IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-328

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

INITIAL BRIEF OF OPPONENT AMERICAN SENIOR ALLIANCE

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STATEMENT OF THE CASE AND FACTS

The Florida Attorney General has requested this Court's advisory opinion on the validity of an initiative petition filed under article XI, section 3 of the Florida Constitution. The title of the proposed amendment is "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice." (the "Investor-Owned Utilities Amendment" or the "Amendment"). The sponsor of the Amendment is a political committee called "Citizens for Energy Choices." The two issues before the Court are whether the Investor-Owned Utilities Amendment encompasses a single subject and matter directly connected therewith, and whether the ballot title and summary fairly and accurately advise voters of the chief purpose of the measure, are not misleading, and comply with specified word limits.[1] The Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const.[2]

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[1]Article IV, section 10, of the Florida Constitution requires the Attorney General to "request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI." Section 16.061, Florida Statutes (2018), states that "(t)he Attorney General shall, within 30 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161."

[2] Article V, section 3(b)(10), of the Florida Constitution provides that "The supreme court … [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law."

IDENTITY OF THE OPPONENT

American Senior Alliance appears in opposition to the Investor-Owned Utilities Amendment pursuant to this Court's Scheduling Order dated March 28, 2019. American Senior Alliance is a not-for-profit organization that brings together our nation's senior citizens to defend their values and to protect the rights and services they've earned. Through strong and targeted advocacy, American Senior Alliance helps preserve the financial resources of seniors and keeps dollars in their wallets.

As a representative of Florida seniors, American Senior Alliance has an interest in this Amendment because of the negative affects the Amendment would have on Florida seniors' utility bills and the Amendment would open up Florida seniors to the predatory practices and fraud seen in other states with deregulated electricity markets.

TITLE, BALLOT SUMMARY, AND TEXT OF THE INVESTOR-OWNED UTILITIES AMENDMENT

The ballot title for the proposed Investor-Owned Utilities Amendment is "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice."

The ballot summary provides as follows:

> 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 full text of the amendment provides as follows:

> (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.

SUMMARY OF THE ARGUMENT

The proposed amendment is clearly and conclusively defective. The Court must strike the Investor-Owned Utilities Amendment from the ballot because it violates the single-subject requirement and because its ballot title and summary violate the requirements of clear and accurate disclosure and instead "fly under false colors," "hide the ball," and the ballot summary is demonstrably false.

I. THE AMENDMENT VIOLATES THE SINGLE SUBJECT REQUIREMENT

The purported chief purpose and declared policy of the Amendment is that "wholesale and retail electricity markets be fully competitive so that electricity customers are afforded meaningful choices among a wide variety of competing electricity providers." But beyond and in addition to that chief purpose the Amendment address other subjects unnecessary to achieve its stated goal. It forces radical changes to the requirements for standing to bring suit against the legislature, creates a new cause of action against the legislature, and places the judicial branch in position to dictate legislation disturbing the separation of powers. It affects multiple unidentified articles and sections of the constitution and forces voters to accept consequences they might not otherwise wish to accept all to obtain the promised benefits of choices in the electricity market.

Standing to bring suit against the legislature

The Amendment upends standing requirements and allows any citizen to bring an action against the Florida Legislature if they "do 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…" without any requirement of showing substantial interests, injury, or status within the zone of interest intended to be protected. It effectively creates a new cause of action unique to this Amendment with no parallel in Florida jurisprudence. It is akin to a writ of mandamus but applicable in an instance where the legislature will have discretion in its ultimate decision on how to implement the Amendment. It creates a distinctly separate change in the requirements for standing in Florida and a heretofore unknown cause of action, neither incidental nor necessary to the chief purpose, and therefore it is an impermissible second subject.

Disturbs the separation of powers

The Amendment shifts legislative power to the judicial branch by leaving it to the judiciary impose its judgment on whether the legislature fulfills its obligation to "adopt complete and comprehensive legislation to implement (the Amendment) in a manner fully consistent with its broad purposes and stated terms…" It is the people's representatives elected to the house and senate who are empowered by the Florida Constitution to mandate, establish, or regulate by making or enacting laws.

This Amendment demands that the judiciary and not the legislature determine what is necessary to mandate, establish, or regulate to enact legislation entitling electricity customers to purchase competitively priced electricity consistent with the Amendment. This shift in the balance of power between the legislative and judicial branches is an impermissible second subject not necessary or incidental to the chief purpose.

Multiple unidentified articles and sections of the constitution are affected

The impact an initiative may have on other articles or sections of the constitution must be considered in determining whether there is more than one subject included in the proposal. There is no reference in the title, the summary or the amendment itself that addresses the multiple effects the Initiative will have on the constitution. Article I section 21 is impacted as injury is no longer required to bring suit against the legislature. Only the opinion by any citizen that the legislature did not meet a subjective standard of complete and comprehensive legislation to implement the Amendment. Article II section 3 is impacted as the legislature's prerogative to decide what is necessary to implement the Amendment will be supplanted by the judiciary. Thus, abrogating the powers of the legislature and empowering the judiciary who is ill-suited to make such a complex regulatory judgement in the context of a lawsuit. Article I, section 10's protection against

impairment of contracts is impacted as the contracts investor-owned electric utilities enter establishing the boundaries of territories served would be made null and void.

The Amendment is fraught with impermissible logrolling

"Logrolling" occurs when an initiative requires voters to approve a provision which they might disfavor in order to obtain a provision which they find beneficial. This packaging of disparate elements is not permitted. It occurs here repeatedly. To gain the imprecise benefits of the Amendment, voters must be willing to accept the changes to standing and separation of powers mentioned previously, eliminate Public Service Commission oversight on setting rates that are fair, just, and reasonable. The voters must be willing to exclude current investor-owned providers of electricity from the generation market. The voters must be willing to forbid any future investor-owned utility from entering the electricity generation market. These additional provisions are forced on the voters and are forbidden logrolling.

II. THE BALLOT TITLE AND SUMMARY VIOLATE SECTION 101.161 OF THE FLORIDA STATUTES

The Summary is Factually Inaccurate

The Summary is factually inaccurate regarding the timing of the Legislature's obligation to adopt laws to implement the Amendment. The Summary states that the legislature is required to adopt implementing legislation by June 1, 2025, when the text of the Amendment requires that by June 1, 2023, the legislature shall adopt implementing legislation.

The Summary is Replete with Omissions and Inconsistencies

The Amendment purports to bring a competitive electricity generation market to Florida. The reality is that its main impact is to remove the main providers of electricity from the market. This means lost choices for consumers inconsistent with the summary's promise of a new right to choices.

The Summary does not inform the voters of a new cause of action and the changes to requirements to bring suit against the legislature. It also omits the shift in the balance of power between the legislative and judicial branches as the Amendment demands the court determine whether the purposes and terms of the Amendment are satisfied displacing the legislatures constitutional role in crafting policy.

The Amendment mandates that the legislature create a statutory scheme that would force investor-owned utilities to sell their power generation assets, but the summary omits this from voters. The summary also omits that the Amendment will end Public Service Commission oversight on setting rates that are fair, just and reasonable.

The Court must strike the Investor-Owned Utilities Amendment from the ballot because it violates the single-subject requirement; and because its ballot title and summary violate the requirements of clear and accurate disclosure.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

The issues before the Court are questions of law. *Fine v. Firestone*, 448 So. 2d 984, 987 (Fla. 1984). Accordingly, the standard of review is *de novo*. *Armstrong v. Harris,* 773 So. 2d 7, 16 (Fla. 2000), *cert. den.*, 532 U.S. 958 (2001). The Court has stated that it "must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people," *Askew v. Firestone,* 421 So. 2d 151, 156 (Fla. 1982). That sensitivity notwithstanding, amendments proposed by initiative are nonetheless subject to rigorous analysis because they do not "provide a filtering legislative process for the drafting of any specific proposed constitutional amendment or revision." *Advisory Op. re Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994); *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). The court must conduct its analysis and an initiative petition must be stricken from the ballot if it is "`clearly and conclusively defective.´" *Weber v. Smathers,* 338 So. 2d 819, 822 (Fla. 1976) (quoting *Goldner v. Adams,* 167 So. 2d 575, 575 (Fla. 1964)), *receded from on other grounds, Floridians Against Casino Takeover v. Let's Help Florida,* 363 So. 2d 337 (Fla. 1978)). Such is the case presented by the Amendment.

II. INTRODUCTION AND CONTEXT

While it is not for the court to pass judgment on the propriety of the proposed Amendment, it is important that the court has a baseline understanding of the consequences that will be brought to Florida if the Amendment is adopted. This baseline understanding enlightens the insurmountable problems with the Amendment and its ballot title and summary.

The Amendment divides the energy market into two parts. The two parts are the generation and sale of electricity, and the transmission and distribution of electricity. The transmission and distribution of electricity accomplished via the grid that connects electricity consumers to the facilities that generate the electricity. Investor-owned electric utilities are limited to the transmission and distribution of electricity by the Amendment. Competition in the generation and retail sale of electricity is supposed to be promoted but investor-owned electric utilities are forbidden from the electricity generation part of the market. This means current investor-owned electric utilities have power generation facilities that they would no longer be allowed to operate. New business enterprises in the energy market backed by investors would be limited to transmission and distribution of electricity and consequently forbidden from the generation and retail sale of electricity.

To avoid expensive, overlapping facilities, power is provided by exclusive utility providers within defined service territories. Further, the only rates that

investor-owned electric utilities can charge are those set by the FPSC. *See, e.g.*, §§366.03, 366.041, 366.06, Fla. Stat. (2018). Rates must be based on the electric utility's cost to serve customers. Grid costs are relatively fixed. The electric utility will fully recover its grid costs only if it sells as much power as it expects. This cost-of-service rate framework would be fundamentally disrupted as the operators of the electric grid will not be permitted to sell power. The Amendment removes the FPSC from its role in setting rates for consumers who will be left to the whims of whatever the new market dictates regardless of costs to the Florida. This Amendment seeks to undermine the well-structured, well-balanced and well-proven system of electricity generation that currently exists in Florida to further a particular financial interest to beset our electricity market regardless of the costs to the people, particularly our vulnerable senior population.

III. THE INITIATIVE VIOLATES THE SINGLE SUBJECT REQUIREMENT

There are five ways to amend Florida's constitution, and only the initiative petitions are limited to a single subject. Accordingly, with one exception not germane here[3], amendments proposed by initiative "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const.

[3] Article XI § 3 allows for an initiative to embrace more than one subject if it is "limiting the power of government to raise revenue" which does not apply to the Amendment.

The purpose of restricting initiative petitions to a single subject is both rational and crucial. The single-subject limitation exists because the citizen initiative process does not afford the same opportunity for public hearing and debate that accompanies the other constitutional proposal and drafting processes. *See Advisory Op. to the Att'y Gen. re Fish & Wildlife Conservation Comm'n,* 705 So.2d 1351, 1353 (Fla.1998). The single-subject provision "is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." *Advisory Op. to Att'y Gen. re Save Our Everglades,* 636 So.2d 1336, 1339 (Fla.1994). This "rule of restraint" was "placed in the constitution by the people to allow the citizens, by initiative petition, to propose and vote on singular changes in the functions of our governmental structure." *Advisory Op. to Att'y Gen. re Prohibiting Public Funding of Political Candidates' Campaigns,* 693 So.2d 972, 975 (Fla.1997) (quoting *Fine v. Firestone,* 448 So.2d 984, 988 (Fla.1984)). As part of its single subject analysis, this Court has recognized that an amendment must identify all articles and sections of the constitution that are substantially affected. *Fine v. Firestone,* 448 So.2d 984, 989 (Fla.1984). The single-subject rule prevents an amendment from engaging in "logrolling" or "substantially altering or performing the functions of multiple aspects of government." *Advisory Op. to Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail,* 769 So.2d 367, 369 (Fla.2000). This amendment defies all three of these requirements.

A. The Initiative substantially affects multiple functions and branches of government

This Court has held that a proposed amendment that substantially affects multiple functions of government violates the single-subject restriction. To quote the Court, "In Fine, we found multiplicity of subject matter because the proposed amendment would have affected several *legislative* functions. (emphasis by court) The proposed amendment now before us affects the function of the legislative and the judicial branches of government." *Evans v. Firestone,* 457 So. 2d 1351 (Fla. 1984). Like in *Evans*, this amendment affects the functions of the legislative and the judicial branches of government. Sections (a), (b), (c), and (d) perform a legislative function by regulating the market for electricity generation. Section (e) affects three other legislative functions and by shifting a legislative function to the judiciary affects a function of the judiciary.

Section (e) of the Amendment changes the standing requirement to bring suit against the legislature. The only prerequisites the Amendment requires to bring suit being a citizen of Florida that does not believe that the legislature has not adopted complete and comprehensive legislation to implement it. Changing the requirements for standing are substantive in nature and therefore is a legislative function.

Section (e) of the Amendment also creates a new cause of action against the legislature that does not exist in all of Florida jurisprudence. The cause of action is akin to a writ of mandamus in that it seeks to compel the legislature to act. However,

writs of mandamus apply only to ministerial acts where a public officer has no discretion to act. Enacting legislation, by its nature, involves an amount of discretion. As stated by this Court, "The legislative discretion cannot be coerced. Mandamus will never be granted against legislative officers as to legislative or discretionary functions." *State ex rel. Lawler v. Knott,* 176 So. 113, 118, (1937). Section (e) allows the plaintiff to bring suit to "compel the Legislature to comply with its constitutional duty" to "adopt complete and comprehensive legislation to implement" the Amendment. This provision invites suit to challenge the legislature's discretion in a legislative function. Because of the inherent discretion involved in legislating this cause of action is not mandamus and cannot be found at common law. It is a completely new and novel cause of action. Creating a new cause of action is an additional legislative function this Amendment undertakes.

By allowing suit to challenge the legislature's discretion in what the choose to adopt to implement the Amendment, the Amendment shifts the ultimate authority on what laws to make to implement the amendment to the judiciary. This shift takes a legislative function from the legislature and transfers it to the judiciary. The shift in power by the Amendment affects both the function of the legislature and the judiciary. *See Burnett v. Greene* 122 So. 570, 590 (Fla. 1929) "The power sought to be conferred is not a judicial power which may be exercised only by courts, because a court is a body in the government for the public administration of justice. Its

purpose and sole function is to administer exact justice, as nearly as may be, to all parties before it, not to determine the wisdom of a public measure designed to promote the 'public health, convenience or welfare."

Therefore, the Initiative affects multiple independent functions of Florida government. This Court's jurisprudence affirms that Florida's constitution forbids a single amendment from modifying multiple functions of state government. Such an amendment may not appear on the ballot.

B. The Amendment substantially affects multiple articles and sections of the constitution, and the Amendment does not identify those articles and sections

The constitution permits amendment by initiative of more than one article or section so long as the amendment is limited to a single subject and does not substantially affect more than one government function. Nevertheless, the Court has recognized that, "how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal." *Advisory Op. to Att'y Gen. re Tax Limitation,* 644 So.2d 486, 490 (Fla. 1994). In addition, as part of its single-subject analysis, the Court has held that identifying substantially affected provisions of the constitution is imperative "in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations."

Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 565 (Fla. 1998) (quoting *Tax Limitation*); *accord, Advisory Op. to the Att'y Gen. re Amendment to Bar Government from Treating People Differently Based on Race in Public Education,* 778 So. 2d 888 (Fla. 2000); *Fine,* 448 So. 2d at 989 (identification is "necessary for the public to be able to comprehend the contemplated changes in the constitution and to avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal."). The Amendment expressly amends article X by creating a new section. The Amendment identifies no other article or section of the constitution that is affected, despite the fact that it substantially affects at least two other articles and multiple sections.

Article I section 21 of the Florida Constitution provides that "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Amendment flips this provision on its head by allowing any citizen to bring suit against the legislature to compel an action without any showing of injury or interest. All is required is an opinion by any citizen that the legislature did not meet a subjective standard of complete and comprehensive legislation to implement the Amendment. There are no dictates or parameters to guide the judiciary on what is actionable under the amendment, just a blanket

invitation for any citizen to bring suit if they disagree with the legislature's policy judgment.

Article II section 3 of the Florida Constitution tells us that "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." Legislative power is "the power to make laws and to alter them; a legislative body's exclusive authority to make, amend, and repeal laws."[4] *legislative power, Blacks Law Dictionary 10th Edition 2014.* Judicial power is the "authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it." *Judicial power, Id.* "The other two great powers of government are the legislative power and the executive power." *Id.*

The Amendment removes the legislature's ultimate authority to make, amend, and repeal laws and shifts that power to the judiciary if any citizen decides they disagree with how the legislature implements the Amendment. The Amendment

[4] Blacks goes on to say "Under federal law, this power is vested in Congress, consisting of the House of Representatives and the Senate. A legislative body may delegate a portion of its lawmaking authority to agencies within the executive branch for purposes of rulemaking and regulation. But a legislative body may not delegate its authority to the judicial branch, and the judicial branch may not encroach on legislative duties."

upsets the separation of powers provided for in Article II section 3. It upends the legislature's prerogative to decide what is necessary to implement the Amendment and supplants it to the judiciary shifting legislative authority to the judicial branch. Thus, abrogating the powers of the legislature and empowering the judiciary which is ill-suited to make such a complex policy judgment in the context of a lawsuit.

The Amendment substantially affects Article I, section 10, which protects contracts against impairment. The provision is understandably taken very seriously by this Court. *See Yamaha Parts Distributors, Inc. v. Eherman,* 316 So. 2d 557, 559, (Fla. 1975) in which the Court notes that "virtually no degree of contract impairment has been tolerated in this state."

Investor-owned, cooperative, and municipal electric utilities enter into contracts establishing the boundaries of territories served, with the expectation that each utility has the exclusive right to provide electric service within its territory. The FPSC has authority to approve such agreements and to resolve disputes arising under the agreements. § 366.04, Fla. Stat. (2018). The Initiative impairs contract rights existing pursuant to such agreements by ending exclusive territories for electricity providers that aren't electric cooperatives or municipally-owned electric utilities.

Therefore, the Initiative substantially affects multiple articles and sections of the constitution, and the Amendment does not identify those articles and sections. This Court's jurisprudence affirms tells us that identification is necessary for the

public comprehension of the contemplated changes avoid the court having to interpret which articles and sections are affected. An amendment that identify the articles and sections affected violates the single subject requirement and may not appear on the ballot.

C. The Initiative deals with separate subjects in a manner that results in impermissible logrolling

One purpose of the single-subject rule is to prevent "logrolling," which is combining different issues into one initiative so that people have to vote for something they might not want, in order to gain something different that they do want. *Advisory Op. to Att'y Gen. re Florida Transportation Initiative for Statewide High Speed Monorail,* 769 So. 2d 367, 369 (Fla. 2000). Also, and significantly for purposes of the present proposal, the Court has described "matters directly connected therewith," as Article XI, section 3 of the Florida Constitution uses that phrase, to mean matters that are "incidental and reasonably necessary to effectuate the purpose of the proposed amendment." *Advisory Op. to Att'y Gen. re Limited Casinos,* 644 So. 2d 71, 74 (Fla. 1994). Under this test, matters that are not merely "incidental," and matters that are not "reasonably necessary to effectuate" the chief purpose of the amendment, violate the single-subject rule.

The Court has consistently refused to approve initiatives that contained multiple provisions that had this effect of logrolling. Typical of those cases was *Advisory Op. to Att'y Gen. re Save Our Everglades,* 636 So. 2d 1336 (Fla. 1994).

The amendment would have created a fund to restore the Everglades and would also have imposed a fee upon sugarcane processors as the source of revenue for the fund. The Court stated:

> There is no "oneness of purpose," but rather a duality of purposes. One 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., 636 So. 2d at 1341. The current Amendment is a classic case of logrolling.

The purported chief purpose of the Amendment is to create a competitive energy market for customers of investor-owned utilities and that is stated in the policy declaration. "(W)holesale and retail electricity markets be fully competitive so that electricity customers are afforded meaningful choices among a wide variety of competing electricity providers." The proposal then contradicts itself and forbids investor-owned utilities from competing in the newly created market. This outcome is the evil the prohibition on logrolling was meant to protect us from. Prohibiting certain entities from the market for electricity generation is an impermissible second subject and a classic instance of logrolling. Voters might want to allow additional competition in the energy generation market but might not want to prohibit and exclude entities with experience and a verifiable track record in that market in Florida. Yet they must accept both here. Forbidding current investor-owned utilities

from participation in the energy generation market is not a matter "directly connected with" the chief purpose of the Amendment. It is not incidental, and it is not reasonably necessary to create a competitive energy market for customers of investor-owned utilities.

Investor-owned utilities is not a defined term. Rules of interpretation direct us to use common meaning and usage of the terms to determine the meaning of the text. Black's Law Dictionary 10th ed. 2014 defines "investor" as 1. A buyer of a security or other property who seeks to profit from it without exhausting the principal. 2. Broadly, a person who spends money with an expectation of earning a profit. *Investor, Blacks Law Dictionary 10th Edition 2014.* In this context, it defines "utility" as a business enterprise that performs an essential public service, and that is subject to governmental regulation. *Utility, Id.* It cannot be argued that in our modern world electricity generation for consumption by Floridians is an essential public service. By its terms, this proposed amendment forbids private investment in business enterprises that would supply the citizens of this state with electricity. This is another example of impermissible logrolling. Stopping private investment in new business enterprises that would supply electricity in Florida is an impermissible second subject. Voters might want to allow additional competition in the energy market but might not want to prohibit and exclude new business enterprises backed by investors from participating in the competitive energy market.

The Florida Public Service Commission (FPSC) is empowered by statute to set rates that are just, reasonable, and compensatory. The FPSC regulates for the purpose of fixing rates and charges for services rendered and requiring the rendition of adequate electric service for the people of Florida. This ensures that electricity is available in a safe, affordable, and reliable manner. §366.03, Fla. Stat. (2018). Whenever an electricity provider wants to change its rates, it must receive permission from the FPSC. The FPSC then investigates its request and sets new rate levels if the request is valid. The investigation is extensive, with many FPSC staff members helping the Commission assess the company's request. The Florida Public Service Commission has the responsibility to set rates that are fair, just and reasonable. It is also required to set rates to allow utility investors an opportunity to earn a reasonable return on their investment. §366.041, Fla. Stat. (2018).

The Amendment would eliminate the FPSC's role in rate setting for electricity provided to consumers. This would eliminate the FPSC's function in providing a regulatory process that results in fair and reasonable rates while offering rate base regulated electricity providers an opportunity to earn a fair return on their investment. Voters may see a value in allowing additional providers of electricity into the market and desire meaningful choices among a wide variety of competing electricity providers. However, they may not want to give up the beneficial regulation of rates by the FPSC, and the other protections FPSC rate regulation

provide. The Amendment forces voters to embrace excluding the FPSC from rate regulation in order to get the purported benefit of additional choices in electricity providers. This change is not incidental, and it is not reasonably necessary to allow additional providers of electricity into the market to compete for consumers and provide them with additional choices.

As discussed previously, the Amendment drastically alters the requirements for standing to bring suit against the legislature, creates a new cause of action against the legislature, and disturbs the separation of powers between the legislative and judicial branches. Each of these is an impermissible second subject not incidental to or reasonably necessary to achieve the purported chief purpose.

This Court's decision in *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers,* 705 So. 2d 563 (Fla. 1998), is on point. The Court held that the initiative violated the single-subject requirement, stating "The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the healthcare provider issue in an "all or nothing" manner. Thus, the proposed amendment has a prohibited logrolling effect and fails the single-subject requirement." *Id.* at 566. Likewise, in this instance, voters are left with an "all or nothing" choice. If they see a benefit from having choices among a wide variety of competing electricity providers, they must accept at least six other consequeces. Current investor-owned utilities will be removed from the market.

New investor-owned utilities will be forbidden from entering the market. The FPSC's role in rate regulation will be abolished. Radical change to standing requirements to bring suit against the legislature will be adopted. A new cause of action against the legislature will be created. And the separation of powers between the legislative and judicial branches will be disturbed. Each of these is impermissible logrolling not reasonably necessary or incidental to achieving the purported goal of competition in the electricity generation market. Each example of logrolling is an impermissible second subject and requires the Amendment to be stricken from the ballot.

IV. THE BALLOT TITLE AND SUMMARY VIOLATE SECTION 101.161 OF THE FLORIDA STATUTES

Section 101.161, Florida Statutes (2018), sets forth the requirements for the ballot title and summary of a proposed constitutional amendment and provides in relevant part:

> [T]he substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure... The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

The basic purpose of section 101.161 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." *Advisory Op. to Att'y Gen. re Fee on Everglades Sugar Prod.*, 681 So.2d 1124, 1127 (Fla.1996).

In conducting its inquiry into the validity of a proposed amendment under section 101.161(1), the Court asks two questions. First, the Court asks whether "the ballot title and summary ... fairly inform the voter of the chief purpose of the amendment." *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses,* 818 So. 2d 491, 497 (Fla. 2002). Second, the Court asks, "whether the language of the title and summary, as written, misleads the public." *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers,* 705 So.2d 563, 566 (Fla.1998). The ballot title and summary of the Amendment fail to fairly inform voters of the chief purpose of the Amendment and they mislead the public about the Amendment's requirements and consequences.

A. The Summary is Factually Inaccurate

The Summary is factually inaccurate regarding the obligation of the Legislature to adopt laws providing for the competitive wholesale and retail markets for electricity generation. The ballot summary states that the amendment "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". The text of the Amendment in Section (c) commands that "(b)y 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." The ballot summary is categorically

incorrect and is misleading voters when it tells them that the amendment requires the legislature to adopt laws by June 1, 2025, when in fact the amendment requires that the legislature adopt laws two years earlier by June 1, 2023.

Besides the obvious infirmity of the summary for being factually wrong, there is a substantial difference in the legislature being given three years to try to craft such a dramatic change to the way that electricity is provided to the citizens of Florida versus five years to attempt to craft the complete transformation of the electricity market. It is irrelevant that the Amendment states that the laws implementing the amendment shall take effect by June 1, 2025, because the summary states that the Amendment "Requires the legislature to adopt laws…by June 1, 2025," when in fact the Amendment requires they do so by June 1, 2023.

B. The Title and Summary are Replete with Omissions and Inconsistencies

The ballot title and summary have been carefully crafted to disguise the true purpose, intent, and consequences of the amendment. That true purpose is to eliminate the current investor-owned electric utilities from the market for electricity generation. The title and summary state that customers will have the right to choose their electricity provider to generate and sell electricity and allow energy choice, but at the same time it doesn't explain that by the Amendment's operation customers will not be able to choose their current provider for their electricity generation. This new right to choose isn't as absolute as stated. The ballot summary and title mislead

voters and do not disclose the true purpose and effect of the Amendment's text which is to remove from the electricity generation market all current and future investor-owned utilities. All customers of investor-owned utilities could no longer choose them as their electricity provider because they are limited to transmission and distribution. The title and summary mislead voters because they give the impression that customers will just be given new options. It implies that there will be new choices in addition to the electricity service they are currently utilizing. Instead almost seventy five percent of Florida's electricity consumers will find themselves forcefully removed from their current electricity provider without fair notice. *Statistics of the Florida Electric Utility Industry*, Pg. 44 Florida Public Service Commission (2018)[5]. It is not the role of the court to review the substantive merits of the Amendment, but it is the role of the court to ensure that voters aren't being deceived into excluding current and future investor-owned participants from the market for electricity generation under the guise of creating more choices.

Section (e) of the Amendment provides that any citizen of Florida has the standing to compel the legislature to adopt complete and comprehensive legislation implementing the Amendment. The Summary does not inform the voters of a new cause of action against the legislature or the changes to requirements to bring suit

[5] The Florida Public Service Commission reports that of Florida's 10,719,403 electricity customers 8,025,927 or 74.87% were served by an investor owned utility in 2017.

against the legislature. As discussed previously, this radical change in the requirements for standing creating this new cause of action is unheard of in all of Florida jurisprudence. An avalanche of lawsuits could overcome the legislature paralyzing their ability to implement the Amendment and ironically frustrating the chances for new entrants into the electricity market. The summary leaves voters without notice of the tectonic shift in Florida law.

With the new cause of action, the Amendment also substitutes the policy judgments of the legislature for those of the judiciary. As discussed previously, this changes the balance of power between the legislative and judicial branches abrogating the powers of the legislature and empowering a judiciary that is ill-suited to make such a complex policy judgment in the context of a lawsuit. The summary leaves voters completely unaware of that fact. Voters may like the idea of the increased choices or competition in the electricity market but may have reservations about leaving the final determination how to implement that idea to judges instead of the people's representatives in the legislature.

The Amendment mandates that the legislature create a statutory scheme that would render the power generation assets of investor-owned utilities useless to them because they are forbidden from the market to sell electricity. The Amendment gives the false impression that consumers will get additional choices in electricity providers, but the reality is that the amendment subjects current investor-owned

utilities to a taking. Billions of dollars in capital expenditures spent to ensure that Floridians have access to reliable electricity service would be locked out of the market. *Financial Impact Statement 18-10* Pg. 14, Office of Economic and Demographic Research (2019). The state will owe current electricity generators just compensation for these power generation assets that would be rendered useless to them. The summary omits this from voters. Additionally, the summary also omits that the Amendment will end Public Service Commission oversight on setting rates that are fair, just and reasonable.

The summary and title "hide the ball" and allow this Amendment to "fly under false colors" regarding the choices customers will be afforded in the newly created electricity generation market and the true consequences the Amendment will bring to bear, a type of deception this Court has previously disallowed and assailed. *See, e.g., Fla. Dep't of State v. Slough,* 992 So. 2d 142 (Fla. 2008).

CONCLUSION

The Amendment violates the single-subject rule because it is guilty of logrolling, it substantially alters or performs the functions of multiple branches of state government, and it amends more than one provision of the Florida Constitution without identifying all the amended provisions. The ballot summary lies to the voter about when the legislature must adopt implementing legislation. Its title and ballot summary mislead the voter through substantive inconsistencies between the

summary and text, and hide the ball by failing to disclose to voters the sweeping changes the Amendment would create. The Court must strike the Amendment from the ballot.

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