SC15-2150; SC16-12

IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF FOR INTERESTED PARTIES PROGRESS FLORIDA, INC., ENVIRONMENT FLORIDA, INC., AND THE ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC. IN OPPOSITION TO THE INITIATIVE PETITION

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STATEMENT OF THE CASE AND FACTS

Pursuant to Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General has petitioned this Court for an advisory opinion on the validity of an initiative petition filed under Article XI, section 3 of the Florida Constitution. The title of the proposed amendment is "Rights of Electricity Consumers Regarding Solar Energy Choice" ("utility-sponsored amendment"), and is sponsored by Consumers for Smart Solar.

IDENTITY AND INTEREST OF THESE OPPONENTS

Progress Florida, Inc., Environment Florida, Inc., and the Environmental Confederation of Southwest Florida, Inc. (collectively, "Conservationists") are organizations dedicated to the protection of the environment for future generations to share and enjoy. It is their conviction that a dramatic increase in the use of solar energy is needed to generate electricity without the burning of fossil fuels to slow the impact of the impending climate crisis.

If passed by the voters, the utility-sponsored amendment would be a constitutional endorsement of the idea that rooftop solar users should pay higher utility bills than other customers. Solar users could end up paying twice as much as other customers pay to buy power from the utilities. This utility-sponsored amendment pretends to be pro-solar but is actually a disguised attempt to derail rooftop solar in Florida.

A substantial number of members of the Conservationists' organizations would like to be able to take advantage of rooftop solar for their own use but are prevented from doing so because of regulatory barriers. Thus, the Conservationists have participated in gathering signatures for the proposed amendment titled "Limits or Prevents Barriers to Local Solar Electricity Supply." In the course of gathering those signatures, they frequently encountered voters that had already signed the utility-sponsored look-alike anti-solar amendment in the belief that it was the proposed constitutional amendment for which the Conservationists' organizations were gathering signatures. For that reason, the Conservationists submit this brief contending that this utility-sponsored amendment is a look-alike amendment that would deceive voters.

Progress Florida is a statewide, non-profit advocacy organization that promotes pro-middle class fiscal and social policies to improve the quality of life for all Floridians. Progress Florida combines research, public education, grassroots organizing and communication strategies to win a Florida that works for all Floridians, not just the powerful and politically connected. Progress Florida has 58,000 members and has been a leader in the effort to win a safer, cleaner, more sustainable energy future. Since its inception in 2008, Progress Florida has led opposition to opening Florida's nearshore waters to drilling rigs, fought unfair

utility fees that undermine energy conservation, and promoted efforts to greatly expand the use of solar power to meet our state's energy needs.

Environment Florida is a statewide, citizen-supported environmental advocacy organization working for a cleaner, greener, healthier future. Environment Florida investigates problems, crafts solutions, educates the public and decision-makers, and helps people make their voices heard in local, state and national debates over the quality of our environment and our lives. Environment Florida has 35,000 members and has worked to repower Florida with clean, renewable energy like solar. Since 2004, Environment Florida has worked to protect Florida's coasts from the dangers of offshore oil drilling, expand renewable energy incentives in Florida, and educate the public on the benefits of energy efficiency and solar power.

The Environmental Confederation of Southwest Florida was organized for the purpose of conserving the natural resources of Southwest Florida, to implement energy efficiency improvements and alternatives, and to engage in actions in the furtherance of energy conservation and alternative energy source development.

SUMMARY OF ARGUMENT

The utility-sponsored amendment is misleading because by stating in the summary that the amendment "establishes" a right to own or lease rooftop solar panels, it implies that there is no right to do so now under current Florida law.

Established law holds that when a proposed amendment represents that it "establishes" a new right, it is misleading and therefore impermissible if that right already exists. Under Florida law, there is already a legal right to own or lease and install solar panels.

By summarizing the amendment as meaning that it would ensure that ordinary customers would not have to subsidize solar users' "backup power," the summary would mislead voters because in common parlance, "backup power" means the gasoline generators used during power outages. The definition in the text of the amendment instead defines "backup power" to mean electricity sold to rooftop solar users at night and when they need more electricity than their solar panels are producing. Similarly, by explaining that the amendment would ensure that ordinary customers would not have to subsidize solar users' "electric grid access," the summary would mislead voters into thinking that it applied only to the cost of converter boxes and wires to connect to the utilities' power pole. The definition of electric grid access reveals that the effect of the amendment would be to endorse a controversial accounting theory that would allow utilities to pay much less for electricity generated by rooftop solar.

The use of the term "subsidize" is misleading because it invokes the stigma of payments of the type made to subsidized industries. An ordinary voter would not consider application of the "same price all the time" rule applied to residential

customers to constitute a subsidy of rooftop solar users that only buy electricity at night. Nor would an ordinary consumer consider it a subsidy if the utility pays for solar electricity from the rooftop solar users at the same per kilowatt hour price that it sells that electricity.

By purporting to establish a widely popular new right to own, lease, and install rooftop solar panels, while at the same time endorsing the principle that rooftop solar users should pay higher electric bills, the proposed amendment violates the single subject requirement.

ARGUMENT

I. The Ballot Summary Is Deceptive Because It Would Mislead Voters As To Existing Rights And As To What The Amendment Would Do If Enacted.

Pursuant to section 101.161(1), Florida Statutes, the ballot title and summary shall be "clear and unambiguous," meaning that "[t]he ballot title and summary must each 'stand on its own merits and not be disguised as something else.'" *In re Advisory Opinion to Attorney General re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 245 (Fla. 2015) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Similarly, "[t]he ballot title and summary may not 'fly under false colors or hide the ball with regard to the true effect of an amendment.'" *Id.* (quoting *Fla. Dep't of State v. Slough*, 922 So. 2d 142, 147 (Fla. 2008)). The ballot summary for the utility-sponsored amendment

does exactly that by disguising itself as pro-solar, by purporting to establish a right to install solar equipment (a right which already exists under Florida law), and by hiding the ball on the definition of backup power and electric grid access, concealing that the utility-sponsored amendment would constitutionalize the authority to penalize solar users with discriminatory charges and rates.

a. The Amendment Is Deceptive Because It Implies That There Is No Right Under Florida Law To Install Solar Equipment Unless The Amendment Is Passed To "Establish" That Right.

The ballot summary is misleading in that it states that the amendment "*establishes* a right under Florida's constitution for consumers to own or lease solar equipment." (emphasis added). Florida law and the Florida Constitution already protect the right of consumers to install solar equipment. The right to acquire, possess and protect property is one of the "basic rights" protected by the Florida Constitution. Art. 1, § 2, Fla. Const. Property rights can only be limited by those regulations that are reasonably necessary. *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 68 (Fla. 1990) (finding statute that limited giving of real property to charities to be an unconstitutional infringement on the property right). Not only is there nothing in Florida law that interferes with the right to install rooftop solar on consumers' own property, Florida law actively protects this right from infringement by others by prohibiting any ordinance restricting the installation of solar equipment, § 163.04(1), Fla. Stat., and voiding

any deed restriction, covenant, declaration, or any other agreement purporting to restrict the exercise of the right to install solar equipment. § 163.04(2), Fla. Stat.

Established law holds that a proposed constitutional amendment is misleading if it purports to "establish" a legal right that already exists. In *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984), this Court invalidated as deceptive a proposed amendment described as "establishing" a right to summary judgment when there are not genuinely disputed facts. This Court held that to use the word "establishes" with regards to a "right" in a proposed constitutional amendment ballot summary that has already "been established in Florida" "is clearly inaccurate." *Id.* When the effect is to "elevate" an existing right "to the status of a constitutional right, protected in the same manner and to the same degree as are other constitutional rights . . . the voter must be told clearly and unambiguously that this is what the amendment does." *Id.* Nowhere in the summary are voters told that this amendment would constitutionalize the existing right to install solar panels.

b. <u>The Summary Of The Amendment Is Deceptive Because Of How The Terms "Backup Power," "Electric Grid Access," And "Subsidy" Are Understood In Common Parlance.</u>

The ballot summary explains that the purpose of the utility-sponsored amendment is "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."

By explaining that the amendment would ensure that ordinary customers would not have to subsidize solar users' "backup power," the summary would mislead voters. In common parlance in Florida, "backup power" means the gasoline generators used during unexpected power outages such as hurricanes. This "unexpected power outage" understanding of that term comports with the "unscheduled outage" definition of "backup power" used in federal utility regulations. The Federal Energy Regulatory Commission defines "back-up power" to mean "electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment *during an unscheduled outage* of the facility." 18 C.F.R. § 292.101(b)(9) (emphasis added). The Florida Public Service Commission incorporates this definition in its own rules. R. 25-17.080, F.A.C.[1]

Thus, a voter would read the ballot summary to mean that regular utility customers will not have to pay for backup generators for rooftop solar users. This

[1] 25-17.080 F.A.C, Definitions and Qualifying Criteria, reads in relevant part:

> (1) For the purpose of these rules the Commission adopts the Federal Energy Regulatory Commission Rules 292.101 through 292.207, effective March 20, 1980, regarding definitions and criteria that a small power producer or cogenerator must meet to achieve the status of a qualifying facility.

is a tiny proposition that no one would disagree with. However, section (b)(3) of the text of the amendment, which will not appear on the ballot, defines "backup power" to mean electricity sold to rooftop solar users at night and at other times when they need more electricity than their solar panels are producing. The amendment text authorizes state and local governments to "ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power . . . to those who do." That authorization necessarily implies that a) rooftop solar users are being subsidized and b) that to avoid these subsidies, rooftop solar users should have to pay the utility more for their electric power than other customers do. That is a big controversial proposition that is concealed through the definition of the term "backup power" as meaning any grid electricity consumed by rooftop solar users rather than small gasoline generators used during power outages.

Similarly, in the context of selling rooftop solar electricity, by explaining that the amendment would ensure that ordinary customers would not have to subsidize solar users' "electric grid access," the summary would mislead voters. The word "access" in common parlance means a way of connecting to or having permission to use, as in internet access. Thus, the term "electric grid access" for rooftop solar users should be understood to mean the wire and converter box needed to connect to the utilities' electric wire next to the building.

However, the term "electric grid" is defined in the amendment to mean "the interconnected electrical network, consisting of power plants and other generating facilities, transformers, transmission lines, distribution lines and related facilities, that makes electricity available to consumers throughout Florida." That definition refers to the entire infrastructure of the electric system — from power plants to neighborhood power lines — that accounts for about two thirds of the price charged to customers for electricity (only about one third of the price is for fuel). In that context, ensuring that rooftop solar users are not "subsidized" refers to the accounting theory advocated by the utilities that when they buy rooftop solar electricity, the price should exclude any charge attributable to the infrastructure cost of their electric grid and power plants.

Under this "pay for fuel saved" theory, utilities that charge 12 cents per kilowatt hour to customers should only have to pay for rooftop solar electricity supplied to the grid at the rate of about 4 cents per kilowatt hour to account for reduced fuel costs. Otherwise, the theory goes, regular customers would be subsidizing rooftop solar because they would have to share in the cost of paying for more than avoided fuel costs. However, the opposing theory – the "pay what you charge" theory – holds that there is no subsidy because the solar electricity supplied to the grid is actually consumed by nearby customers. The utility charges those nearby customers the ordinary rate charged to all customers even though they

are actually selling solar electricity generated by nearby solar panels. If the utilities are selling it at the ordinary price (even though it cost nothing for the utilities to generate that power), they should pay the rooftop solar user that same price.

If the amendment means that rooftop solar users should have to pay for their own converter box and wires needed to connect to the grid, it is a tiny proposition that no one would disagree with. But if the question posed to the voters is to endorse "pay for fuel saved" instead of "pay what you charge," that is a big controversial proposition.

The misleading nature of the terms "backup power" and "electric grid access" is reinforced by the use of the misleading word "subsidize." The term "subsidize" in the ballot summary carries with it a stigma similar to that associated with government payments to farmers who grow or agree not to grow certain crops. Its use imports that stigma into the context of electric rates charged by regulated utilities, where half of all customers are always paying more than their exact share of the utility's costs than are the other half. Customers close to power plants pay the same electric rate as customers 25 miles away that need vast networks of power lines and transformers. The same rate is charged to residential customers at all hours of the day ("same price all the time") even though the cost

of generating power varies widely during the day and customers use widely varying amounts at different hours. Voters do not think of that as a subsidy.

Residential customers are not charged different rates depending on the amounts of electricity they use at different times of day. No ordinary voter would consider application of the "same price all the time" principle to rooftop solar users to be a subsidy. Similarly, when rooftop solar users generate excess electricity that is sent into the electric grid, that solar electricity is consumed by the neighboring users who are then charged for that electricity by the utility just as if it came from a distant power plant. No ordinary voter would consider it to be a subsidy to follow the "pay what you charge" principle if the utility paid the rooftop solar user the same amount the utility charged those neighboring users for that same electricity. Thus, the proposed amendment seeks voter endorsement of a controversial accounting theory that posits that ordinary customers are subsidizing rooftop solar users without disclosing that accounting theory or its effect on rooftop solar users.

A reasonable voter would not view the treatment of rooftop solar users as a subsidy unless something specific were paid for, such as a generator for backup power or for the converter box and wires needed to connect the solar panels to the utilities' electric power pole. As argued above, those terms deceptively suggests that the effect of the amendment was simply to require rooftop solar users to pay for those items.

Because the ballot description of the utility-sponsored amendment — the part seen by the voters — does not convey the actual purpose and effect of the amendment, this Court should find the amendment does not qualify for placement on the ballot.

II. By Purporting To Establish A Widely Popular New Right, While Endorsing The Principle That Rooftop Solar Users Should Pay Higher Bills, The Proposed Amendment Violates The Single Subject Requirement.

If some voters were to understand that the effect of the proposed amendment was to authorize and implicitly endorse the principle that utilities should charge more for electricity bought by rooftop solar users and pay less for electricity that utilities buy from rooftop solar users, they would be forced to decide whether to accept those discriminatory rates and charges in order to obtain a purported new legal right to have rooftop solar panels.

This Court has addressed this issue before. When one component of an amendment is widely popular, and another component is not necessarily connected to it, the single-subject rule is implicated. *In re Advisory Opinion to the Attorney General – Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994) ("*Save Our Everglades*") (widely popular initiative combined with a tax on one industry to fund the initiative forced an all or nothing choice where the tax might not have passed when standing alone). Solar power is also widely popular and this utility-sponsored amendment seeks to harness that popularity to impose an all or nothing

vote on a purported new legal right to use rooftop solar panels combined with discriminatory rates and charges for their use.

CONCLUSION

The utility-sponsored solar amendment misleads the voter to believe that there is no right to install solar equipment in the State of Florida, and misleads the voter through a summary that contains terminology that is only defined in the text of the amendment and that is different than that understood by an ordinary voter. The proposed amendment also violates the single-subject rule by combining what appears to be a provision that would open the doors to rooftop solar power with a provision constitutionalizing the authority to charge solar users discriminatory rates and charges.

Respectfully submitted this 11th day of January, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished electronically through the Florida Courts E-filing Portal on this 11th day of January, 2016, to the following:

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