IN THE SUPREME COURT OF FLORIDA

CASE NO: SC19-328; SC19-479 (CONSOLIDATED)

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 (FIS)

INITIAL BRIEF OF PARTNERSHIP FOR AFFORDABLE CLEAN ENERGY a/k/a ENERGY FAIRNESS IN OPPOSITION TO THE INITIATIVE

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IDENTITY AND INTEREST OF ENERGY FAIRNESS

Partnership for Affordable and Clean Energy, a/k/a Energy Fairness ("Energy Fairness") is a non-partisan, not-for-profit public interest group dedicated to bringing together and educating consumers, policymakers and other stakeholders to discuss energy policy and affordable energy solutions in a fact-based manner. Energy Fairness advocates for policies that benefit consumers at both the state and federal levels. The organization supports an "all-of-the-above" approach to energy policy, including renewable energy. Energy Fairness is managed by a diverse board of directors, including membership in Florida.

Energy Fairness publishes a variety of reports, makes presentations, and offers public testimony to legislators and other policymakers around the country, concerning a wide variety of issues impacting the delivery of affordable, reliable energy. Energy Fairness has advocated for energy issues in states such as Florida, Georgia, Missouri, Kentucky, Texas, and Wyoming, as well before Congress. Energy Fairness has consistently opposed electricity deregulation efforts in Florida, for example, offering testimony during the 2018 Constitution Revision Commission process and the 2019 Financial Impact Estimating Conference.

INTRODUCTION

The citizen initiative petition at issue would amend the Florida Constitution to, among other things, (i) create new constitutional rights of electricity customers of investor-owned utilities to choose their electricity provider and to generate electricity; (ii) force investor-owned utilities to divest their electricity generation assets and limit their activities to the construction, operation and repair of electrical transmission and distribution systems; and (iii) require the Legislature to enact sweeping laws that would create undefined "competitive" wholesale and retail markets for electricity generation and supply, as well as provide for unspecified "consumer protections." Energy Fairness opposes placement of the initiative on the ballot because it is clearly and conclusively defective in that it fails to satisfy both the single-subject requirement of Article XI, section 3, and the clarity requirement of Section 101.161(1).[1]

Brief Overview of the Electric Utility Industry in Florida

In order to understand the clear and conclusive defects of the Proposed Amendment and Petition, a brief examination of the electric utility system in Florida is necessary. The generation and delivery of reliable electric service is of vital

[1] Constitutional or statutory references and citations are to the Florida Constitution or Florida Statutes (2018), respectively, unless otherwise stated. Unless otherwise noted, in citations, internal quotes and citations are omitted and emphasis is added.

importance to commerce, national security, and our everyday lives.[2] For this reason, a highly integrated and strictly regulated national power grid has been developed. Florida's electric utility system is integrated throughout the state and with that national grid. Electric power is generated, sold, and delivered by a coordinated group of investor-owned utilities,[3] municipal utilities, and rural electric cooperatives – each with particular service areas that they exclusively serve. These service areas effectively constitute legally sanctioned and protected monopolies, granted as a matter of necessity to serve the public benefit in delivering safe and reliable electricity service throughout the State. *See PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988) ("The regulation of the production and sale of electricity **necessarily contemplates the granting of monopolies in the public interest**.").[4]

Basic electricity infrastructure consists of: *power generation* (via power

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[2] *See, e.g.*, § 366.04(5) (the PSC "shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.").

[3] The Proposed Amendment relates and refers to "investor-owned" utilities, a term that is not defined under Florida law and one that may be confusing to voters not familiar with utility industry jargon.

[4] *See also City of Homestead v. Beard*, 600 So. 2d 450, 452 (Fla. 1992) ("[O]ur decisions exempting territorial agreements from antitrust legislation have been premised on the existence of a statutory system of regulations governing the public utilities that is sufficient to prevent any abuses arising from the monopoly power created by the agreements."); *Storey v. Mayo*, 217 So. 2d 304, 307-08 (Fla. 1968)

plants)[5] and *power delivery* (*e.g.*, via a system of step-up transformers and transmission lines, which convert and carry high-voltage electricity over long distances from the power plant; and step-down transformers and distribution lines that convert and deliver low-voltage electricity to individual consumers such as homes, schools, and businesses). Investor-owned utilities account for nearly 80% of the electricity generation in Florida;[6] their rates are set and businesses strictly regulated by the Florida Public Service Commission ("PSC").[7]

Because of their typically small size, most municipal utilities and rural co-ops do not individually own power generation plants.[8] At times, those municipal utilities

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(noting that in the context of approved "territorial service agreements between two regulated utilities ... **a regulated or measurably controlled monopoly is in the public interest**…"). Municipalities can, via franchise agreements, confer that monopoly to a third-party, such as an investor-owned utility. *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1240 (Fla. 2004).

[5] Generation plants may be powered by hydro, coal, natural gas, or nuclear power. Nuclear power plants are strictly governed under Federal law. *See, e.g.*, Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5879 (2017); Atomic Energy Act, 42 U.S.C. §§ 2011-2022 (2017).

[6] Florida Public Service Comm'n, *Statistics of the Florida Electric Utility Industry for 2017*, p. 17, Table 6 ("Net Energy for Load") (Oct. 2018), available at: http://www.psc.state.fl.us/Publications/Reports#.

[7] Municipal utilities and rural co-ops are governed by ordinance or local rule and generally not by the PSC; their rates are set by their respective local boards.

[8] Well over two-thirds of the municipal utilities and rural co-ops do not generate their own electricity. Florida Public Service Comm'n, *Statistics of the Florida Electric Utility Industry for 2017*, p. 8 (Oct. 2018), available at: http://www.psc.state.fl.us/Publications/Reports#.

and rural co-ops will purchase electricity on the wholesale market from investor-owned utilities, which includes electricity generated in Florida as well as imported from other states. The wholesale electricity market is contract-based and largely governed by Federal law. *See, e.g.*, Federal Power Act, 16 U.S.C. § 824 (2017); *Public Utility Comm'n v. Attleboro Steam Electric Co.,* 273 U.S. 83 (1927) (holding that states are precluded from regulating wholesale electric rates because to do so would be a burden on interstate commerce). Investor-owned utilities enter into various contracts with municipal and rural co-op utilities; for example: power purchase agreements; territorial service agreements governing agreed upon service areas (which must be approved by the PSC, and may not result in public detriment); agreements to transmit power over lines owned by investor-owned utilities; easements or right of access agreements; and franchise or requirements agreements where an investor-owned utility may agree to construct and operate an electric supply system or will agree to supply a municipality's or co-op's utility needs over a given period of time. The Proposed Amendment, set forth below, will significantly impact hundreds, if not thousands, of such agreements throughout the State.

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Ballot Title, Ballot Summary, and Full Text of Proposed Amendment

TITLE: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice

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.

FULL TEXT OF PROPOSED AMENDMENT:

(a) POLICY DECLARATION. It is the policy of the State of Florida that its wholesale and retail electricity markets be fully competitive so that electricity customers are afforded meaningful choices among a wide variety of competing electricity providers.

(b) RIGHTS OF ELECTRICITY CUSTOMERS. 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. 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.

(c) IMPLEMENTATION. 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, and which shall:

(1) implement language that entitles electricity customers to purchase competitively priced electricity, including but not limited to provisions that are designed to (i) limit the activity of investor-owned electric utilities to the construction, operation, and repair of electrical transmission and distribution systems, (ii) promote competition in the generation and retail sale of electricity through various means, including the limitation of market power, (iii) protect against unwarranted service disconnections, unauthorized changes in electric service, and deceptive or unfair practices, (iv) prohibit any granting of either monopolies or exclusive franchises for the generation and sale of electricity, and (v) establish an independent market monitor to ensure the competitiveness of the wholesale and retail electric markets.

(2) Upon enactment of any law by the Legislature pursuant to this section, all statutes, regulations, or orders which conflict with this section shall be void.

(d) EXCEPTIONS. Nothing in this section shall be construed to affect the existing rights or duties of electric cooperatives, municipally-owned electric utilities, or their customers and owners in any way, except that electric cooperatives and municipally-owned electric utilities may freely participate in the competitive wholesale electricity market and may choose, at their discretion, to participate in the competitive retail electricity market. Nothing in this section shall be construed to invalidate this State's public policies on renewable energy, energy efficiency, and environmental protection, or to limit the Legislature's ability to impose such policies on participants in competitive electricity markets. Nothing in this section shall be construed to limit or expand the existing authority of this State or any of its political subdivisions to levy and collect taxes, assessments, charges, or fees related to electricity service.

(e) EXECUTION. If the Legislature does not adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad purposes and stated terms by June 1, 2023, then any Florida citizen shall have standing to seek judicial relief to compel the Legislature to comply with its constitutional duty to enact such legislation under this section.

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SUMMARY OF ARGUMENT

The Proposed Amendment should not be placed on the ballot because it is clearly and conclusively defective, failing to satisfy both the single-subject requirement of Article XI, section 3, as well as the clarity requirements of Section 101.161(1). The Proposed Amendment violates the single-subject requirement in that it constitutes impermissible logrolling, to wit: in order to gain the ability to select their own electricity provider, generate their own electricity, and/or obtain the proposal's promise of "competitive" markets and "consumer protections," investor-owned utility customers must vote to give up their current investor-owned utility electric providers because the Proposed Amendment: (1) prohibits investor-owned utilities from owning/operating power generation plants; and (2) bars investor-owned utilities from the wholesale and retail sale of electricity (by limiting them to the "construction, operation, and repair of electrical transmission and distributions systems").

The Petition's ballot title and summary also fail to satisfy Section 101.161(1). Rather than state the Proposed Amendment's chief purpose in clear, non-misleading language, the title and summary affirmatively mislead voters as to its true nature and effect. Although promising to offer customer "choice" and "competitive" markets in the ballot title and summary, the Proposed Amendment limits choice and stifles competition by eliminating an entire class of market participants – investor-owned

electricity generators and sellers. In doing so, the ballot title and summary hide the ball as to the Proposed Amendment's chief purpose – which is to replace investor-owned generators and sellers with another undisclosed class of non-investor-owned entities that necessarily must be created in order to satisfy the electricity supply needs of the State. The proposal is defective for a number of other reasons detailed below.

ARGUMENT

I. Principles of Review.

The principles governing this Court's review of the Proposed Amendment and Petition are well-known and not in dispute. The "Court has traditionally applied a deferential standard of review to the validity of a citizen initiative petition and has been reluctant to interfere with the right of self-determination for all Florida citizens to formulate their own organic law" and has the "duty to uphold a proposal unless it is clearly and conclusively defective." *Rights of Electricity Consumers*, 188 So. 3d 822, 827 (Fla. 2016). Equally important is the Court's obligation to ensure that the petition "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." *Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 247-48 (Fla. 2015) (Polston, J., concurring and dissenting in part).

The Court does not inquire as to the merits or wisdom of the proposal; rather, review is limited to determining whether: (1) the Proposed Amendment violates the single-subject requirement of Article XI, section 3 of the Florida Constitution; and (2) the ballot title and summary violate the clarity requirements of Section 101.161(1). *Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 795 (2014). Failure of either prong is fatal to ballot placement; here, the Proposed Amendment violates both and should not be placed on the ballot.[9]

II. The Proposed Amendment Violates the Single-Subject Requirement.

The single-subject requirement "is a rule of restraint designed to insulate Florida's organic law from **precipitous and cataclysmic change**." *Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994). Thus, a proposed citizen initiative amendment "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3. As such, "the Court must determine whether it has a logical and natural oneness of purpose." *Treating People Differently*, 779 So. 2d 888, 891 (Fla. 2000); *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984) (holding same). The proposal cannot engage in logrolling, nor substantially alter or perform the functions of multiple branches of government. *Use of Marijuana for Certain Medical Conditions*, 132 So. 3d at 795.

[9] The ballot title and summary satisfy the word count limits imposed by Section 101.161(1).

A. The Proposed Amendment impermissibly engages in logrolling.

"The term logrolling refers to a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed." *Voting Restoration Amendment*, 215 So. 3d 1202, 1206 (Fla. 2017).[10] The proposal engages in improper logrolling because it combines unrelated provisions and forces an all or nothing choice for voters. In order to gain the purported ability to choose their provider in a purported "competitive" market, to generate electricity on their own or with others, or to obtain some (undisclosed) consumer protections, they must also vote to do two things: (1) prohibit investor-owned utilities from owning/operating power generation plants; and (2) bar investor-owned utilities from the wholesale and retail sale of electricity (by limiting their activity to the "construction, operation, and repair of electrical transmission and distributions systems"). Prohibiting investor-owned utilities from generating or selling electrical power is not related to creating a competitive electricity generation or sales market, nor to providing consumer protections.

[10] *See also Tax Limitation*, 644 So. 2d 486, 491 (Fla. 1994) (concluding that proposed amendment violated the single-subject requirement because it combined the subjects of taxes and fees); *Save Our Everglades*, 636 So. 2d at 1341 (holding that initiative's dual objectives, *i.e.*, to restore the Everglades and to compel the sugar industry to fund the restoration, constituted impermissible logrolling).

Aside from the clear lack of relatedness, it is not necessary — and may be disfavored by voters — to prohibit investor-owned utilities from generating and selling electricity in order to gain the purported rights offered by the Proposed Amendment. In fact, savvy voters – including those that are satisfied with their current investor-owned utility providers – will readily perceive that barring an entire class of electric utility owners, generators, and sellers (investor-owned utilities) from the market may likely have an opposite, anti-competitive effect. *See, e.g.*, *Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (holding that proposed amendment was "flawed in many respects" and violated single-subject requirement by banning limitations on health care provider choices and prohibiting private parties from entering into contracts that would limit health care provider choice). For these reasons, the proposal engages in impermissible logrolling and should be kept off the ballot.[11]

[11] The Proposed Amendment arguably further violates the single-subject requirement because it substantially alters or performs multiple functions of government. As discussed above, the electric utility industry is highly integrated and regulated by *federal* [*e.g.*, Federal Energy Regulatory Commission, Nuclear Regulatory Commission], *state* [*e.g.*, Florida legislature, Public Service Commission], and *local jurisdictions* [*e.g.*, municipal authorities and rural co-ops]. By prohibiting investor-owned utilities from owning plants and generating and selling power, the Proposed Amendment upends the entire multi-governmental regulatory scheme of the industry. This integrated regulatory system was designed to ensure the delivery of safe, reliable, and affordable electricity. Yet, the Proposed Amendment purports to create a class of constitutionally protected electricity

B. The Proposed Amendment will work precipitous and cataclysmic change upon electric utilities and consumers.

The Proposed Amendment will bring the type of "precipitous and cataclysmic change" that the single-subject rule was designed to prevent. Investor-owned utilities serve nearly 80% of the electricity market in Florida, with billions of dollars' worth of assets that they would be required to divest.[12] The investor-owned utilities also have innumerable contracts related to the generation and sale of electricity throughout the State – all of which would be significantly impacted, if not canceled outright. Barring investor-owned utilities from the generation and sale of electricity in order to foster purported competition will necessarily create a cataclysmic void in the system. *See, e.g.*, *Fort Pierce Utilities Auth. v. Beard*, 626 So. 2d 1356, 1356 (Fla. 1993) (noting that competition between an investor-owned utility and municipal utility authority resulted in duplication of facilities, confusion in ownership of current facilities, and numerous safety hazards). Under the Proposed Amendment's plain text, that void will be filled by unknown electricity generators

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generators that, pursuant to the amendment's plain text, need not be regulated by any of the above authorities.

[12] The sellers of such assets will be hard pressed to get fair market value when potential buyers will know they are under a mandated deadline to sell. Not to mention the significant stranded costs for which the investor-owned utilities will be entitled to compensation – most likely from government, and ultimately, customers. *See* Florida Financial Impact Estimating Conference, *Financial Impact Statement for Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice, Serial Number 18-10* (Mar. 15, 2019) ("*FIS*"), p. 16.

and sellers. There is no guidance in the Proposed Amendment's text as to minimum requirements for experience or competency, let alone an indication of whether, how, or by whom these entities will be regulated – if at all. *See, e.g.*, *Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d at 248 (Polston, J., concurring and dissenting in part) (expressing concern that the "ballot summary does not inform the voter that the proposed amendment creates a new and limited class of electricity sellers that would not be subject to PSC regulation.…").

Because the Proposed Amendment violates the single-subject requirement of Article XI, section 3, it should be kept off the ballot.

III. The Ballot Title and Summary Fail to Clearly Inform Voters of the Amendment's Chief Purpose and Are Affirmatively Misleading.

It cannot be overlooked that:

> One of the most important rights enjoyed by the people of Florida under our constitution is the right to vote on constitutional amendments proposed through the initiative process. That right and the initiative process **are subverted when the voters are presented a misleading ballot summary**. The **integrity of the electoral process is seriously compromised** by placing this proposed amendment on the ballot with a radically defective summary—a summary that will affirmatively mislead the voters in several different ways concerning the chief purpose of the amendment.

Use of Marijuana for Certain Medical Conditions, 132 So. 3d at 819-20 (Canady, J., dissenting).

Section 101.161(1) thus requires the Court to determine whether: (1) the ballot title and summary, in clear and unambiguous language, "fairly inform the voter of

the chief purpose of the amendment[;]" and (2) "the language of the title and summary, as written, misleads the public." *Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d at 248 (Polston, J., concurring and dissenting in part). As this Court has long held, "a ballot title and summary cannot fly under false colors or hide the ball with regard to the true effect of an amendment." *Id*. (internal quotes and citations omitted). "When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken." *Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998); *see also Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) (striking initiative from ballot where "[t]he problem … lies not with what the summary says, but rather what it does not say."). The ballot title and summary here violate these clarity requirements of Section 101.161(1) in a variety of ways.

A. The <u>undisclosed</u> chief purpose and effects of the Proposed Amendment.

The chief purpose of the Proposed Amendment is not – despite lofty language in the ballot title and summary – to foster competition and consumer choice. Rather, the Proposed Amendment's plain text reveals that its chief purpose is to eliminate the integrated system of state sanctioned public benefit monopolies and exclusive franchises and replace it with a deregulated scheme that "profoundly differs." (*FIS*, p. 1). The proposal bars key experienced market participants that historically have provided safe, reliable, and affordable electricity from the ownership and operation

of electric generation plants and from the wholesale and retail sale of electricity. If passed, the Proposed Amendment would have the following effects, none of which are disclosed in the ballot title or summary:

- Requires that legislation be enacted that would force investor-owned utilities to divest their power generation and sales assets.[13]
- Prohibits investor-owned utilities from the wholesale and retail sale of electricity. Although the summary states that the Proposed Amendment "[l]imits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems[,]" that language does not clearly and unambiguously advise voters that investor-owned utilities will be prevented from generating or selling electricity, or owning such assets.
- Prohibits investor-owned utilities from owning electrical transmission and distribution systems. Although the summary states that the Proposed Amendment "[l]imits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems[,]" that language does not clearly and unambiguously advise voters that investor-owned utilities

[13] Despite this, the Amendment makes no provision for how the investor-owned utilities would be required to divest their current interests in billions of dollars of facilities and infrastructure, nor whom might purchase those assets and take over responsibility for producing the nearly 80% of the state's electricity generation currently provided by investor-owned utilities.

will be prevented from owning electrical transmission and distribution systems.

- Invalidates – in violation of the federal and Florida constitutional contracts clauses (and federal preemption principles)[14] the innumerable contracts between investor-owned utilities and municipal utilities and/or rural co-ops governing everything from territorial boundaries, franchises, cogeneration, and long-term and spot sales of electricity.[15]

At bottom, the Proposed Amendment seeks radically redefine "electric utility" under Florida law, while creating an unspecified class of utilities to fill the void of exiled investor-owned utilities when it comes to the generation and sale of electricity – without expressly saying so in the summary.[16] *See* § 366.02(2) ("'Electric utility'

[14] U.S. Const. Art. I, § 10 ("No State shall … pass any … Law impairing the Obligation of Contracts, …."); Fla. Const., Art. 1, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."); Federal Power Act, 16 U.S.C. § 824 (2017) (rates and service for wholesale transactions by investor owned utilities are subject to the Federal Power Act).

[15] An initiative must disclose its impact on constitutional rights. *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) ("The purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment. A proposed amendment cannot fly under false colors."); *Armstrong v. Harris*, 773 So. 2d 7, 17-18 (Fla. 2000) (*citing Traylor v. State*, 596 So. 2d 957 962-63 n. 5 (Fla. 1992)) ("where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election.").

[16] Municipal and rural co-op utilities generally do not generate enough electricity to supply their own currently existing service areas, let alone have the ability to supply

means any municipal electric utility, **investor-owned electric utility**, or rural electric cooperative which **owns**, maintains, or operates an **electric generation**, transmission, or distribution system within the state."). The Proposed Amendment does not require that such unspecified generators and sellers be regulated by the PSC. Consequently, the ballot summary does not disclose the creation of a class of electricity generators and sellers that may not be regulated by the PSC (or any other body).[17]

That was precisely the problem identified by Justice Polston in *Limits or Prevents Barriers to Local Solar Electricity Supply*. 177 So. 3d at 248 (Polston, J., concurring and dissenting in part). There, Justice Polston noted the amendment removes solar suppliers from the jurisdiction of the PSC and the protections that it provides. *Id*. at 249 ("The PSC is a separate body with comprehensive regulatory authority, and it supervises and regulates public utilities to ensure affordable rates, safe practices, and quality service throughout the State."). Justice Polston concluded that he would not approve the initiative for the ballot because, in part, the "ballot summary does not inform the voter that the proposed amendment creates a new and

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the rest of the State. *See* note 8. Therefore, some presently undisclosed and unknown group of electricity generators and sellers must spring up to serve the 80% of the State currently served by Florida investor-owned utilities.

[17] The same is true with respect to individuals seeking (or groups of individuals that combine) to generate and potentially sell electricity. Proposed Am., Subsec. (b).

limited class of electricity sellers that would not be subject to PSC regulation…" and, thus, "does not convey the scope of the proposed amendment[.]" *Id*. That rationale applies with equal vigor here.

By failing to disclose the chief purpose and true effects of the Proposed Amendment, the ballot title and summary hide the ball in violation of Section 101.161(1), and should not be submitted to the voters.

B. Rhetoric relating to "choice" and "competitive" markets are affirmatively misleading, and the initiative flies under false colors.

By cloaking the Proposed Amendment in grandiose terms of granting customers the constitutional rights to a "competitive energy market" and "energy choice," the ballot title and summary are affirmatively – and fatally – misleading. The ballot title and summary advertise the Proposed Amendment as providing investor-owned utility customers the constitutional "**right to competitive** energy market," "energy **choice**," "the **right to choose** their electricity provider," and "**competitive** wholesale and retail markets for electricity generation and supply."[18]

[18] Such language here "more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." *Save Our Everglades*, 636 So. 2d at 1342. "A voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment." *Id.* at 1341; *see also Evans v. Firestone*, 457 So. 2d 1352, 1355 (Fla. 1984) (holding ballot summary defective in part because phrase "thus avoiding unnecessary costs" constituted "editorial comment"); *Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994) (stating ballot summary must be accurate, informative, and free from political rhetoric).

None of this is supported by the Proposed Amendment's plain text. In fact, rather than promote "choice," the Proposed Amendment expressly prohibits a consumer from choosing an investor-owned utility (including their current utility) as her electricity provider because investor-owned utilities – *as a class* – will be barred from generating or selling electricity. This is so even if the customer is perfectly satisfied with – and wishes to retain – her current investor-owned provider. Despite the summary's prominent promotion of the right to choose, the Proposed Amendment's text and clear effect is the exact opposite of choice.[19]

The same is true for the summary's promise of "competition." There is nothing in the Proposed Amendment requiring that multiple providers compete to serve in all areas of the State. Under the Proposed Amendment, it is possible that some areas of the State may only have one (or no) provider – rendering the purported "right to choose their electricity provider" illusory.[20] *See, e.g.*, *Rights of Electricity Consumers*, 188 So. 3d at 835 (Pariente, J., dissenting) (noting: "The ballot title is

[19] The phrases employed in the ballot summary are the same "rhetorical staples" more indicative of "market hype" seen in similar deregulation efforts in other states. *See, e.g.*, Borenstein, S., Bushnell, J.B., "The U.S. Electricity Industry after 20 Years of Restructuring" (May 2015), p. 9 (available at: https://ei.haas.berkeley.edu/research/papers/WP252.pdf). Such "price-reduction promises" have "generally been viewed as a disappointment." *Id*., at p. 1.

[20] As noted above, consumers lose the ability to choose their current investor-owned provider under the Amendment. This crucial fact not disclosed in the ballot summary.

affirmatively misleading by its focus on 'Solar Energy Choice,' **when no real choice exists**…. The ballot language is **further defective for purporting to grant rights** to solar energy consumers **that are illusory**."); *Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (finding that a ballot summary for an amendment that "creates an illusory right to choose a health care provider" misled the public and, as such, was "fatally defective").

The ballot title and summary claim that wholesale and retail markets will be "competitive"– an undefined and vague term that suggests (without any basis in the text) that the Proposed Amendment will result in lower electricity prices. By eliminating an entire class of market participants (investor-owned utilities), the Proposed Amendment works an anti-competitive effect – the exact opposite of what the ballot title and summary promise. Competition is a function of supply and demand in the marketplace; it cannot be coerced by resort to a constitutional amendment that sharply eliminates experienced, knowledgeable, and proven capable market participants.

For these reasons, the initiative flies under false colors and should be barred from the ballot. *Use of Marijuana for Certain Medical Conditions*, 132 So. 3d at 810-11 (Polston, C.J., dissenting with Canady, J., concurring in dissent); *see also Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000) (Section 101.161 serves as a "truth in packaging" requirement).

C. The ballot summary's promise of "consumer protections" is misleading and illusory.

The ballot summary states that the Proposed Amendment "[r]equires the Legislature to adopt laws providing for … consumer protections…." While the summary fails to identify what those protections might be, the Proposed Amendment's text requires that the legislation "protect against unwarranted service disconnections, unauthorized charges in electric service, and deceptive or unfair practices." Proposed Am., Subsec. (c)(1)(iii). The ballot summary creates the misimpression that utility consumers have no such protections, when in fact they already do vis-à-vis the PSC. *See, e.g.*, § 366.05; *Florida Power & Light Co. v. Feo*, 24 So. 3d 737 (Fla. 3d DCA 2009) (recognizing that PSC has jurisdiction over conducted that was claimed to violate the Florida Deceptive and Unfair Trade Practices Act); *see also Rights of Electricity Consumers*, 188 So. 3d at 835, and *Right of Citizens to Choose Health Care Providers*, 705 So. 2d at 566, above. Misleading voters in this manner renders the proposal clearly and conclusively defective.

D. The ballot summary misleads voters as to the adoption and effective dates of the implementing legislation.

Subsection (c) of the Proposed Amendment provides that: "**By June 1, 2023**, the Legislature **shall adopt** complete and comprehensive legislation to implement this section … which shall **take effect no later than June 1, 2025**…." The ballot summary, however, states that the Proposed Amendment "Requires the Legislature

to **adopt** laws … **by June 1, 2025**." The summary confuses the adoption deadline – the date by which the Legislature must pass the implementing legislation – with the effective date of such legislation. This is significant because voters will be misled into believing that the legislature has until June 1, 2025 to pass the implementing legislation, when, in fact, the Legislature must do so much sooner by June 1, 2023.

This defect is more problematic in light of the standing granted under Subsection (e) (discussed below), which would enable any Florida citizen to sue to compel the Legislature to adopt "complete and comprehensive" legislation to implement the Proposed Amendment as soon as June 2, 2023 – even though the implementing legislation might not be effective until June 1, 2025. It makes no sense to allow the launch of lawsuits directed to the implementing legislation until such legislation becomes effective – and its efficacy/effect can be evaluated.

E. The ballot summary is misleading because it fails to disclose that the Proposed Amendment grants any Florida citizen the right to seek judicial relief compelling the Legislature to implement the Proposed Amendment.

Subsection (e) provides that:

> If the Legislature does not adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad purposes and stated terms by June 1, 2023, then **any Florida citizen shall have standing to seek judicial relief to compel the Legislature** to comply with its constitutional duty to enact such legislation under this section.

Leaving aside the fact that courts generally lack the power to order the Legislature to legislate and the obvious separation of powers problems implicated by this provision,[21] the ballot summary's failure to disclose the grant of standing is misleading. While voters may favor the other provisions of the Proposed Amendment, they may balk at this provision – which appears to create a new private right of action and gives standing to the general public to sue the Legislature.

Under the provision's plain language, any Florida citizen will have a constitutional right to bring suit even where the Legislature has adopted the implementing legislation, but she feels it is not "complete and comprehensive" nor "consistent with [the Amendment's] broad purposes and stated terms." Voters may not want to authorize such sweeping ability to second guess the Legislature. One need only look at the crushing litigation surrounding the implementation of the 2016 amendment relating to medical marijuana (Article X, section 29) to understand the paralyzing effect such litigation can have. It is no stretch that voters might wish to avoid similar litigiousness – particularly with respect to a regulatory scheme that touches every citizen in the State. However, voters will be denied the opportunity

[21] "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3; *Whiley v. Scott*, 79 So. 3d 702, 708 (Fla. 2011) (strictly construing the separation of powers so "that no branch may encroach upon the powers of another"); *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000) (The Florida Supreme Court "has traditionally applied a strict separation of powers doctrine.").

to evaluate this provision and weigh its potential consequences because it is not disclosed in the ballot summary.

F. The ballot summary fails to provide adequate notice of the "conflicting" statutes, regulations or orders that must be repealed.

The failure to identify law, rules, and regulations subject to repeal violates Section 101.161. In *Restricts Laws Related to Discrimination*, the Court analyzed the following ballot summary:

> Restricts laws related to discrimination to classifications based upon race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. **Repeals all laws inconsistent with this amendment**.

632 So. 2d 1018 (Fla. 1994). The Court struck the initiative from the ballot, in part, because "[b]oth the summary and the text of the amendment omit any mention of the myriad of laws, rules, and regulations that may be affected by the repeal of 'all laws inconsistent with this amendment.'" *Id*. at 1021. The Proposed Amendment and ballot summary here employ nearly identically vague language and should similarly be kept of the ballot. This is particularly so where the Proposed Amendment here essentially guts Chapter 366 and decades of rules and orders issued by the PSC, without providing voters any hint as to which ones are on the chopping block. This does not constitute fair notice to voters such that they might cast an informed and intelligent ballot, and it impermissibly hides the ball.

CONCLUSION

For all of the foregoing reasons, the initiative is clearly and conclusively defective and should not be placed on the ballot.

Respectfully submitted this 18th day of April, 2019.

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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 was filed via the Florida e-filing Portal this 18th day of April, 2019 and served on the list below:

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