

**IN THE SUPREME COURT OF FLORIDA**

Advisory Opinion to  
the Attorney General re:  
Rights of Electricity  
Consumers Regarding  
Solar Energy Choice

Case No: SC15-2150

**MOTION TO ACCEPT THE PROPOSED BRIEF OF  
FLORIDA ENERGY FREEDOM AS TIMELY FILED**

Florida Energy Freedom filed both its Motion for Leave to File an Amicus Brief (“Motion for Leave”) and the supporting brief (the “Brief”) with this Court on January 21, 2016. This Court denied the motion as moot on January 22, 2016 but asked Florida Energy Freedom to file a motion to accept the Brief as timely. In response, Florida Energy Freedom respectfully requests that this Court accept the Brief as timely filed for these reasons.

- 1. The Brief was written, filed, and served as an amicus brief in good faith, in line with a timeline derived by applying rule 9.370 to this Court’s Order.**

Pursuant to rule 9.370(a), an amicus curiae may file a brief only by leave of court. A motion for leave to file “must state the movant’s interest, the particular issue to be addressed” and “how the movant can assist the court in the disposition of the case.” [Liberty Counsel v. Fla. Bar Bd. of Governors](#), 12 So.3d 183, 186 n.8

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(Fla. 2009). Florida Energy Freedom's Motion for Leave states that it is interested in this case because the outcome will affect all of Florida's end users of electricity:

[Its] mission is to represent Florida's residential, commercial, and industrial end users - the customers who ultimately purchase electricity and pay for the electric grid - in calling for a competitive restructuring of Florida's vertically integrated electricity market. Of the seven largest states in America, Florida is the only one where end users have no choice in their electricity supply. The one alternative Florida's end users have to the vertically integrated electric utilities – affordable, self-generated solar energy – is at issue here, and that is why Florida Energy Freedom seeks specifically to intervene in opposition to the initiative petition in this case.

Florida Energy Freedom's Motion for Leave further stated that the particular issue the Brief will address is “why the proposed amendment should be stricken from consideration on the 2016 general election ballot.” Florida Energy Freedom then explained that it would assist this Court by discussing the actual ramifications of the proposed amendment:

Many of the filings in opposition to the initiative petition have paid great attention to [Fla. Stat. §101.161](#). Florida Energy Freedom supports all of their conclusions. But as an organization representing end-users across Florida, from restaurants and lodging establishments, to competitive energy companies, and international mass-market retailers, Florida Energy Freedom can assist this Court with the unique perspective of the Floridians that the proposed amendment would most affect every day. To that end, it would focus on analyzing the effects of each part of the text of the proposed amendment in light of the requirements of [Fla. Const. Art. XI, §3](#).

Under rule 9.370(b), amicus briefs may not exceed 20 pages and must identify the parties being supported. Florida Energy Freedom's Brief is exactly 20 pages, and

the cover references its stance in opposition to the proposed amendment. Under rule 9.370(c), amicus briefs may be submitted up to ten days after an initial brief. Along with the Motion for Leave, Florida Energy Freedom filed the Brief on January 21, 2016, ten days after initial briefs were filed on January 11, 2016, and served the Brief to all parties to this case by e-mail at the time of filing.

In a case like this, where any interested party may file an initial brief, an amicus brief is not an “initial brief.” A prospective amicus must first move for leave to file a brief, which this Court may deny at its discretion. Further, “initial briefs” may span up to 50 pages, but an amicus brief is limited to 20 pages, due to its narrowed focus. An amicus brief must not “repeat the same arguments advanced by one party,” but should discuss “how the decision will impact the real world in the future.”<sup>[1]</sup> To adhere to this, an amicus curiae necessarily must begin with a review of the parties’ briefs. The initial briefs in this case are exemplary. Florida Energy Freedom intends to add its rigorous review of the proposed amendment’s text and the analysis of its provisions in the context of its effects on existing individual rights and government authority.

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<sup>1</sup> Sylvia Walbolt & Joseph Lang, Jr., [Amicus Briefs: Friend or Foe of Florida Courts?](#), 32 Stetson L. Rev. 269, at 276 and 278 (2003).

**2. The Brief is similar to those amicus briefs ultimately accepted by this Court as timely filed in previous citizen initiative petition cases.**

Several of this Court's initiative petition cases up until 2002 included amicus briefs.<sup>[2]</sup> The amicus briefs were sometimes filed with the initial briefs of the other parties to the case, or filed shortly afterward. In at least three cases, amici curiae filed motions for leave to file useful briefs well after other parties had filed all of their briefs and completed oral argument. Each of these motions was granted by this Court.<sup>[3]</sup> In another initiative petition case, an amicus brief was rejected by this Court, but even then, it was eventually amended, refiled, and accepted as timely one week later.<sup>[4]</sup>

Where a useful amicus brief is filed after the ten-day deadline, this Court may also grant leave for later service under rule 9.370(c), even despite objections. More recently, this Court has granted such leave in other similarly high-profile cases on constitutional questions. This Court accepted a late-filed brief from the League of Women Voters over the Florida Senate's objections.<sup>[5]</sup> This Court accepted another brief from the Academy of Florida Elder Law Attorneys and the

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<sup>2</sup> It is not clear why amicus filings in initiative petition cases ceased around 2002. By [Amend. Fla. Rules of App. Pro.](#), 827 So.2d 888, 922-23 (Fla. 2002) the rules on them were updated, perhaps changing their applicability to these cases.

<sup>3</sup> Docket links: [Adv. Op. - English](#), 520 So.2d 11 (Fla. 1988), [Adv. Op. - Discrim. Laws](#), 632 So.2d 1018 (Fla. 1994), and [Adv. Op. - Prop. Rights](#), 699 So.2d 1304 (Fla. 1997).

<sup>4</sup> Docket and index link: [Adv. Op. - VPK.](#), 824 So.2d 161 (Fla. 2002) ([index](#)).

<sup>5</sup> Docket and index link: [Roberts v. Brown](#), 43 So.3d 673 (Fla. 2010) ([index](#))

Elder Law Section of The Florida Bar over objections from the Governor. The elder law amici curiae and the Attorney General then objected to one another's amicus briefs; this Court accepted each brief anyway.<sup>[6]</sup>

By comparison, Florida Energy Freedom asks that this Court accept as timely filed the Brief, which would have been considered timely had it been filed in nearly any other type of case. The Brief was filed ten days after initial briefs, and ten days before answer briefs. While preparing this motion to accept the proposed brief, counsel for Florida Energy Freedom spoke with counsel for both the sponsor and the opposition to the proposed amendment. The sponsor, Consumers for Smart Solar, objects to this motion to accept the proposed brief as timely filed. The first interested party in opposition, Floridians for Solar Choice, supports this motion. Counsel for both parties were prompt in their responses.

**3. Allowing the filing of the Brief will neither prejudice the parties nor delay the case, as all parties were served ten days prior to the date to file answer briefs.**

Even if rule 9.370 were to not apply here, Florida Energy Freedom asks that this Court accept the Brief as timely. There is no risk of prejudice in accepting the Brief because it was (1) filed ten days prior to this Court's February 1, 2016 deadline for answer briefs, (2) served to all parties in this case by e-mail, and then

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<sup>6</sup> Docket and index link: [Whiley v. Scott](#), 79 So.3d 702 (Fla. 2011) ([index](#)). All docket and index links are available through [www.floridasupremecourt.org](http://www.floridasupremecourt.org).

(3) posted to this Court’s website soon after it was filed. Nor is there any risk of delay. The parties to this case may file answer briefs by February 1, 2016, ten days after the service of Florida Energy Freedom’s proposed brief, and are unlikely to need extensions. The Brief focuses on the implications of the language of the proposed amendment, which its supporters have likely already evaluated independently of the Brief, albeit from a different perspective.

#### **4. Conclusion**

The citizen initiative process is “the most sanctified area in which a court can exercise power.” [Right to Treatment & Rehab.](#), 818 So.2d 491, 494 (Fla. 2002). Even if there were a filing error, those most affected by the language of the proposed amendment – in this case, the end users of electricity – should not be so prejudiced by it as to lose their opportunity “to be heard on the questions presented.” [Fla. Const. Art. IV, §10](#). Rule 9.370(c) and prior orders on amicus briefs in citizen initiative petition cases suggest such a loss of an opportunity to be heard is unnecessary.

Florida Energy Freedom’s Brief was written, filed, and served as an amicus brief in good faith, and its filing was similar to amicus briefs ultimately accepted by this Court as timely filed. Allowing it neither will prejudice the parties nor delay this case. Therefore, Florida Energy Freedom respectfully requests that this Court grant its motion to accept its proposed brief as timely filed.

Respectfully submitted, this  
Friday, January 29, 2016

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## **CERTIFICATE OF SERVICE**

I hereby certify that on Friday, January 29, 2016, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal, as authorized by Fla. R. Jud. Admin. 2.516, with notice furnished as indicated below:

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Florida Rules of Appellate Procedure 9.210(a), I certify that this Motion to Accept the Proposed Brief of Florida Energy Freedom as Timely Filed was generated using Times New Roman, a proportionately spaced font, and has a typeface of 14 points.

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