IN THE SUPREME COURT OF FLORIDA

Case No. SC19-328; SC19-479

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 OPPONENT

THE FLORIDA SENATE; and
BILL GALVANO, in his official capacity as President of the Florida Senate

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SUMMARY OF THE ARGUMENT

The Energy Choice Initiative clearly violates the single-subject rule found in the Florida Constitution, which allows voters to know what an amendment does and how it will affect the Constitution.

The Energy Choice Initiative fails both historic tests established by the Court to determine whether an initiative complies with the single-subject rule. First, if passed the Initiative would dramatically affect the functions of multiple branches and levels of government. Secondly, the Initiative engages in log-rolling by forcing voters to choose among numerous different policy choices.

The Energy Choice Initiative also fails to identify what parts of the Constitution it would affect. The terms in the Initiative are not entirely clear and voters will not have notice of all the ramifications of the Initiative if it were to pass. The terms it uses are ambiguous and how it would interact with other parts of the Constitution are unclear.

The ballot summary and title for the Energy Choice Initiative are defective. The ballot summary fails to fairly inform the voter of the chief purpose of the Initiative. The ballot summary does not even hint at the sweeping effects it will have by requiring the Legislature to upend the entire electric utility regulatory framework. The ballot summary affirmatively misleads the public by it stating it grants rights, but fails to include that such rights are dependent and subject to legislative action as

the Initiative is not self-executing.

ARGUMENT

I. The Energy Choice Initiative violates the Single-Subject Rule

The Energy Choice Initiative completely eliminates the electrical regulatory scheme in Florida and imposes new duties on the Legislature, the Court, the Public Service Commission, the Executive Branch and local governments. This contradicts the limitations in the Constitution regarding citizen initiatives. It also provides a number of unconnected policy choices that voters have to choose from.

Any citizen initiative "shall embrace but one subject and matter directly connected therewith." Fla. Const. Art. XI, s. 3. The touchstone case for determining whether a citizen initiative complies with the single-subject rule is *Fine v. Firestone*, 448 So.2d 984 (Fla.1984). "The test is whether it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of subject and plan is the universal test.'" *Fine*, 448 So.2d at 990 quoting *City of Coral Gables v. Gray*, 154 Fla. 881, 883-84, 19 So.2d 318, 320 (1944). "The single-subject requirement is at its base a 'rule of restraint' designed to protect Florida's organic law from 'precipitous and cataclysmic change.'" *In re Advisory Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So.3d 235, 242 (Fla.2015) quoting *In re Advisory Op. to Att'y Gen.—Save Our Everglades*, 636 So.2d 1336, 1339 (Fla.1994).

A. The Energy Choice Initiative Affects Multiple Areas of Government

The Court has held that a purpose of the single-subject restriction is to prevent "a single amendment from substantially altering or performing the functions of multiple branches of government." *Advisory Op. to the Att'y Gen. re Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So.2d 491, 495 (Fla.2002). In the present case the Energy Choice Initiative substantially alters not only all three branches of state government, but has major impacts on local governments as well.

The impact on the legislature is obvious. The proposed text provides "the Legislature shall adopt complete and comprehensive legislation to implement this section." Part (c). This Court has generally found initiatives that focus on a single subject and "respect the legislative function by making allowance for the legislature to enact statutes to implement the constitutional provision," do not violate the single subject requirement. See, e.g. *Advisory Opinion to Attorney General re Protect People from the Health Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So.2d 415 (2002). Rather than require the Legislature to implement components of a readily definable program, the Energy Choice Initiative mandates the Legislature implement an extremely broad and aspirational overhaul of the state's utility regulatory framework. This is the type of cataclysmic change prohibited by the single subject restriction.

Furthermore, the Initiative stops short of leaving the Legislature with wide discretion on how best to implement its broad purposes, the creation of a competitive wholesale and retail electricity market. The Initiative goes a step further. The proposed text performs a legislative function by mandating the Legislature make and implement very specific policy choices. *Advisory Opinion to Attorney General ex rel. Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So.2d 367, 371 (2000). Policies, such as limiting activities of investor-owned utilities to transmission and establishing an independent market monitor, which are not "incidental and reasonably related to effectuate the purpose of the proposed amendment," but which "trend toward" what the sponsor believes to be the best model for a competitive market. *Advisory Opinion to Atty. Gen. re Ltd. Casinos*, 644 So.2d 71, 74 (1994); see Financial Impact Estimating Conference, Part 1 (Feb. 11, 2019) 21:20-22:15 (testimony of Warren Rhea, representing Citizens for Energy Choice).

The Court is also affected by the Energy Choice Initiative. The Initiative is not self-executing. In *St. John Medical Plans, Inc. v. Gutman*, 721 So.2d 717, 719 (Fla.1998) the Court held language "provided by law" and a lack of definitions in a constitutional provision meant it was not self-executing. This meant that citizens of the state lacked standing to enforce the provision absent legislative action. See also *Williams v. Smith*, 360 So.2d 417 (Fla.1978). However, in part (e) the Initiative

creates a cause of action for any Florida citizen (without any showing of harm) to "seek judicial relief to compel the Legislature to comply with its constitutional duty to enact legislation under this section." In *Dade County Classroom Teachers Association v. Legislature*, 269 So.2d 684, 686 (Fla.1972) the Court declined to issue a writ compelling the Legislature to create implementing legislation for Article I, s. 6 Florida Constitution.

> "The petition for the writ must, of course, be denied. Florida's Constitution, like those of most other states, divides the state's sovereign powers into three co-ordinate branches-legislative, executive and judicial-and prohibits a person belonging to one of such branches from exercising any powers 'appertaining to either of the other branches unless expressly provided herein.' Section 3, Article II, 1968 Constitution. And it is too well settled to need any citation of authority that the judiciary cannot compel the Legislature to exercise a purely legislative prerogative." *Ibid*

The remedy envisioned by the Court in that instance, should the legislature refuse to act, was to "fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution." *Id*. In contrast, the remedy included in the Energy Choice Initiative acts in derogation of the separation of powers and gives the Court the ability to compel the Legislature in a heretofore unprecedented fashion.

Left unanswered by the Initiative is how the courts would compel the Legislature. Would a circuit judge be able to order a special session? Hold the legislators in contempt if nothing passed? This discussion also raises the question of

the Governor's power to veto. What if the legislature passed legislation and the Governor refused to sign it? Could the Circuit Court of Leon County tell the Governor to sign the Bill? Or could the judge just declare it to be the law without the nicety of the Governor's approval?

Many of the requirements of the Initiative are aspirational. Part (c)(1), which is the heart of the Initiative, requires the legislature provide for "competitively priced electricity", "promote competition…through various means", "protect against unwarranted service disconnections, unauthorized changes in electric service and deceptive and unfair practices." These protections involve policy choices and value judgments. What is an appropriate level of competition while still protecting the environment and adhering to growth management policies? What is "unfair"? These terms are not defined by the Initiative and would require legislative definition. Normally such questions would not be considered justiciable. Merely putting broad terms into the constitution does not create a judicially manageable standard. The First District Court of Appeal considered whether the "State violated its "paramount duty" to provide a "uniform, efficient ... and high quality system of free public schools that allows students to obtain a high quality education," as required by Article IX, section 1(a) of the Florida Constitution." See *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So.3d 1163, 1165 (Fla. 1st DCA 2017)(*Citizens I), aff'd Citizens for Strong Schools, Inc. v. Florida State Board of Education*, 262

So.3d 127 (Fla. 2019)(*Citizens II)*. The Court found that the constitutional challenges to legislative action were not justiciable because the challenges "raise political questions not subject to judicial review, because the relevant constitutional text does not contain judicially discoverable standards by which a court can decide whether the State has complied with organic law." *Id*. In *Citizens I* the court found that terms such as "high-quality" and "adequacy" do not give sufficient guidance to a court on how to apply them. *Id*. The same would be true of the broad terms used in this Initiative. Courts usually defer to the legislature in matters of economic regulation. As the Third District Court of Appeal observed:

> A competent judge can certainly analyze an economic regulation and identify the way different parties and classes are benefited or injured. But absent fundamental rights or suspect classifications, which provide at least a degree of constitutional direction, the choice of how to balance competing economic interests is a policy question that is largely political in nature because no pre-existing neutral principles exist to govern the judge's decision. At the end of any such analysis, the judge is left with little more guidance than the very same subjective political convictions a person would use if he or she were voting as a legislator during a roll call or a citizen at the polls. A decision of this sort may be well-intentioned, even admirable, but it is not judicial. *Silvio Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So.3d 13, 25 (Fla. 3d DCA 2016).

The Energy Choice Initiative proposes 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" See Part (e). This section takes a matter that would not be justiciable and creates standing for any citizen to seek relief from the courts to make determinations in terms of policy. The very language of the Initiative acknowledges it has "broad purposes."

"The Supreme Court has held that the doctrine of justiciability can require the rejection of "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities" of a coordinate branch of government. *Gilligan v. Morgan*, 413 U.S. 1, 5, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973)." *Citizens II* at 145 (Fla. 2019)(Canady, J, concurring). The Initiative goes beyond the Court stepping in if the legislature completely fails to act and instead allows the Court to pass judgement on the wisdom of legislative enactments. Part (e) gives the Court the power to "assume continuing regulatory jurisdiction over the activities of a coordinate branch of government." It effectively permits the Court the ability to weigh on policy decisions anytime the legislature is not acting in a manner the Court thinks is "fully consistent" with the Initiative's "broad purposes."

The Energy Choice Initiative would also clearly impact the Public Service Commission. (PSC). "The Florida Public Service Commission has been and shall continue to be an arm of the legislative branch of government. The Public Service Commission shall perform its duties independently." Fla. Stat. §350.001. "We realize that some of the functions given the Public Service Commission are executive

in nature because it is directed to enforce laws. The commission also performs quasi-judicial functions. However, its primary function is setting rates, which is legislative in nature. The legislature, in creating the Public Service Commission, expressly stated that the Public Service Commission is part of the legislative branch." *Chiles v. Pub. Serv. Comm'n Nominating Council*, 573 So.2d 829, 832 (Fla.1991). Chapter 366, Florida Statutes, gives the PSC the ability to set retail rates for electrical utilities other than Rural Electric Cooperatives and Municipal Utilities. "As authorized by s. 3(b)(2), Art. V of the State Constitution, the Supreme Court shall review, upon petition, any action of the commission relating to rates or service of utilities providing electric or gas service." Fla. Stat. §366.10. So by upending rate regulation and creating a competitive market, the Energy Choice Initiative impacts both the PSC and the Supreme Court's oversight of rates.

The Governor and the Cabinet are also part of state energy regulation. The Cabinet sits as Florida's State Siting Board. Fla. Stat. §§403.503(8), 403.522(6). Sections 403.501–403.518, Florida Statutes, comprise the "Florida Electrical Power Plant Siting Act" (PPSA). Sections 403.52-403.5365, Florida Statutes, comprise the "Florida Electric Transmission Line Siting Act" (FETLSA). Under the PPSA and FETLSA the Governor and Cabinet are responsible for permitting new power plants and transmission lines. In order to apply for a permit to build power plants or transmission lines, an applicant must be an electric utility, which includes

generation. Fla. Stat. §§403.503, 403.522. Power plants and transmission lines take years to build. *Cost and Performance Characteristics of New Generating Technologies, Annual Energy Outlook 2019*, pg. 2 (U.S. Energy Information Administration).[1] So if this Initiative passed, the Governor and Cabinet's orders authorizing the building of power plants and lines would be voided by the passage of legislation since the Initiative redefines the term utility. The gap of almost three years from the passage from the Initiative to when the Legislature would be required to pass legislation would almost certainly complicate if not freeze this process.

It should also be noted the PSC under sections 403.519 and 403.537, Florida Statutes, makes a determination of need before the Siting Board can approve applications. In Florida's current regulatory scheme, the PSC manages generation capacity. Under the Initiative, there would be a right for "every person or entity" to produce "electricity themselves or in association with others." Part (b). It further says the State is prohibited from "granting of either monopolies or exclusive franchises for the generation and sale of electricity." Part (c)(2). So the PSC's ability to manage generation would be curtailed.

There is also the issue of the creation of a Regional Transmission Operator (RTO) or Independent System Operator (ISO).[2] If the state creates a wholesale

[1] https://www.eia.gov/outlooks/aeo/assumptions/pdf/table_8.2.pdf

[2] https://www.ferc.gov/industries/electric/indus-act/rto.asp

energy market then Federal regulation would apply. In their filing with the Financial Impact Estimating Conference (FIEC), the sponsors of the Energy Choice Initiative acknowledged that Florida does not have an ISO or RTO and that one would probably have to be created. See *Citizens for Energy Choices – Financial Impact Statement for the Amendment*, pg. 5.[3] They compared their proposed amendment to Texas, which has created the Electric Reliability Council of Texas (ERCOT). The need to create an ISO is not mentioned in the amendment. The ramifications of creation of such an entity are significant. ERCOT exists separate from the Texas Public Utility Commission which is their equivalent of the PSC. Texas Courts have held that ERCOT is a quasi-governmental entity, which although a municipal corporation, still possesses sovereign immunity as a necessary component of the Texas' Legislature utility industry regulatory scheme. See *Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC,* 552 SW 3d 297, 318 (Tex. App.-Dallas [5th Dist.] 2018). The creation of an entirely new regulatory entity is in addition to the requirement to create an independent market monitor set out in part (c)(1)(v) of the Energy Choice Initiative. Market monitoring is one eight functions of an RTO/ISO. See 18 CFR 35(k)(6). In Texas, the market monitor is a contracted function separate from ERCOT. See Tex. Util. Code Ann.

[3] http://edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook1_FINAL.pdf

§39.1515. If the State did not create an RTO/ISO then the Federal Energy Regulatory Commission (FERC) regulations would still require these functions to be performed and would be adding new regulations to the Florida wholesale energy market. See 18 C.F.R. 35, FERC Orders 888/890, 2000.

The Energy Choice Initiative also affects municipalities. This Court has held on multiple occasions that it is a violation of the single-subject requirement not merely if the amendment affects multiple branches of government but multiple levels of government. See *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So.2d 1304, 1308 (Fla.1997) (holding proposed initiative affected home-rule powers of local government in addition to Legislature); *Advisory Op. to Att'y Gen. re Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ*., 778 So.2d 888, 893 (Fla.2000) (holding amendment affected state and local government). This Initiative allows municipalities who generate power to compete in the markets created by the Initiative. See part (2)(d). The sponsors foresee that "Municipally owned and cooperative electric utilities are exempted from retail competition, unless they opt-in." See *Citizens for Energy Choices – Financial Impact Statement for the Amendment*, pg. 8.

Currently in Florida, municipalities have the "power to provide electric service in the community." If they do not, then they negotiate with a utility for franchise fees that cover access to rights-of-way, monopoly electricity, and the municipality relinquishes its power to provide electricity. See *Florida Power Corp. v. City of Winter Park*, 887 So.2d 1237, 1240 (Fla. 2004) citing *City of Plant City v. Mayo*, 337 So.2d 966, 973 (Fla.1976). All over Florida these fees will be in question because there will no longer be monopolies within the electricity market. There will monopoly transmission but since there will almost certainly be a different rate structure it is hard to believe there will not be renegotiation of these fees or new contracts to charge electricity providers fees.

There will also be an impact on taxes. Section 212.05(1)(e)1.c., Florida Statutes, provides for a sales tax on electricity sales. Since transmission will be unbundled under the Initiative then the Legislature would have to address transmission as part of dealing with implementation. There is also a gross receipt tax under section 203.01, Florida Statutes, which goes into the Public Education Capital Outlay and Debt Service Trust Fund as provided for in Article XII, section 9(a)(2) of the Constitution. This trust fund is used in part to issue full faith and credit bonds. Even if the cost of transmission and electricity remained the same after passage of the Initiative, receipts of these taxes would go down because under the present legislative scheme only the sale of electricity is taxed, not transmission.

If the Legislature was going to increase electricity taxes or add a transmission tax, even if it was just to maintain current levels of revenue, Article VII, section 19 of the Constitution requires any increase or addition of a tax to be passed by a two-thirds vote and as a stand-alone measure.

B. The Energy Choice Initiative Engages in Logrolling

The second test of a citizen initiative to make sure it complies with the single-subject requirement is whether it combines several issues into a single initiative to obtain support. See *Save Our Everglades* at 1339. This practice is referred to as logrolling. "In addressing the issue of logrolling, this Court determines whether the amendment manifests a 'logical and natural oneness of purpose.'" *Advisory Opinion to Attorney General re Independent Nonpartisan Commission to Apportion Legislative & Congressional Districts Which Replaces Apportionment by Legislature*, 926 So.2d 1218, 1225 (Fla.2006) (Internal Citations Omitted). In *Nonpartisan* the Court found an initiative that created both an independent reapportionment commission and amended the standards to be used for reapportionment violated the single-subject rule. The Court found it was reasonable to believe that a voter might support the former without supporting the latter. In *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 566 (Fla.1998), the Court held "the proposed amendment combines two distinct subjects by banning limitations on health care

provider choices imposed by law and by prohibiting private parties from entering into contracts that would limit health care provider choice." Again the voter may support the one subject and oppose the other.

In *Evans v. Firestone*, 457 So.2d 1351, 1353 (Fla.1984), the Court stated "Fine stands for the axiomatic proposition that enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement. There we held that the single subject "revenue" encompassed at least three subjects. Similarly "citizen's rights in civil actions" is so broad as to fail to delineate the subject or subjects of this amendment in any meaningful way." See also *Determination that Sales Tax Exemptions & Exclusions Serve a Pub. Purpose (Fairness Initiative)*, 880 So.2d 630, (Fla.2004). These cases establish that lumping together a number of issues that may be broadly related but are not necessary components of a single scheme will not pass constitutional muster.

The Energy Choice Initiative has a number of issues that are not necessary to be combined in order effect the Initiative's purpose and which voters could have different views on. To wit, the Initiative: creates a right for consumers to buy, sell, trade or dispose of electricity; establishes a right to select from multiple electricity vendors; ends territorial restrictions on investor-owned utilities; allows municipalities and cooperatives to sell electricity on the open market while maintaining their exclusive territories; divests investor-owned utilities from their

generation capabilities; requires an independent market monitor; and creates a cause of action for any Florida Citizen to compel the passage of legislation. In looking at the experience of other states, it can easily be seen that the policy choices made by the Energy Choice Initiative do not have "natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Fine* at 990.

These issues do not necessarily relate to one another. No state allows sale of electricity by residential consumers. The only thing some states, including Florida, allow for is for consumers to get credits against their bill for excess energy they produce. This practice, referred to as net-metering, is required in 38 states and Washington, DC.[4] How the credits are allocated, how long they can rollover and whether they are at the same rate as electricity provided by the utility differ from state to state. In no sense are everyday consumers allowed to sell electricity as one would commonly understand what it means to sell something. Only 17 states and Washington, DC have partially deregulated energy markets such as the type sought by the Energy Choice Initiative.[5] The state with the largest deregulated market, Texas, is one of the states that does not require net-metering. Until recently, Ohio

[4] A list of the 38 States can be found at http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx.

[5] https://www.electricchoice.com/map-deregulated-energy-markets/ Not all of these states provide full retail choice but provide some consumer options.

did not require competitive energy suppliers to engage in net metering. See. PUCO Order 12-2050-EL-ORD (December 19, 2018). New York only allows net-metering for renewable energy sources.

The sponsor maintains the Energy Choice Initiative would allow consumers to share energy. According to the FAQ section on the sponsor's website, people who owned solar or wind turbines "could share excess power with others in their community, something they're prohibited from doing now." See www.flenergychoice.com/the-issue . Only 16 states provide for solar sharing.[6] This is a relatively new concept and again states that allow this type of sharing have different models of utility regulation. The Initiative also allows electricity customers to "dispose of electricity." Part (b). It is not clear what this means or what type of policy it may refer to. The "buy, sell, trade, or dispose" portion of the Initiative introduces a host of policy questions that are separate and apart from the creation of an unbundled electricity sales market all of which states routinely deal with as different policy questions. The Initiative requires voters to accept them as part of one package.

The requirement in the Energy Choice Initiative that there be a competitive wholesale market is another issue. Wholesale markets usually require the creation

[6] http://www.sharedrenewables.org/community-energy-projects/ Last visited on 4/8/2019

of a Regional Transmission Operator (RTO) or Independent System Operator (ISO). See 18 C.F.R. 35.[7] The market would have to be subject to FERC regulation regardless of whether an ISO/RTO was formally established. See id. These entities are usually set up as municipal corporations with independent governing boards. There are 7 RTO/ISO's in the country that cover both states that offer retail choice and some that do not. There are states that provide some level of retail choice that are not part of an RTO/ISO.

The Energy Choice Initiative also provides the Legislature will "establish an independent market monitor to ensure the competitiveness of the wholesale and retail electric market." While wholesale electric markets organized as RTO/ISO's are required by the FERC to have wholesale market monitors there is no such requirement for retail markets. See 18 C.F.R. 35(k)(6). So while states with retail choice do have statutes providing for wholesale market monitoring, they do not establish a market monitor for the retail market. See e.g. Tex. Util. Code Ann. §39.1515 or Ohio R.C. §4928.142(B)(2).

It is also worth noting the ability for municipalities and Rural Electric Cooperatives to expand outside their territory represents yet another separate policy change for the state. Municipalities enjoy "the privileges of legally protected monopolies within municipal limits." *Storey v Mayo*, 217 So.2d 304 at 307, (Fla.

[7] https://www.ferc.gov/industries/electric/indus-act/rto.asp.

1968); see also Fla. Stat. §366.11. When a municipality seeks to add service outside their geographical boundaries however it must be approved by the PSC. See Fla. Stat. §366.04(1)(d). This allows for the PSC to make a determination that it is in the public's best interest to act. It should also be noted that Article VII, section 3(a) of the Constitution, provides in relevant part "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is located." This means property interests of a municipality used for power generation and transmission are not subject to ad valorem taxation. See *Schultz v. Crystal River Three Participants* 686 So. 2d 1391 (Fla 1997). It is not a stretch that a voter could believe that a competitive energy marketplace is good but that allowing governmental entities who do not have to pay the same taxes or adhere to the same regulations make for fair competitors. Some voters could also have a problem with the potential of government actors to become profit driven. While now if a municipal utility is poorly run the customers can vote the board of directors out of office, under the Initiative they could compete on a non-level playing field without being accountable ultimately to customers which are located outside of their jurisdiction. Municipalities will now be able to sell power across the state on their own say-so, which creates additional powers for those governments that have generation

capabilities. Of course if they opt-in, then they will be giving up their exclusive power to provide electricity to their citizens. While this portion of the Initiative seems to preserve the status quo, it actually will make a dramatic change.

Similarly, Cooperatives were created with a specific purpose in mind. Section 425.02, Florida Statutes, provides "cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas. Corporations organized under this chapter and corporations which become subject to this chapter in the manner hereinafter provided are hereinafter referred to as 'cooperatives.'" Under federal law cooperatives are eligible for loans and grants that regular utilities are not. See 7 U.S.C. §904. So the Initiative would allow Co-ops to move away from their initial purpose and enter the competitive market. Co-ops, like municipalities, would also have market advantages, which investor-owned utilities do not. Again, a voter could feel that this provision is not something they want even if they feel other provisions might be a good idea.

II. The Energy Choice Initiative does not Identify the Portions of the Constitution It Affects

This Court has held that "it is imperative that an initiative identify the provisions of the constitution substantially affected by the proposed amendment 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." *Right of Citizens to Choose Health Care Providers*, 705 So.2d at 565-66. In *Advisory Op. to Att'y Gen. re Tax Limitation*, 644 So.2d 486, 492–93 (Fla.1994) this Court held that an amendment that affected multiple parts of the Constitution affecting taxes needed to be stricken from the Constitution. The point is the meaning and effect of an initiative needs to be understood before it goes on the ballot. If a voter has no knowledge of what parts of the Constitution are being changed then they cannot know what the initiative is going to do.

This brief has already discussed how this Initiative affects Article III by limiting and substantially performing legislative power. There is also the argument regarding how the Initiative affects separation of powers by giving the Court the ability to direct the Legislature in the implementation of a non-self-executing amendment. There is also discussion regarding Article XII, section 9(2) and PECO bonds. Article V section 3(b)(2) also is implicated regarding the Court's ability to oversee rate cases. None of these provisions are identified in the Energy Choice Initiative. Nor is it entirely clear, as stated in *Right of Citizens to Choose Health Care Providers*, what the effect of the Initiative would be on those other provisions. There are clearly "various interpretations" that this Initiative could have.

This lack of clarity has been problematic in the past. In 2002, a constitutional amendment was proposed by citizen initiative that "sought to amend the Florida

Constitution to create a system of governance for the state university system." *In re Advisory Op. to Atty. Gen. Ex rel. Local Trustees,* 819 So.2d 725, 727 (Fla.2002). That initiative created Article IX, section 7 of the Florida Constitution which creates the Board of Governors. Subsequently there was a challenge to the power of the legislature to set tuition and the Court held that it was unclear who had that power. "Simply put, the language of article IX, section 7, is not "clear" or "unambiguous" and does not expressly "address the matter in issue." *Graham v. Haridopolos*, 108 So.3d 597 (Fla.2013)(internal citations omitted). So the Court had to resolve the ambiguity after the amendment was law.

In *Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries,* 2 So.3d 175 (Fla.2009) the Legislature challenged the initiative on the grounds that it would substantially change the function of the Court as well the Legislature. The Court dismissed that claim as speculative. See *Id.* at 184. After the initiative was passed the Court held " with the adoption of the article III, section 21, standards in 2010, "intent," which is an inquiry that can often involve disputed issues of fact, is now a key element in the analysis of the Legislature's compliance with the Florida Constitution's redistricting standards." *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So.3d 198, 205 (Fla.2013). "Simply put, the framers and voters clearly desired more judicial scrutiny of the legislative apportionment plan, not less." *Id.* So during the pre-ballot consideration

of the initiative, the Court thought the need for judicial involvement was speculative, but afterward found greater authority in the Court to hear challenges to reapportionment plans was obvious.

In both of these instances, opponents had noted ramifications of the initiatives and the Court did not consider the broader implications on the Constitution. Therefore, the Court found itself in the middle of controversies about what those provisions meant. While allowing voters to exercise their constitutional right to amend the Constitution should not be ignored, the process should not ignore the restriction on such initiatives that the voters have already adopted.

III. The Energy Choice Initiative violates the Ballot Summary Rule

Implicit within Article XI, section 5 of the Constitution is that any proposed amendment be accurately represented on the ballot. *Florida Educ. Ass'n v. Florida Dept. of State*, 48 So.3d 694 (Fla. 2010). In approving a citizen's initiative this Court is required to review whether the proposed amendment's ballot summary complies with the requirements of section 101.161, Florida Statutes, under which the ballot summary must provide in clear and unambiguous language an explanatory statement of the chief purpose of the measure. When reviewing a proposed amendment the Court considers two questions: (1) whether the ballot title and summary fairly inform the voter of the chief purpose of the amendment; and (2) whether the language

misleads the public. *Advisory Opinion to Atty. Gen. re Rights of Electricity Consumers Regarding Solar Energy Choice*, 188 So.3d 822, 831 (2016).

A. The ballot summary fails to fairly inform the voter of the chief purpose of the Initiative and its sweeping effects

While it is not necessary to explain every ramification of a proposed amendment, the ballot summary "in clear and unambiguous language" must state the "chief purpose of the measure" so the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot. *Askew v. Firestone*, 421 So.2d 151, 154-155 (Fla. 1982). The ballot summary in question reads more like the title of a bill than a statement of the chief purpose of the measure. Rather than lay out what the chief purpose is, the ballot summary lists the distinct components included within the proposed text.

To ascertain the chief purpose of the Initiative one must look beyond the text of the ballot summary to the sponsor's memorandum provided to the Financial Impact Estimating Conference. The sponsor's stated chief purpose of the amendment is through comprehensive legislation to "change a significant portion of Florida's retail electricity market from a traditional vertically integrated monopoly framework to a competitive framework…" See *Citizens for Energy Choices – Financial Impact Statement for the Amendment*, pg. 7.

The restructuring of an electricity market has never been accomplished through a constitutional amendment. Other states, usually in multiple steps over a

period of years, have transitioned from a vertically integrated framework through complex legislation or regulatory reforms.[8] Voters may be presumed to have a certain amount of knowledge; however, it stretches logic to presume that voters would be aware or have fair notice of the complexity and sweep of the changes necessary to implement the Initiative. By requiring the Legislature to enact sweeping policy reforms that fully effectuate the broad purposes of the Initiative, it is impossible for the voter to make an informed decision based upon the stated terms. *Smathers v. Smith*, 338 So.2d 825, 829 (1976) (holding voters must be able to comprehend the sweep of the proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be).

Additionally, both the summary and the text fail to specify the myriad of "statutes, regulations, and orders" that will be void upon enactment of any law by the Legislature pursuant to the new constitutional text. Simply stating in the ballot summary that the Initiative "repeals inconsistent statutes, regulations, and orders" is insufficient to put a voter on notice of the extensive effects that it will have on the entire utility industry. The omission of such material is misleading and precludes voters from being able to cast their ballots intelligently. *In re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination*, 632 So.2d 1018,

[8] See, e.g. Texas Acts 1999, 76th R.S., ch. 405, General and Special Laws of Texas (S.B. No. 7); Am.S.B. No. 3, 1999 Laws of Ohio 47; NY PSC Opinion No. 96-12, May 20, 1996, Case 94-E-0952).

1021 (1994) citing *Advisory Opinion to the Attorney General-Limited Political Terms in Certain Elective Offices*, 592 So.2d 225 (Fla.1991).

Furthermore, the ballot summary does not provide fair notice of the multitude of varying effects the specific terms of the proposed Initiative require, effects which might weigh significantly on a voter's decision. This Court has stated "[t]he critical issue concerning the language of the ballot summary is whether the public has fair notice of the meaning and effect of the proposed amendment. *In re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1021 (Fla. 1994)(quotations omitted).

Customers of a municipal or cooperative electric company may be under the impression the Initiative does not apply to them because the ballot title refers only to customers of investor-owned utilities and the ballot summary merely authorizes such entities to opt-in. However, even if a municipal or cooperative electric company does not choose to opt in, such entities will be significantly affected if they are non-generating[9] or purchase a portion of electricity from an investor-owned utility. For example, since 2014 the Lee County Electric Co-op has sourced 100 percent of its energy under a purchase contract with an investor-owned utility.[10] All power

[9] For a full list of non-generating utilities in Florida, see Florida Public Service Commission, *Statistics of the Florida Electric Utility Industry* (Oct. 2018).
[10] Lee County Electric Co-op, *Customer Guide*, pg. 5 (April 2018), *available at* https://www.lcec.net/pdf/CustomerGuide.pdf.

purchase contracts between non-generating entities and current investor-owned utilities upon which non-generating utilities currently base their rates would be affected by the unbundling requirement within the Initiative. Such entities would be forced to contract with another power supplier or restructure their current agreements, which, unbeknownst to the voter, would ultimately affect their customers.

Another effect of the proposed Initiative which may weigh significantly on a voter's decision, is the likelihood of the potential recovery of stranded costs through increased customer rates. The Initiative requires the Legislature to adopt legislation that would "limit the activity of investor-owned utilities to the construction, operation, and repair of electrical transmission and distribution systems." Part (c)(1). An investor-owned utility would be precluded from further recovering costs related to its generation assets. Such prohibition would inevitably lead to stranded costs, which are investments that a utility has incurred with an expectation of cost recovery through rates. In all restructured states, utilities were compensated for these costs and compensation most commonly was accomplished through retail rate repayment. FIEC at 16. The ballot summary fails to mention how, depending on the mechanics of divestiture and structure of the market, a customer's electricity bills would likely increase.

Yet another factor that may weigh significantly on a voter' decision which the ballot summary fails to disclose is the effect the creation of a competitive wholesale market will have on the state's jurisdiction over the electric utility industry. Under the current framework the Florida Public Service Commission has the authority to determine and fix fair, just, and reasonable rates that a public utility may charge for its service. Fla. Stat. §366.06(1). However, the text requires a shift in the "public policy of the state to wholesale and retail electricity markets." Part (a).

The Federal Regulatory Commission (FERC) has exclusive jurisdiction over matters that directly affect wholesale electricity rates, including whether the rules or practices affecting wholesale rates are just and reasonable. 16 U.S.C. §824(b)(1). The U.S. Supreme Court has broadly interpreted this authority. *F.E.R.C. v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 774-775 (2016)(upholding FERC's authority extends to what takes place on the wholesale market, no matter the affect, even substantially, on retail rates). The Court explained this expanding scope of jurisdiction was a necessary result of the electric utility industry increasingly becoming a competitive intrastate business as a result of the reduction of utilities operating as vertically integrated monopolies in confined geographic areas. *Id*. at 768.

This is exactly what the Initiative attempts to accomplish, extinguish the ability for vertically integrated electric utilities to operate within the state and

transition the state's traditional electricity market to competitive wholesale and retail markets. While it is clear the Initiative opens the door to broad federal oversight, the degree of which ultimately depend on the structure of the competitive markets. Voters are entitled to know if they are being asked to open Florida to more federal oversight and, thereby, limiting the state's authority to enact policies which it feels are in the state's best interest. Another "problem therefore lies not with what the summary says, but, rather, what it does not say." *Askew* at 421.

The ballot summary fails to disclose how the Initiative will restrict the Legislature from regulating electricity customers, which includes large commercial users, who choose to generate electricity for themselves or in association with others. See Part (b). The language of the Initiative states "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." *Id*. The only public policies that are specifically mentioned in the text include "renewable energy, energy efficiency, and environmental protection," all of which under current law are inextricably linked to the current traditional framework. Therefore, it is unclear which aspects of these current policies the Legislature would be able to apply to participants, including self-generators, in the competitive electricity market.

It is also unclear what authority the state is left with regarding policies that are not specifically mentioned, such as storm protection, reliability, and hardening

and what authority the Legislature has to make policy decisions it deems are in the public's interest. For example, in Texas the legislature found there were "competitive development areas in which it is not in the public interest to transition to full retail customer choice at this time" and, therefore authorized vertically, integrated electric utilities to continue operating in such areas subject to traditional utility regulation. See Tex. Util. Code Ann. §39.401. The Legislature arguably is precluded from making a similar determination for Florida by the terms of the Initiative, specifically the terms "prohibit *any* granting of monopolies or exclusive franchise for the generation and sale of electricity." Part (c)(1)(emphasis added). Unlike the proposed language in *Solar Energy Choice* where the ballot summary and text clearly indicated that state and local governments retained their ability to protect consumer rights and the public health, safety, and welfare, the Initiative at issue does not include such language. *Advisory Opinion to the Atty. Gen. re Rights of Electricity Customers regarding Solar Energy Choice,* 188 So.3d 822, 832 (2016). Conversely, the proposed text includes language that would preclude the Legislature from limiting the rights of electricity customers. See Part (b). It begs the question of what authority the state would have in light of the constitutional amendment to regulate self-generators and ensure grid reliability. Such lack of state oversight may weigh significantly on a voter's decision.

B. The ballot summary misleads the public

On its face by mandating the Legislature adopt complete and comprehensive legislation to implement the proposed text, the Initiative is not self-executing. *Gray v. Bryant*, 125 So.2d 846 (Fla. 1960) (holding to be self-executing a provision must lay down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment). When provisions of the Constitution are not self-executing, the Court has concluded there is not an expectation the benefits are automatic from the date of its adoption, and that Legislation is required to carry out the intent expressed. *St. John Med. Plans, Inc. v. Gutman*, 721 So. 2d 717, 719 (Fla. 1998).

The ballot summary and title are misleading in that the ballot summary directly states the Initiative grants the right of energy choice within the Constitution, which is materially different than what the actual text provides. Under the terms of the text, such rights become effective only upon implementation by and are subject to the broad discretion of the Legislature. A reasonable person could read the ballot summary and believe an affirmative vote for the Initiative would grant customers of investor-owned utilities the right to choose their electricity provider and to generate and sell electricity upon passage. While the ballot summary provides the Legislature is required to adopt laws "providing for competitive wholesale and retail markets for

electricity generation and supply," such language does not sufficiently link this provision to the aforementioned rights it purports to grant. The Initiative is fatally defective because it leaves the impression it grants rights to a customer of an investor-owned utility, when in reality the proposed amendment creates an illusory right to a competitive market. *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 566 (1998) (holding "the proposed amendment created illusory right to choose healthcare provider when in fact it would have severely limited individual's ability to enter into health care contract.")

Rather than clearly and unambiguously stating the amendment requires the Legislature to overhaul electric utility regulation, the ballot title and summary declare the Initiative grants rights to a competitive market and allows energy choice. "Because of the complexity involved in implementing full electricity restructuring," the sponsor felt it was necessary for "the Initiative to delegate the lion's share of specifics to the Florida Legislature." See *Citizens for Energy Choices – Financial Impact Statement for the Amendment,* pg. 8. What means the Legislature will use to get to the very broad end of creating a "competitive energy market" is completely speculative. As the proposed Financial Impact Statement states: "The final design of the new market system for electricity is unknowable until the Legislature acts." See Financial Impact Estimating Conference, *Financial Impact Statement*, pg. 1. While amendments that are not self-executing have been approved, a proposed initiative

"must stand on its own merits and not be disguised as something else." *Florida Educ. Ass'n.* at 701 quoting *Askew*, 421 So.2d at 156. This Initiative comes disguised as a grant of a constitutional right to energy choice when in reality it is a directive to the Legislature to restructure the electricity market within a framework the sponsor believes is the best model.

The sponsor has made clear that the right to energy choice and the creation of a competitive market depend on how the Legislature chooses to restructure the market. At the Financial Impact Estimating Conference on February 11, 2019, in response to a question posed by Amy Baker, the FIEC principal for the Office of Economic & Demographic Research, regarding the constitutionality of the rights provided, Warren Rhea, a representative of the sponsor, stated:

> Well the purpose of the amendment is to guide the legislation, but it therefore should have the same impact because it's not self-executing legislation. So what we are envisioning is that the Legislature looks at this as set of, uh, kind of guiderails for how to then implement the broader program so that, uh, for example, it takes a closer approach to Texas than to other states that have had, ya know, different amounts of success. But in practice it should be, uh, it should work out similarly to a state that did it purely through legislation alone because, uh, the legislation itself would be the, the, uh, the guidance or the, um, or would be what's executed. (Warren Rhea testimony before Financial Impact Estimating Conference)

Similar to the "promise of tax relief" as provided in *In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption*, 800 So.2d 646, 653 (2004), whether the amendment would ultimately result in energy choice or a competitive

market depends on a variety of factors independent of the amendment. Until the Legislature acts, it is entirely speculative whether electricity customers will have access to multiple providers or the degree to which the state's wholesale and retail markets will be "competitive." Because the amendment flies under false colors using terms such as "allowing energy choice," which elicit an emotional response, rather than reflecting the true legal effect of the amendment, the ballot summary is misleading. *In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption*, 800 So.2d 646, 652-653 (2004).

The ballot summary is also misleading in that it inaccurately states the Initiative "requires the Legislature to adopt laws…by June 1, 2025." The proposed text requires the Legislature to adopt implementing legislation by June 1, 2023, which shall take effect no later than June 1, 2025. The term "adopt" is materially different than the term "effect." The Constitution provides a default for when all acts become effective, but authorizes the Legislature to choose a different. Art. III, s. 9, Fla. Const. The Initiative requires the Legislature to choose a date prior to June 1, 2025, for when the implementing legislation will become effective. However, it requires the Legislature to adopt laws by June 1, 2023. A reasonable voter could assume based on the ballot summary that the Legislature has been provided five years to act, when the Legislature will only have been given three. Such discrepancy is materially misleading.

If a proposed amendment fails to adequately define material terms, the Court has found the language to be misleading. *Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education…*, 778 So.2d 888, 899-900 (Fla. 2000). The proposed Initiative grants rights to "customers of investor-owned utilities" and requires the Legislature to limit the activities of investor-owned utilities" without defining the term "investor-owned utility."

While the term investor-owned utility is commonly used by the industry, it is not defined under Florida law. Instead the terms "public utility" and "electric utility" are defined and the term "investor-owned utility" is included within the definition of "electric utility". See Fla. Stat. §§366.02, 366.11, 366.8255. The Florida Public Service Commission does commonly refer to the following group of five electric utilities as "investor-owned": Duke Energy Florida, LLC; Florida Power & Light Company; Florida Public Utilities Corporation; Gulf Power Company; and Tampa Electric Company.[11] However, it is unclear under the terms of the amendment if these are the five entities which are meant by the term "investor-owned utility." For example, the Initiative requires the Legislature to "limit the activity of investor-

[11] Florida Financial Impact Estimating Conference, *Financial Impact Statement*, pg. 5, citing Florida Public Service Commission, *"Facts & Figures of the Florida Utility Industry,"* (May 2018), *available at* http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Factsandfigures/May%202018.pdf, p. 10.

owned electric utilities to the construction, operation, and repair of electrical transmission and distribution systems." Part (c)(1). However, the Florida Public Utilities Corporation, an investor-owned utility according to the PSC, is non-generating. Its activities are already limited to distribution and transmission, and begs the question of whether under the terms of the Initiative it should be included as an investor-owned utility.

As contemplated by the sponsors, if "properly implemented, this limitation would require Florida's existing IOU's to functionally unbundle their current operations by transferring their power generation and retail sales functions to separate business entities subject to market power limitations." *Financial Impact Statement for the Amendment: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice*, pg. 9 (Feb. 11, 2019). It is unclear whether it was intended for the term to capture an "investor-owned utility" as defined by the Legislature pre- or post-implementation. For example, in Texas electric utilities were required to "unbundle" into three units: (1) a power generation company; (2) a retail electric provider; and (3) a transmission and distribution utility by September 1, 2000. See Tex. Util. Code Ann. §39.051. It wasn't until after January 1, 2002, that the right to retail choice became effective. See Tex. Util. Code Ann. §39.102. Furthermore, the language made clear that an affiliated retail electric

provider serving a customer pre-retail choice was authorized to continue to serve such customer until the customer choose an alternative service. *Id*.

The term "unbundling" mentioned is entirely absent from the ballot summary and title. The ballot summary merely repeats the exact terms that are within the proposed text, "limits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems." It is unclear how such terms could be construed to mean what the sponsor has stated they were intended to mean. Discrepancies such as these highlight the problem with trying to accomplish such a complex policy proposal through an amendment to constitutional text. Once a policy goes into the constitution, it necessarily precludes the Legislature from implementing contradictory policies. See *Garcia v. Andonie*, 101 So.3d 339, 346 (2012) (quoting *State ex rel. West v. Butler*, 70 Fla. 102, 69 So. 771, 777 (1915)).

Even if it could be clarified by the Legislature what the term investor-owned utility means under the proposed Initiative, it is still unclear who would be the customers of investor-owned utilities. The Initiative defines "electricity customer" as "every person or entity that receives electricity service from an investor-owned electric utility." Part (b). However, the Initiative does not specify the time at which a person must have received service from such a utility. It is unclear whether it is the time of passage of the Initiative, when the legislation is adopted, or when the implementing legislation takes effect. It would be left to the Legislature to attempt

to decipher which class of people the crux of the entire amendment would apply. It is unfair to require an individual to vote on an initiative without knowing whether it will apply to them or not. While the Court should be wary of interfering with the public's right to vote on an initiative proposal, the Court must be equally cautious of approving the validity of a ballot summary that is not clearly understandable. *In re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1021 citing *Smith v. American Airlines*, 606 So.2d 618 (Fla. 1992).

CONCLUSION

"The single-subject restraint on constitutional change by initiative proposals is intended to direct the electorate's attention to *one change* which may affect only *one subject* and matters directly connected therewith, and that *includes an understanding by the electorate of the specific changes* in the existing constitution proposed by any initiative proposal." *Fine* at 989 (emphasis added). The Energy Choice Initiative fails to stick to one subject and provide the electorate any understanding of the myriad changes it makes to the Constitution and Florida law.

It is clear the Initiative's ballot title and summary are not drafted in a straightforward, direct, and accurate way and fail to disclose significant effects. By falsely implying the Initiative grants rights to electricity customers, the Initiative suffers from misleading wordsmithing. As this Court made clear in *Florida Dept. of State v. Slough*, 992 So.2d 142 (2008), "when such wording selections render a ballot

title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot." *Slough* at 149. Therefore, the Energy Choice Initiative should not proceed forward for consideration by the voters.

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I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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