SC19-328 & SC19-479 (CONSOLIDATED)

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: RIGHT TO COMPETITIVE ENERGY MARKET FOR CUSTOMERS OF INVESTOR-OWNED UTILITIES; ALLOWING ENERGY CHOICE

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: RIGHT TO COMPETITIVE ENERGY MARKET FOR CUSTOMERS OF INVESTOR-OWNED UTILITIES; ALLOWING ENERGY CHOICE (FINANCIAL IMPACT STATEMENT)

INITIAL BRIEF OF ASSOCIATED INDUSTRIES OF FLORIDA, FLORIDA HEALTH CARE ASSOCIATION, AND FLORIDA HOSPITAL ASSOCIATION IN OPPOSITION TO THE INITIATIVE

DANIEL NORDBY (FBN 14588)
RACHEL NORDBY (FBN 56606)
BENJAMIN GIBSON (FBN 58661)
AMBER STONER NUNNALLY (FBN 109281)

SHUTTS & BOWEN LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
(850) 241-1717
DNordby@shutts.com
RNordby@shutts.com
BGibson@shutts.com
ANunnally@shutts.com

Counsel for Associated Industries of Florida, Florida Health Care Association, and Florida Hospital Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

CONSTITUTIONAL PROVISIONS

IDENTITY AND INTEREST OF OPPONENTS

Known as "The Voice of Florida Business" in the Sunshine State, Associated Industries of Florida ("AIF") has represented the principles of prosperity and free enterprise before the three branches of state government since 1920. A voluntary association of diversified businesses, AIF was created to foster an economic climate in Florida conducive to the growth, development, and welfare of industry and business and the people of the state.

Established in 1954, Florida Health Care Association ("FHCA") has a strong history of leadership and advocacy on behalf of Florida's long-term care providers and the elders they serve. FHCA's founding members were passionate about improving care for elder Floridians and recognized that their ability to shape public policy would be greatly enhanced by the creation of a statewide organization that brought together like-minded individuals. Today, FHCA is a federation representing over 80% of the state's 683 nursing centers and thousands of caregivers who provide skilled nursing, post-acute and sub-acute care, short-term rehabilitation, assisted living, and other services to the frail elderly and individuals with disabilities in Florida. FHCA works to promote the importance of investing in the well-being of Florida's frail elders and individuals with disabilities and to ensure their continued access to high quality long-term care.

The Florida Hospital Association ("FHA") is the leading voice of Florida's

hospital community. Founded in 1927, FHA supports the mission of its members to provide the highest quality of care to the patients they serve. To that end, FHA advocates proactively on behalf of hospitals at the state and federal levels on issues that will assist members in their mission of community service and care to patients.

Affordable and reliable electricity is critical to Florida's economy. For large commercial and industrial consumers, hospitals, and long-term care providers, reliability of electricity supply is not just expected—it is an absolute necessity. Florida's highly reliable electric power system has allowed our state—including the members of AIF, FHCA, and FHA—to grow and flourish. Florida's existing electric utility providers have built the current electric system over many decades and continue to improve it through hardening and smart technology, even in the face of hurricanes and other natural disasters.

The Opponents filing this brief have an interest in this proposed amendment to the Florida Constitution because the proposal threatens Florida's affordable and reliable electric system. The Opponents have an interest in this Court's review of the proposed amendment both because the proposal presents a misleading ballot summary to the voters and also because the proposal addresses multiple distinct subjects in violation of the Florida Constitution. Because of these defects, the proposed amendment should be denied placement on the ballot.

STATEMENT OF THE CASE AND FACTS

On March 1, 2019, the Attorney General petitioned this Court for an advisory opinion as to the validity of an initiative petition entitled "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice." This Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const. The full text of the Proposed Amendment, which would create a new section within Article X of the Florida Constitution, is set forth in the Attorney General's Petition.

The Proposed Amendment includes the following ballot title and summary:

> BALLOT TITLE: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice
>
> BALLOT SUMMARY: Grants customers of investor-owned utilities the right to choose their electricity provider and to generate and sell electricity. Requires the Legislature to adopt laws providing for competitive wholesale and retail markets for electricity generation and supply, and consumer protections, by June 1, 2025, and repeals inconsistent statutes, regulations, and orders. Limits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems. Municipal and cooperative utilities may opt into competitive markets.

The Attorney General subsequently petitioned the Court for an advisory opinion as to the Financial Impact Statement for the Proposed Amendment that was prepared by the Financial Impact Estimating Conference. On March 28, 2019, this Court issued an order consolidating the two cases for all purposes and

establishing a briefing schedule.

Associated Industries of Florida, Florida Health Care Association, and Florida Hospital Association submit this brief as interested parties opposed to the Proposed Amendment.

SUMMARY OF THE ARGUMENT

The Proposed Amendment is clearly and conclusively defective on multiple grounds, any one of which constitutes sufficient grounds for this Court to find the proposal invalid and ineligible to appear on the ballot.

The Proposed Amendment violates the Florida Constitution's single-subject requirement by addressing multiple topics, by logrolling distinct provisions into a single initiative, and by substantially altering the functions of multiple branches of state government. The single-subject requirement exists to prevent an initiative process that lacks transparency and accountability from introducing precipitous and cataclysmic changes to Florida's Constitution on multiple distinct topics about which voters may hold differing opinions.

The Proposed Amendment violates the single subject requirement in several respects. The proposal addresses at least five distinct and logically separable subjects by: 1) establishing a constitutional right for electricity customers to choose their electricity provider from multiple providers in competitive markets; 2) establishing a separate constitutional right for electricity customers to produce

electricity themselves or in association with others; 3) denying customer choice by prohibiting Florida's existing investor-owned utilities from generating electricity or otherwise participating in the new competitive markets; 4) eliminating the Florida Public Service Commission's electric utility ratemaking duties and this Court's mandatory jurisdiction over electricity ratemaking; and 5) creating an undisclosed private cause of action for any Florida citizen to obtain a court order compelling the Legislature to enact implementing legislation under vague and non-justiciable standards. The Proposed Amendment bundles and logrolls these disparate subjects into a single proposal in violation of the single-subject requirement. The multiple subjects addressed by the Proposed Amendment also substantially alter the functions of multiple branches of state government in violation of the single-subject requirement. This Court should find the Proposed Amendment invalid as a result of these constitutional deficiencies and issue an advisory opinion denying ballot placement for the proposal.

In addition to violating the Florida Constitution's single-subject requirement, the Proposed Amendment is also invalid because its ballot statement is misleading and fails to fairly and accurately inform voters of the proposal's chief purpose. The ballot statement affirmatively misinforms voters by stating that the proposal *grants* customers of investor-owned utilities the right to choose their electricity provider when the Proposed Amendment actually *denies* customers a

choice of electric utility providers. Specifically, the Proposed Amendment denies customers the right to choose to continue receiving service from their current electricity provider by prohibiting investor-owned utilities from engaging in the retail sale of electricity. The ballot statement fails to disclose that the Proposed Amendment would dramatically restrict the activities of investor-owned utilities—prohibiting investor-owned utilities from any involvement in the generation or sale of electricity and even mandating (by necessary implication) that investor-owned utilities divest their ownership of the electrical generation, transmission, and distribution systems that are currently responsible for providing electric service to millions of Floridians.

The Proposed Amendment's ballot statement also misleads voters in several other respects. The ballot statement advises voters that the proposal grants a constitutional right to "sell electricity," but the Proposed Amendment grants no such affirmative constitutional right. Instead, the Proposed Amendment merely states that its terms *should not be construed to limit* the right to sell electricity. The Proposed Amendment's ballot statement fails to disclose that it would invalidate countless statutes, regulations, and orders governing the current electric utility system up to *two years* before implementing legislation for the Proposed Amendment would be required to take effect. Finally, the Proposed Amendment's ballot statement plainly misstates the deadline by which the Proposed Amendment

would require the Legislature to adopt implementing legislation.

Because of these serious legal defects, this Court should issue an advisory opinion concluding that the Proposed Amendment is invalid and cannot be approved for placement on the ballot.

ARGUMENT

I. THE PROPOSED AMENDMENT VIOLATES THE FLORIDA CONSTITUTION'S SINGLE-SUBJECT REQUIREMENT.

The Florida Constitution restricts constitutional amendments proposed by initiative petition to "one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. The single-subject requirement "is a rule of restraint" placed in the constitution upon the ballot initiative process to allow the people to propose and vote upon "singular changes in the functions of our governmental structure." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). By focusing the electorate's attention on "a change regarding one specific subject of government," the single-subject requirement "protect[s] against multiple precipitous changes in our state constitution." *Id*.; *see also In re Adv. Op. to Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (noting that single-subject requirement is "designed to insulate Florida's organic law from precipitous and cataclysmic change").

This Court requires "strict compliance" with the single-subject rule in the

initiative process because "our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature." *Fine*, 448 So. 2d at 989. For that reason, this Court is called upon to provide "careful scrutiny" of an initiative proposal to ensure that it meets the single-subject requirement. *In re Adv. Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 242 (Fla. 2015).

The Proposed Amendment, on its face, violates the single-subject requirement by addressing multiple subjects that are logically separable. As an analytical matter, this Court has also evaluated compliance with the single-subject requirement by determining whether the initiative: 1) engages in "logrolling" of distinct subjects; or 2) substantially alters or performs the functions of multiple branches of state government. *Adv. Op. to Att'y Gen. re Water & Land Conservation*, 123 So. 3d 47, 50 (Fla. 2013). The Proposed Amendment engages in both of these prohibited practices, and each provides a further independent ground for this Court to deny ballot placement to the Proposed Amendment for its violation of the single-subject requirement.

A. The Proposed Amendment addresses multiple subjects in a single initiative.

On its face, the Proposed Amendment violates the Florida Constitution's single-subject requirement by addressing at least five distinct and logically

separable subjects. The Proposed Amendment: 1) establishes a constitutional right for electricity customers to choose their electricity provider from multiple providers in competitive markets; 2) establishes a separate constitutional right for electricity customers to produce electricity themselves or in association with others; 3) denies customer choice by prohibiting Florida's existing investor-owned utilities from generating electricity or otherwise participating in the new competitive markets by limiting their activities to the "construction, operation, and repair of electrical transmission and distribution systems"; 4) eliminates the Florida Public Service Commission's electric utility ratemaking duties and this Court's mandatory jurisdiction over electric ratemaking; and 5) creates an undisclosed private cause of action for any Florida citizen to obtain a court order compelling the Legislature to enact implementing legislation under vague and non-justiciable standards.

These separate and distinct subjects addressed by the Proposed Amendment lack the "logical and natural oneness of purpose" required by the single-subject requirement and this Court's precedent. *See*, *e.g.*, *Adv. Op. to Att'y Gen. re Voting Restoration Amend.*, 215 So. 3d 1202, 1206 (Fla. 2017). The initiative establishes—at the constitutional level—a multitude of new "rights" for "electricity customers," including "the right to choose their electricity provider," a right to "select[] from multiple providers in competitive wholesale and retail

electricity markets," and a right to "produc[e] electricity" by themselves or in association with others.

Each of these new constitutional rights is logically separable and distinct from one another. As but one example, the creation of a new right to "choose [an] electricity provider" in a competitive retail market does not necessitate the *separate* creation of a right for individual customers to "produc[e] electricity themselves or in association with others." Only three years ago, this Court concluded that an initiative proposal establishing a constitutional right of electricity consumers to own or lease solar equipment installed on their own property to generate electricity for their own use satisfied the Florida Constitution's single-subject requirement. *Adv. Op. to Att'y Gen. re Rights of Electricity Consumers Regarding Solar Energy Choice*, 188 So. 3d 822 (Fla. 2016). The Proposed Amendment here goes far beyond the single-subject of the initiative approved by this Court in *Solar Energy Choice* by proposing a panoply of logically separable and distinct constitutional rights related to electricity.

In addition to creating a variety of new constitutional rights related to electricity—and in addition to the creation of a new "competitive energy market"—the Proposed Amendment severely curtails the activities of Florida's existing investor-owned utilities by mandating legislation to "limit the activity of investor-owned electric utilities to the construction, operation, and repair of

electrical transmission and distribution systems." The effect of such legislation would be a prohibition on participation by investor-owned utilities in the "competitive" wholesale and retail energy markets created by the Proposed Amendment. Such an evisceration of the current role and activities of investor-owned utilities bears no relation or logical connection to the other provisions of the Proposed Amendment. The creation of an open and competitive energy market free from legal monopolies and exclusive franchises may be a single subject. But the enactment of an outright ban on the participation of existing electric utility providers within that "competitive" market is an entirely different subject—particularly for a proposal presented to the voters as empowering "choice." The distinct and logically separate topics contained within the Proposed Amendment cannot fairly be characterized as a single "subject and matter directly connected therewith" as required by the Florida Constitution.

The presence of any more than one of these distinct subjects in the Proposed Amendment is fatal under the single-subject requirement. It is no answer to a single-subject challenge that each of these distinct subjects relate to different aspects of "energy choice." Indeed, almost any collection of distinct topics can be characterized as a "single subject" at a sufficiently high level of generality. But this Court has long held that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." *Evans v.*

Firestone, 457 So. 2d 1351, 1353 (Fla. 1984); s*ee also Fine*, 448 So. 2d at 990 (rejecting sponsor's contention that single-subject requirement was satisfied because multiple provisions of an initiative all addressed "limiting government revenue"). Were this Court to adopt a different approach, initiative sponsors could readily evade the Florida Constitution's single subject requirement by the simple artifice of describing their proposals in sweeping generalities: "proposing legal reform" or "proposing changes to government structure," for example.

The Proposed Amendment violates the single-subject requirement by addressing disparate subjects in a single initiative and should be denied placement on the ballot.

B. The Proposed Amendment engages in logrolling.

The Proposed Amendment also engages in "logrolling" of distinct subjects in violation of the Florida Constitution's single-subject requirement.This Court has long noted that the single-subject requirement "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 unpopular issue." *In re Adv. Op. to Att'y Gen. re Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994); *see also Adv. Op. to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1224 (Fla. 2006) (defining logrolling as the practice wherein a single

proposal combines unrelated issues, "some of which electors might wish to support, in order to get an otherwise disfavored provision passed").

In *Nonpartisan Commission*, this Court concluded that a ballot initiative violated the single-subject requirement by combining the creation of a new redistricting commission with a separate change to the standards applicable to the districts that would be created by the commission.[1] 926 So. 2d at 1225–26. The combination of these two subjects constituted logrolling because "[a] voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place." *Id*. at 1226. This Court concluded that the proposal engaged in logrolling and ordered it stricken from the ballot because "a voter would be forced to vote in the 'all or nothing' fashion that the single subject requirement safeguards against." *Id*.

Similarly, in *Save Our Everglades*, this Court found that an initiative that both established a "Save Our Everglades Trust" to restore the Everglades—and also imposed a fee on raw sugar to fund the Trust—embodied "precisely the sort

[1] A concurring opinion for three justices would have further found that the initiative in *Nonpartisan Commission* violated the single-subject requirement by joining congressional and legislative redistricting in the same proposal. *Id*. at 1229.

of logrolling that the single-subject requirement was designed to foreclose." 636 So. 2d at 1341. As the Court explained, "[o]ne objective—to restore the Everglades—is politically fashionable, while the other—to compel the sugar industry to fund the restoration—is more problematic. Many voters sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing." *Id*. This Court ordered the "Save Our Everglades" initiative stricken from the ballot because it engaged in logrolling in violation of the single-subject requirement.

The Proposed Amendment here similarly violates the single-subject requirement by engaging in logrolling of disparate topics. A voter considering the Proposed Amendment may favor the establishment of a constitutional right for customers to produce their own electricity (as in the 2016 *Solar Energy Choice* initiative), but oppose the broader dismantling and restructuring of Florida's electric utility market mandated by the Proposed Amendment. Another voter may favor the creation of a competitive energy market, but oppose the Proposed Amendment's prohibition on electricity generation and participation in the market by his or her current investor-owned utility. And a third voter may generally prefer the concept of "energy choice" but oppose the effective elimination of the current electric utility rate review by the Florida Public Service Commission and this

Court. Yet, "[t]he amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote . . . in an 'all or nothing' manner." *Adv. Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998).

The multiple topics addressed in the Proposed Amendment here are also considerably more divergent than those at issue in the initiatives this Court found invalid in *Nonpartisan Commission* and *Save Our Everglades*. Just as the initiative sponsors in those cases contended that their proposals addressed the single subjects of "redistricting reform" and "Everglades restoration," the sponsor here may contend that "energy choice" is the Proposed Amendment's single subject. But "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." *Evans*, 457 So. 2d at 1353. And this Court found little difficulty in declaring that the proposals at issue in *Nonpartisan Commission* and *Save Our Everglades* were invalid based upon their noncompliance with the Florida Constitution's single-subject requirement.

The Proposed Amendment engages in classic logrolling of the sort that this Court has repeatedly condemned as violative of the single-subject requirement. This Court should issue an Advisory Opinion finding the proposal invalid and denying ballot placement for the Proposed Amendment based upon its constitutional deficiencies.

C. The Proposed Amendment substantially alters the functions of multiple branches of government.

Finally, the Proposed Amendment violates the single-subject requirement by substantially altering the functions of multiple branches of government in a single initiative proposal. Although a proposed amendment may lawfully *affect* more than one branch of government, a ballot initiative violates the Florida Constitution's single-subject requirement where it "substantially alters or performs the functions of multiple branches" of government. *Adv. Op. to Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353–54 (Fla. 1998). The Proposed Amendment here fails to satisfy this standard.

In *Save Our Everglades*, 636 So. 2d at 1340, this Court concluded that a ballot initiative violated the single-subject requirement by performing the functions of multiple branches of government. The initiative at issue would have "establishe[d] a trust for restoration of the Everglades" while "provid[ing] for funding and operation of the trust." *Id*. The court characterized this provision as implementing a "policy decision of statewide significance and thus perform[ing] an essentially legislative function." *Id*. The proposal would also have involved the exercise of "vast executive powers" to administer the trust and engage in capital projects and land acquisition. *Id*. Finally, the proposal would have performed a "judicial function" by making factual findings of liability and damages against the

sugar cane industry. *Id*. By creating a "virtual fourth branch of government," the initiative fell "far short of meeting the single-subject requirement" of the Florida Constitution. *Id*. at 1340–41.

The Proposed Amendment here also substantially alters the functions of multiple branches of government in a manner prohibited by the single-subject requirement. By establishing a "competitive energy market," the Proposed Amendment would largely eliminate the ratemaking duties of the Florida Public Service Commission and, consequently, this Court's mandatory jurisdiction to review the PSC's ratemaking actions. This Court's review under Article V, section 3(b)(2), is self-evidently a judicial function of the judicial branch. The Public Service Commission operates as a entity of the legislative branch, and its public-utility ratemaking has been acknowledged by this Court as a "legislative function." *Chiles v. Pub. Serv. Comm'n Nom. Council*, 573 So. 2d 829, 832 (Fla. 1991); *see also* § 350.001, Fla. Stat. (stating that "[t]he Florida Public Service Commission has been and shall continue to be an arm of the legislative branch of government"). The proposal therefore alters the functions of both the legislative and judicial branches in violation of the single-subject requirement.

The Proposed Amendment also substantially alters the functions of the judicial, legislative, and executive branches of government by creating a private cause of action—undisclosed in the ballot statement—for any Florida citizen to

obtain a court order compelling the Legislature to enact legislation. And this extraordinary intrusion on inter-branch comity would be authorized whenever a court concludes that the Legislature had not adopted "complete and comprehensive" legislation to implement the Proposed Amendment "in a manner fully consistent with its broad purposes and stated terms."

The terms of the Proposed Amendment therefore present a hopelessly vague and non-justiciable standard. In the absence of clear and definite standards to adjudicate a proceeding under the proposal, the Proposed Amendment would require the judiciary to exercise a *policymaking* function exclusively assigned to the legislative and executive branches under the Florida Constitution. *See* Art. II, § 3, Fla. Const. (providing for the division of the powers of state government into legislative, executive, and judicial branches and prohibiting any person belonging to one branch from exercising powers appertaining to either of the other branches).

After nearly a decade of litigation, this Court recently rejected a challenge to Florida's entire K-12 education system under Article IX, section 1(a), after determining that the constitutional requirement that the state make "adequate provision" for a "uniform, efficient, safe, secure, and high-quality system of free public schools" failed to present a manageable standard to avoid judicial intrusion into the other branches of government. *Citizens for Strong Schools, Inc. v. Fla. State Bd. of Edu.*, 262 So. 3d 127 (Fla. 2019).

The Proposed Amendment would authorize the judiciary to order legislative action under a standard even less manageable than Article IX, section 1(a). Under the Proposed Amendment, the Legislature's enactment of complete and comprehensive legislation that is entirely consistent with the proposal's explicit terms could nonetheless be stricken if a court determined that the legislation is inconsistent with the "broad purposes" of the Proposed Amendment. This, in effect, is no standard at all and invites judicial intrusion into the policymaking functions of the legislative and executive branches. By mandating judicial review under vague and non-justiciable standards, the Proposed Amendment substantially alters the respective roles of the judicial, legislative, and executive branches in establishing Florida's energy policy.

The Proposed Amendment violates the single-subject requirement by substantially altering the functions of both the legislative and judicial branches of government. And, as discussed below, it alters these significant functions of multiple branches of state government without adequate disclosure to the voters in the proposal's ballot title and summary.

* * *

The creation of a variety of new and disconnected constitutional rights, the dismantling of Florida's current electric utility system, a mandate for the Legislature to establish a new "competitive energy market" through

"comprehensive legislation" consistent with unstated "broad purposes," a constitutional ban on the participation of investor-owned utilities in the new "competitive" market, the abolition of the Public Service Commission's ratemaking function and this Court's review of electric utility ratemaking for customers of investor-owned utilities, and the creation of a private cause of action to compel the Legislature's compliance with vague and non-justiciable standards are each separate and distinct subjects. The proposal's attempt to bundle these disparate subjects together under the umbrella of "allowing energy choice" violates the single-subject requirement by engaging in logrolling and by altering the functions of multiple branches of government. This Court should disapprove the Proposed Amendment from ballot placement for these violations of the Florida Constitution's single-subject requirement.

II. THE PROPOSED AMENDMENT'S BALLOT TITLE AND SUMMARY ARE MISLEADING AND DO NOT FAIRLY AND ACCURATELY INFORM VOTERS OF ITS CHIEF PURPOSE.

In addition to the single-subject requirement imposed by the Florida Constitution, Florida law also requires the sponsor of an amendment proposed by initiative to prepare a ballot summary not exceeding 75 words in length. § 101.161(1), Fla. Stat. The ballot summary is an explanatory statement in "clear and unambiguous language" of the "chief purpose of the measure." *Id*. When reviewing the validity of a ballot title and summary under section 101.161 of the

Florida Statutes, this Court has asked two questions: 1) whether the ballot title and summary fairly and accurately inform the voter of the chief purpose of the amendment; and 2) whether the language of the title and summary, as written, is likely to mislead the public. *See*, *e.g.*, *Adv. Op. to Att'y Gen. re Water & Land Conservation*, 123 So. 3d at 50; *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008). The ultimate purpose of the ballot title and summary requirements is "to provide fair notice of the content of the Proposed Amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citation omitted). "Reduced to colloquial terms, a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an amendment." *Slough*, 992 So. 2d at 147.

Here, the Proposed Amendment's ballot title and summary fail to satisfy these basic "truth-in-advertising" requirements on several grounds.

A. The Ballot Title and Summary fail to disclose that the Proposed Amendment denies electricity customers the right to choose their current electricity provider.

With its very first sentence, the ballot summary for the Proposed Amendment affirmatively misleads voters by stating that customers of investor-owned utilities would be granted "the right to choose their electricity provider." Read in conjunction with the ballot title's promise of "energy choice," a

reasonable voter would presume that the Proposed Amendment would guarantee customers of investor-owned utilities the right to choose whether to continue receiving service from their *existing* electricity provider or to choose a new provider.

But the Proposed Amendment offers no such choice. Instead, the Proposed Amendment *denies* customers of investor-owned utilities the right to choose to continue receiving service from their current electricity provider by prohibiting investor-owned utilities from generating electricity or otherwise participating in the wholesale and retail markets. The ballot title and summary, as written, are likely to mislead the public into presuming that the Proposed Amendment offers a choice that the text of the amendment affirmatively denies.

The misleading first sentence of the ballot summary is not clarified by the vague reference in the third sentence to limits on the activities of investor-owned utilities. The ballot summary fails to clearly and unambiguously state that the Proposed Amendment, by limiting investor-owned utilities to construction, operation and repair of transmission and distribution systems, is actually prohibiting investor-owned utilities from participating in the wholesale or retail markets. The ballot summary therefore misleads voters by failing to disclose the broader effects of the Proposed Amendment on investor-owned utilities.

Under current law, investor-owned utilities may engage in all aspects of the

electrical utility system: generation, transmission, and distribution. The Proposed Amendment would radically reshape Florida's system of electric utility regulation by prohibiting investor-owned utilities from engaging in any activities other than the construction, operation and repair of transmission and distribution systems. The ballot summary is misleading in failing to inform voters regarding the activities in which investor-owned utilities may currently engage that would be prohibited under the terms of the Proposed Amendment.

As a result of this omission, a voter reading the ballot summary would have no reason to suspect that the Proposed Amendment would ban investor-owned utilities from operating electric generating facilities or from participating in the retail electricity market. In this respect, the Ballot Summary is misleading not for what it says, but what it fails to say.

B. The Ballot Summary falsely states that the Proposed Amendment grants customers a constitutional right to "sell electricity" when no such right is conferred by the text of the proposal.

The Ballot Summary is also misleading to voters by falsely stating that the Proposed Amendment "[g]rants customers of investor-owned utilities the right to . . . sell electricity" when the text of the Proposed Amendment does not actually grant any affirmative constitutional right to sell electricity. This Court should find the ballot summary fails to clearly and accurately describe the substance of the Proposed Amendment because it misstates the nature of the rights conferred by the

text of the proposal.

The Proposed Amendment purports to confer a variety of separate rights to electricity customers in its subsection (b), entitled "Rights of Electricity Customers." The proposal provides, in relevant part, that:

> Effective upon the dates and subject to the conditions and exceptions set forth in subsections (c), (d), and (e), every person or entity that receives electricity service from an investor-owned electric utility (referred to in this section as "electricity customers") has the right to choose their electricity provider, including, but not limited to, selecting from multiple providers in competitive wholesale and retail electricity markets, or by producing electricity themselves or in association with others, and shall not be forced to purchase electricity from one provider.

The specific constitutional rights conferred by the Proposed Amendment therefore include the right to "choose their electricity provider," the right to "select[] from multiple providers in competitive wholesale and retail markets," the right to "produc[e] electricity themselves or in association with others," and the right to "not be forced to purchase electricity from one provider." Although this list of constitutional rights conferred by the Proposed Amendment includes rights relating to the *purchase* and *production* of electricity, nowhere within the text of the Proposed Amendment are customers granted a constitutional right to *sell electricity*.

The only reference to a right to "sell" electricity within the proposal's text is not a statement of a constitutional right granted by the Proposed Amendment, but part of a rule of constitutional construction: "Except as specifically provided for below, nothing in this section shall be construed to limit the right of electricity customers to buy, sell, trade, or dispose of electricity." By its terms, this provision neither grants nor restricts any independent rights, but merely addresses how the other terms of the Proposed Amendment are to be construed.

Stated differently, if rights to buy, sell, trade, or dispose of electricity are granted *elsewhere*—by statute, by regulation, or by a separate constitutional provision, for example—the Proposed Amendment's terms should not be construed to limit those separately-conferred rights. Other recent ballot initiatives amending the Florida Constitution have been clear and express when establishing a new right in the State's governing document. *See, e.g.,* Art. X, § 24(d), Fla. Const. (Florida's Minimum Wage Amendment – "*Rights protected under this amendment include, but are not limited to,* the right to file a complaint or inform any person about any party's alleged noncompliance with this amendment, and the right to inform any person of his or her potential rights under this amendment and to assist him or her in asserting such rights." (emphasis added)); *Id.* § 25(a) (Patients' Right to Know Amendment – "In addition to any other similar rights provided herein or by general law, *patients have a right to have access to any*

records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." (emphasis added)). When compared to these constitutional rights—or to the separate rights to purchase and produce electricity granted by the Proposed Amendment—it is apparent that the proposal itself does not grant any constitutional right to sell electricity.

Because the Proposed Amendment *does not* grant a constitutional right to sell electricity, the proposal's ballot summary is affirmatively misleading by falsely informing voters that the proposal *does* grant a right to sell electricity. The very first sentence of the ballot summary states that the Proposed Amendment "[g]rants customers of investor-owned utilities the right to choose their electricity provider and to generate and sell electricity." As described above, however, and in contrast to the explicit constitutional rights that *are* granted by the Proposed Amendment, the text of the proposal *does not grant customers of investor-owned utilities the right to sell electricity*, but merely provides direction on how the proposal's terms should be construed with respect to the right to sell electricity. The ballot summary is therefore misleading and should be declared invalid.

C. The Ballot Summary fails to disclose which "statutes, regulations, and orders" would be repealed upon the adoption of implementing legislation by the Legislature.

The Ballot Summary states that the Proposed Amendment "repeals inconsistent statutes, regulations, and orders" but does not identify which of the

thousands of statutes, regulations, and orders governing Florida's electric utility industry would be affected by this repeal. The Ballot Summary therefore fails to provide sufficient accurate information to allow the voter to make an intelligent choice.

The flaws in the Ballot Summary are not clarified by the text of the proposal itself. The Proposed Amendment actually sweeps more broadly than the Ballot Summary suggests by stating that "*Upon the enactment of any law* by the Legislature pursuant to this section, *all* statutes, regulations, or orders which conflict with this section shall be void." (Emphasis added). Under the plain language of the Proposed Amendment, even a minimal implementing law that does not address all aspects of the initiative would automatically render void *all* statutes, regulations, and orders that conflict with the Proposed Amendment. The Proposed Amendment itself also establishes the "enactment of any law by the Legislature" as the constitutional trigger for this wholesale voiding of laws governing Florida's electric utilities. Neither the ballot summary nor the Proposed Amendment itself explain to the voters how Florida's utility system will operate during the period between the *enactment* of implementing legislation (no later than June 2023) and the *effective date* of that implementing legislation (no later than June 2025) when hundreds of statutes, regulations, and orders governing the electric utility system will have become void upon the enactment of implementing

legislation.

At the same time, the ballot summary also fails to disclose that some statutes, rules, and orders inconsistent with the Proposed Amendment *may not* be repealed. Specifically, the text of the Proposed Amendment states that the Proposed Amendment "shall not be construed to invalidate this State's public policies on renewable energy, energy efficiency, and environmental protection." But many of these policies are inextricably intertwined with the statutes, rules, and orders governing Florida's current electric utility system. For example, Florida law addresses Clean Air Act compliance by providing for public utilities to submit compliance plans for approval by the Florida Public Service Commission. § 366.825, Fla. Stat. ("Clean Air Act compliance; definitions; goals; plans"). This statute—which addresses the Clean Air Act compliance obligations of public utilities that are engaged in the generation of electricity—would presumably be rendered "void" upon the adoption of implementing legislation, as the Proposed Amendment prohibits public utilities from generating electricity. Yet the Proposed Amendment also states that its provisions "shall not be construed to invalidate" Florida's public policies on environmental protection—which would presumably include Florida's policies related to Clean Air Act compliance. The ballot summary contains no reference to this broad exception to the repeal of inconsistent statutes, and voters are therefore provided no information that would allow them

to evaluate how this textual conflict within the Proposed Amendment itself might be resolved.

Because the ballot summary is misleading both in what it says, and also in what it omits, this Court should find the ballot summary invalid and deny ballot placement to the Proposed Amendment.

D. The Ballot Summary misstates the deadline by which the Proposed Amendment would require the Legislature to adopt implementing legislation.

Finally, the Ballot Summary fails to accurately disclose the deadline imposed by the Proposed Amendment for the Legislature to adopt implementing legislation. Instead, the Ballot Summary misinforms voters by stating that the Legislature has more than two years longer to adopt laws to implement the Proposed Amendment than the proposal actually provides.

The Proposed Amendment provides that: "By June 1, 2023, the Legislature shall adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad purposes and stated terms, which shall take effect no later than June 1, 2025 . . . ." Under the plain language of the Proposed Amendment, the Legislature's deadline to *adopt* implementing legislation is June 1, 2023, and that legislation must *take effect* no later than June 1, 2025.

The Ballot Summary, on the other hand, states that the proposal "Requires the Legislature to adopt laws . . . by June 1, 2025." The disclosure of the adoption

deadline in the Ballot Summary is plainly inconsistent with the express terms of the Proposed Amendment. The ballot summary is invalid because it provides an inaccurate and misleading statement regarding the content of the Proposed Amendment.

CONCLUSION

"The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions." *Slough*, 992 So. 2d at 149. For the reasons stated above, the Proposed Amendment and its ballot title and summary fail to provide the clarity that the voters deserve when considering whether to amend their constitution. This Court should issue an advisory opinion finding the Proposed Amendment invalid and prohibiting it from being placed on the ballot.

Respectfully submitted,

/s/ Daniel Nordby
DANIEL NORDBY (FBN 14588)
RACHEL NORDBY (FBN 56606)
BENJAMIN GIBSON (FBN 58661)
AMBER STONER NUNNALLY (FBN 109281)

SHUTTS & BOWEN LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
(850) 241-1717
DNordby@shutts.com
RNordby@shutts.com
BGibson@shutts.com
ANunnally@shutts.com

Counsel for Associated Industries of Florida, Florida Health Care Association, and Florida Hospital Association

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 18th day of April, 2019, through the Florida Courts E-Filing Portal to:

JOE JACQUOT
Executive Office of the Governor
State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001
Telephone: (850) 717-9310
Facsimile: (850) 488-9810
joe.jacquot@eog.myflorida.com

General Counsel to Governor Ron DeSantis

BRAD MCVAY
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
Telephone: (850) 245-6536
Facsimile: (850) 245-612
brad.mcvay@dos.myflorida.com

General Counsel to Secretary of State Laurel Lee

ADAM S. TANENBAUM
General Counsel
Florida House of Representatives
420 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300
Telephone: (850) 717-5500
adam.tanenbaum@myfloridahouse.gov

General Counsel to House Speaker Jose Oliva

JEREMIAH HAWKES
General Counsel
The Florida Senate
409 The Capitol
404 S. Monroe Street
Tallahassee, Florida 32399-1100
Telephone: (850) 487-5237
hawkes.jeremiah@flsenate.gov

General Counsel to Senate President Bill Galvano

AMY J. BAKER
Coordinator
Financial Impact Estimating Conference
Office of Economic and Demographic Research
111 West Madison Street, Suite 574
Tallahassee, Florida 32399-6588
Telephone: (850) 487-1402
Facsimile: (850) 922-6436
baker.amy@leg.state.fl.us

ASHLEY MOODY
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1060
Telephone: (850) 414-3300
Facsimile: (850) 401-1630
E-mail:
oag.civil.eserve@myfloridalegal.com

MARIA MATTHEWS
Director, Division of Elections
Florida Department of State
R.A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250
Telephone: (850) 245-6200
Facsimile: (850) 245-6217
DivElections@dos.myflorida.com

/s/ Daniel Nordby
DANIEL NORDBY