion of solar power in the state within an essential regulatory framework.”<sup>5</sup>
- 4) “Whether Floridians wish to include a provision in the state constitution establishing the right of electricity consumers to own or lease solar equipment to generate electricity for their own use.”<sup>6</sup>
- 5) “Whether there should be a constitutional framework for consumers to own or lease solar equipment installed on their property to generate electricity for their own use.”<sup>7</sup>

The inconsistencies between these statements of a “chief purpose” are obvious. Although several of these statements address establishment of a “framework,” the nature of said “framework” is different in each instance. While statement number 2 asserts that the purpose of the amendment is to establish a “framework of rights” to protect all electricity consumers regarding the use of solar equipment, statement number 5, asserts that the chief purpose of the amendment is

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<sup>4</sup> Consumers for Smart Solar, Inc., Initial Brief at p. 8.

<sup>5</sup> Duke Energy Florida, Florida Power & Light Co., Gulf Power Company, and Tampa Electric Company, Initial Brief at p. 7.

<sup>6</sup> The 60-Plus Association, Inc., Initial Brief at p. 7.

<sup>7</sup> Florida Electric Cooperatives Association, Inc., Initial Brief at p. 7.

to establish a “constitutional framework” for consumers to own or lease solar equipment. Statement number 3 asserts that the amendment establishes a “necessary regulatory framework.” Each of these statements has clearly different meanings, and each is inaccurate in its own way. For example, the amendment does not establish a framework of rights. Rather, the amendment expressly constitutionalizes an existing right, and also includes several additional provisions concerning the power of government to continue to do what it already has the authority to do. The explicit expression of an existing constitutional right and the clarification that existing government authority is unaffected does not constitute the establishment of a “framework of rights.” Likewise, the amendment does not create (or even preserve) a “regulatory framework” within which consumers may exercise the right to own or lease solar equipment, because the referenced regulatory framework already exists, and nothing in the amendment puts it at risk in any way. Statement number 4, by addressing only the provision that expressly constitutionalizes an existing right, ignores entirely in its description of the chief purpose the role of the other provisions of the amendment.

It is telling that the Proposed Solar Amendment’s sponsor and main proponents cannot agree as to the chief purpose of their amendment. If they cannot articulate it, how will the average voter be able to do so?

**C. The Ballot Title and Summary Misleads the Voter That the Initiative Creates a Solar Choice When it Does Not.**

The ballot title for the Proposed Solar Amendment reads: “Rights of Electricity Consumers Regarding Solar Energy Choice.” Voters reading this title will be misled to believe that the amendment will create a right for consumers to choose from among two or more solar energy alternatives. Indeed, Oxforddictionaries.com defines “choice” as “the act of choosing between two or more possibilities.”<sup>8</sup> Because the Proposed Solar Amendment merely enumerates in the Florida Constitution existing rights of electricity customers and existing powers of State and local governments, the amendment has nothing to do with a choice between two or more solar energy alternatives. In fact, the Proposed Solar Amendment is calculated to keep in place the status quo which prohibits electricity consumers from making choices among solar energy alternatives by treating third-party solar power agreements as regulated utility agreements.

The word “choice” is absent from the operative text of the Proposed Solar Amendment, appearing only in the proposed new section’s directory language. This is understandable, since the undisclosed legal effect of the amendment is to enumerate in the Constitution existing rights and powers, and not to create a right of consumers to make a choice among solar energy alternatives. However, rather

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<sup>8</sup> <http://www.oxforddictionaries.com/definition/english/choice>

than use the ballot title to clearly and unambiguously explain the legal effect of the amendment, the drafters introduced the out-of-place term “choice” which serves no descriptive purpose and will only serve to confuse voters as to the legal effect of the proposed amendment before them.<sup>9</sup> The Proposed Solar Amendment has already succeeded in confusing petitioners.<sup>10</sup> The Court should strike the Proposed Solar Amendment from the ballot so that will not add to the confusion.

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<sup>9</sup> The phrase “solar choice” has been used extensively by sponsors of the amendment already approved by this Court, “Limits or Prevents Barriers to Local Solar Electricity Supply,” to popularly describe that amendment. Indeed, the sponsor of the already-approved solar amendment is named Floridians for Solar Choice, Inc.

<sup>10</sup> Mary Ellen Klas, *Rival solar petitions spawn confusion, race for signatures*, Miami Herald Herald/Times Tallahassee Bureau, Oct. 30, 2015 ([http://www.miamiherald.com/news/politics-government/state-politics/article\\_41968473.html](http://www.miamiherald.com/news/politics-government/state-politics/article_41968473.html)).

## **CONCLUSION**

The Proposed Solar Amendment fails the constitutional single-subject test under the Court's oneness of purpose doctrine because it attempts to enfold multiple disparate subjects under the cloak of a broad and ambiguous purpose. The amendment's ballot title and summary also fail the statutory requirement for accuracy because their misleading language creates a false impression that existing rights are newly created by the amendment, confuses as to the chief purpose of the amendment, and misleads voters that the amendment concerns consumer choices among solar energy alternatives. For these reasons, the Proposed Solar Amendment should be stricken from the ballot.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following parties, this 1st day of February, 2016.

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

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