CASE NOS. SC19-328; SC19-479 (CONSOLIDATED)

IN THE SUPREME COURT OF FLORIDA

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

AMENDED INITIAL BRIEF OF FLORIDIANS FOR AFFORDABLE RELIABLE ENERGY (FARE), URBAN LEAGUE OF PALM BEACH COUNTY, JACKSONVILLE URBAN LEAGUE, AND THE CENTRAL FLORIDA URBAN LEAGUE

IN OPPOSITION TO THE INITIATIVE

M. STEPHEN TURNER
FLORIDA BAR NO. 095691
NELSON MULLINS BROAD AND CASSEL
215 SOUTH MONROE STREET, SUITE 400
P.O. DRAWER 11300 (32302)
TALLAHASSEE, FLORIDA 32301
Counsel for Floridians for Affordable Reliable Energy (FARE), Urban League of Palm Beach County, Jacksonville Urban League, and the Central Florida Urban League

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Cases **Page No.**

Statutes

State Constitutions

Other Authorities

STATEMENT OF OPPONENTS' INTEREST

The Court's Order dated March 29, 2019, invited interested persons to submit arguments in opposition to the constitutional amendment initiative styled "Right To Competitive Energy Market For Customers Of Investor Owned Utilities; Allowing Energy Choice." A copy of the Initiative, *i.e.*, the Ballot Title and Summary and the proposed Amendment text, is included in a separately filed Appendix, App. pp. 3-4.

Floridians for Affordable Reliable Energy (FARE), a Florida nonprofit corporation, is an "interested person" that opposes the Initiative. FARE is dedicated to consumer advocacy for efficient, reliable, and reasonably priced electrical service on behalf of residential households and small businesses. FARE is opposed to electrical energy deregulation pursuant to the proposed initiative amendment.

Urban League of Palm Beach County, Jacksonville Urban League, and the Central Florida Urban League, three non-profit organization affiliates of the National Urban League, are also interested persons who oppose the initiative. They are human services organizations dedicated to enable disadvantaged minorities and minority communities to secure economic self-reliance and empower them to elevate their standard of living in urban areas.

Opponents believe that Florida residents, minority communities and small businesses pay among the lowest rates in the country for reliable energy service. They oppose the initiative because the State's energy policy should not be

dramatically and unalterably disrupted to the detriment of the public that depends on affordable, reliable electric energy service. The so-called "Energy Choice" Initiative, if placed on the ballot, may mislead voters to abandon Florida's existing regulatory structure for electricity service and instead substitute a deregulated structure that would allow a multiplicity of retail providers to come between customers and power generators to charge higher rates for less reliable service and to engage in marketing practices that unfairly target seniors, minorities, low income communities, and other vulnerable citizens.

Because of serious energy policy concerns, Opponents present their legal arguments herein to establish that the proposed "Energy Choice" initiative does not meet constitutional and statutory standards to be allowed on the ballot.

CONCERNS AS TO THE EFFECT OF THE PROPOSED AMENDMENT ON THE STATE'S ENERGY POLICY

Under current law, the Florida Public Service Commission (PSC) regulates Florida retail public utility electricity companies, apparently referred to as "investor owned utilities" (IOUs) by the proposed Amendment. *See Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 432-33 (Fla. 2002) (using both terms). These companies generate, distribute and sell power. Regulation under Ch. 366, Fla. Stat. (2019), includes price, service terms, service area, and all other matters that concern the delivery of electrical service. *Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968),

explains that PSC regulation supplants competition as the means to protect electric power consumers in the public interest:

> [W]e recognized the importance of the regulatory function as a substitute for unrestrained competition in the public utility field. We there noted that often a regulated or measurably controlled monopoly is in the public interest, and that in the area of public utility operations competition alone has long since ceased to be a potent or even a reasonably efficient regulatory factor. (citing prior decision)

Regulated rates must be "fair, just and reasonable," as determined by the PSC, subject to review in this Court. *Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018). Ratemaking must serve the public interest, *id*. at 910, and rates of Florida retail utility companies are generally low, *see Florida Energy Facts*, Florida Energy Systems Consortium (Apr. 1, 2019, http://floridaenergy.ufl.edu/florida-energy-facts).

The proposed initiative amendment would eliminate the long established public utility infrastructure and regulatory framework by which Florida retail utility companies provide reliable power to customers at fair and reasonable rates. It would completely restructure this essential public service and debilitate the industry by creating the right of customer choice of retail electricity providers, creating the right for individual customers to be power suppliers, and precluding current public utility companies from being providers or generating or selling electricity.

There is no guarantee that residential and small business users will gain any advantage from this restructuring of the State's energy policy. To the contrary, customers will likely incur substantial disadvantages, including price increases, unpredictable price spikes, complex pricing that impedes comparative pricing, discrimination in rates or service, lack of service, shortages and blackouts, supplier failure (with uncertain backup), and safety issues. Homeowners and small businesses that are the focus of Opponents' concerns will bear substantial risk and incur more cost. Opponents have provided public testimony, for example, that residents in deregulated states paid substantially higher rates than residential customers in Florida in 2018.

The U.S. Energy Information Administration (EIA.gov), collects, analyzes, and disseminates independent and impartial energy information to promote sound policymaking. The EIA reports that customers living in regulated market states actually pay lower rates than in the sixteen states that have a deregulated market model. Comparison Tables compiled by EIA, reflect average revenues (Table 1) and average residential revenues (Table 2) per kilowatt hour in deregulated versus regulated states. These Tables are presented in separately filed Appendix, App. pp. 6-7. The EIA table comparisons substantiate Opponents' abiding concern that the so-called "Choice" initiative amendment would not serve to lower consumer costs as suggested, but instead will have the exact opposite effect, to significantly increase

electricity costs for seniors, low income households, minority communities, average citizens and small businesses in Florida.

Also presented in the Appendix are various sourced factual materials that support FARE's concerns about the detrimental public consequences of an irrevocably deregulated (so-called "Energy Choice") retail electricity market. App. pp. 8-12. Customer choice in a competitive market does not function the same for electric power utilities as for automobile dealers, brand-named stores, or fast food restaurants. A regulated utility market provides oversight necessary to keep prices fair while at the same time promoting necessary investment in infrastructure and renewable energy. In deregulated market states, prices are higher, opportunity for fraud abounds, and investment in infrastructure and renewable energy goes down. *See,* App. pp. 6-12; *see also*, Massachusetts Attorney General's Office, Press Release, dated Mar. 29, 2018, reporting upon conclusion of two-year study, "that competitive suppliers appear to have targeted low income and minority residents *** millions of dollars in overcharges have been picked from the pockets of Massachusetts families, especially low income families, as a result of the failed regulatory experiment." App. pp. 14 and 15. (The press release is enclosed in the Appendix at pp. 13-16).

SUMMARY OF THE ARGUMENT

The proposed "Energy Choice" initiative amendment violates the single subject requirement of Art. XI, § 6 of the Florida Constitution by combining three separate subjects as aspects of the amendment, to wit: 1) granting electricity customers the right of competitive choice of retail electricity providers; 2) precluding current Florida retail utility companies from providing electricity service or generating power; and 3) granting the right to individual customers of investor owned utilities to generate and apparently sell electricity.

The single subject requirement that a proposed initiative amendment embrace one subject or matters directly connected therewith requires strict compliance and is not broadly viewed.

The combined subjects of the proposed Initiative are not interdependent, or immediately or dependently related. The impact and voter interest for each subject is substantial yet disparate, each having effect perceived by the voter as discreet from the others. The latter two subjects do not implement, nor are they subordinate to, the primary subject of customer choice of retail energy providers, and thus are not directly connected with it. While the latter two subjects may be viewed as aspects of a proposed initiative generally concerning electricity in Florida, they are not the same subject as "customer choice" of retail electricity providers, nor a necessary or integral part of "allowing energy choice."

At most, the latter two subjects are at the periphery or stand in the penumbra of the core subject of "choice" of energy providers. They are not directly connected with it. Their presence forces voters to choose all or nothing among three different significant impacts in voting on the Initiative. This violates the prohibition against logrolling, so that the Initiative should not be allowed on the ballot.

The proposed Initiative also violates the single subject requirement and should not be allowed on the ballot because it substantially alters or performs multiple functions of government, or the functions of multiple branches or levels of government, including by repealing existing laws, rules and orders; by granting electricity customers the right to choose their retail providers and to produce electricity; by eliminating legislative regulation of the retail electricity utility industry through the Public Service Commission; by limiting the operations of existing retail electricity utility companies to distribution and transmission and thus precluding them from generating or selling electricity; by directing state monitoring of the interstate wholesale energy market in Florida; by providing a new judicial remedy for citizens to enforce the Legislature's obligation to enact legislation under the amendment; and by negating municipal franchise fee agreements with existing retail electricity companies, and depriving cities of substantial franchise fee revenues — all of which radically change the State's energy policy.

Finally, the Initiative should not be allowed on the ballot because it violates § 101.161(1), Fla. Stat., requiring the ballot summary to clearly and unambiguously explain the chief purpose and important consequence of the proposed amendment. This assures that the voter does not have to guess or be deceived about what is being voted on. The ballot title and summary for the proposed amendment fails to comply with the statute's requirement in several respects, including: by failing to clearly inform that choice of retail providers may be no choice or limited choice because current retail electricity companies will not be providers; by failing to disclose that the likely consequence of retail provider choice is higher cost and less reliable service, or at least that lower cost and reliable service are not assured; by deceptively stating that individuals are granted the right to sell electricity; and by deceptively misstating when and how the proposed amendment affects current laws and regulations.

In sum, the proposed "Choice" initiative fails each required test for ballot placement and should not be approved by the Court.

Point I

THE INITIATIVE AMENDMENT ADVANCES MULTIPLE SUBJECTS IN VIOLATION OF THE LOGROLLING PROHIBITION.

Article XI, § 3, Fla. Const., as amended in 1972, prohibits initiative amendments from embracing more than "one subject and matter *directly connected therewith*" (e.s.). Under contemporaneous definitions, the adjective "direct" means "immediate, proximate … the opposite of collateral." *Black's Law Dictionary* p. 546 (4th ed. 1968). "Connected" means "united or joined … by dependence or relation…." *Id*. p. 374. This limits initiatives to one subject and matters immediately and dependently related to that chief purpose subject.

Cases following the 1972 constitutional amendment initially applied Art. XI, § 3 broadly, analogizing it to the single subject requirement of Art. III, § 6 for legislation. That provision allows statutory enactments to contain widely divergent rights and requirements. *See Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 340 (Fla. 1978). However, Justice Alderman vigorously dissented in *Floridians*, insisting that the initiative proposal under review combined two subjects, *i.e.*, authorizing casino gambling in two counties, and allocation of state tax revenues from casino operations for public schools and law enforcement, and that such was a classic example of the very logrolling evil that the constitutional single subject limitation was designed to prevent. *Id*. at 342. "(T)he interest of

citizens who favor casino gambling is not necessarily the same as the interest of those citizens who seek additional tax revenues for support and maintenance of free public schools.*** The allocation of tax revenues is separate from and not directly connected to the subject of casino gambling." *Id*. at 343 (*e.s.*) Justice Alderman cautioned against a philosophy of pragmatic functional unity for an initiative amendment, fearing the Court would "pragmatize" the one subject limitation right out of the Constitution. *Id*.

Six years later, in *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984), the Court aligned with Justice Alderman's dissent, finding the initiative proposal there violated the single subject requirement because it addressed at least three subjects: limitation of how government can tax, restriction of government user-fee operations, and funding of capital improvement through revenue bonds. *Id*. at 986. By opinion authored by Justice Overton, the Court recognized the rule against logrolling multiple subjects that engender divergent interests or different views of voters:

> "The single-subject requirement of Article XI, Section 3, mandates that the electorate's attention be directed to a change regarding one specific subject of government... (and) avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support. An initiative proposal with multiple subjects, in which the public has had no representative interest in drafting, places voters with different views on the subjects contained in the proposal in the position of having to choose which subject they feel most strongly about." *Id*. at 988.

Fine v. Firestone rejected the notion that the single subject requirement for initiative amendments should be broadly viewed, and instead required "strict compliance," based on analysis of both the text and purpose of Art. III, § 6:

> First, we find that the language "shall embrace but one subject and matter *properly connected* therewith" in Article III, Section 6, regarding statutory change by the legislature is broader than the language "shall embrace but one subject and matter *directly connected* therewith," in Article XI, Section 3, regarding constitutional change by initiative. (Emphasis added.) Second, we find that we should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative. Third, and most important, *we find that we should require strict compliance with the single-subject rule in the initiative process for constitutional change* because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature. 448 So. 2d at 988-89. (e.s.)

Later cases adhere to strict compliance. *See Standards For Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 180 (Fla. 2009) (citing cases).

This constitutional single subject requirement for initiative proposed constitutional amendments prevents separate issues being combined in a single initiative to aggregate votes to secure approval of an otherwise unpopular issue. *See Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994), striking a proposed amendment that violated the single subject requirement, and holding:

> 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*. at 1341.

Only when a provision of a proposed amendment is subordinate to and serves to implement its primary subject is there an oneness of purpose so that provision is "directly connected" to the primary subject and not separate or distinct from it. *See Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998):

> 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. The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the health care 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.

See also, Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994) (proposed initiative amendment violated single subject requirement by combining protections for different classes of persons in a single "yes or no" ballot); *In re Tax Limitation*, 644 So. 2d 486, 491 (Fla. 1994) (proposed initiative amendment violated the single-subject requirement because it combined the subjects of taxes and fees); *Independent Nonpartisan Comm'n to Apportion Legislative & Cong. Districts*, 926 So. 2d 1218, 1226 (Fla. 2006) (proposed initiative amendment violated single subject requirement because creating new redistricting commission is distinct subject from enactment of standards for creation of districts). *See and Compare Limited Casinos*, 644 So. 2d 71, 72 (Fla. 1994) (proposal to authorize

casinos in various counties is implemented by provision to regulate and tax those casinos); *In re Physician Charges*, 880 So. 2d 659, 663 (Fla. 2004) (proposal to limit physician charges to lowest fee charged any patient is implemented by provision allowing patient access to physician fee schedules).

In re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose, 880 So. 2d 630 (Fla. 2004), held that a proposed initiative amendment violated the single subject requirement by combining "three disparate subjects": legislative review of existing sales tax exemptions; effective creation of a sales tax on services not specifically excluded; and limitation on legislative authority to create or continue sales tax exemptions or exclusions (without express finding of public purpose under defined criteria). *Id*. at 634-35. "While all of these three goals arguably relate to sales tax, and any one of these three goals might be the permissible subject of a constitutional amendment under the initiative process, we conclude that together they constitute impermissible logrolling and violate the single subject requirement of Art. XI, § 3 of the Florida Constitution, because of the substantial yet disparate impact they may have.*** This initiative requires the voter to 'choose all or nothing' among the three apparent effects of the amendment." *Id*. at 635. (*e.s.*) The Court there cited *In re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998), (where a proposed Amendment violated the single subject requirement by banning limitations

on health care provider choice and also prohibiting private parties from entering contracts that would limit health care provider choice).

The instant initiative violates the single subject prohibition against logrolling, by requiring voters to decide three disparate issues with distinct impacts in voting on one proposal, as follows:

1. Granting the right of electricity customers to choose retail electrical energy providers.

2. Limiting retail utility companies to transmission and distribution of electricity, thereby precluding them from generating or selling electrical power.

3. Granting the right of electricity customers to generate and purportedly to sell electricity.[1]

The second and third subjects are separate and distinct from the primary subject (number 1). The second and third subjects are not interdependent with or a necessary part of the core subject of a competitive energy market by choice of investor owned utility providers. While they may stand in the penumbra or on the periphery of that core subject, the second and third subjects are distinct aspects of

[1] While the ballot summary declares that the proposed Amendment "grants customers… the right to… generate or sell electricity, the text at subsection (b) actually provides that "nothing should be construed to limit the right of electricity customers to buy, sell, trade or dispose of electricity." The text does not expressly grant any "right" to sell. This is discussed in Point III, item 4, *infra.*

the proposed initiative with substantial disparate impact, and thus not immediately or dependently related, *i.e.*, not directly connected with it.

Subject #2, proposing to eliminate as competitors existing retail providers, which have long offered reliable service and fair value, does not advance, but rather impairs, the primary stated subject of customer choice, and is thus distinct therefrom.

Subject #3, proposing a right for all individual consumers to produce electricity themselves or in association with others is also distinct from the right of provider choice. The individual right to produce electricity does not serve to advance customer choice of retail providers, or produce lower competitive prices from retail providers, or assure that reliable providers will compete to meet consumer needs.

By analogy, if an initiative proposed patient "choice" of health care providers, as in *Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, and also proposed that provider patients have the right to sell health care services and to be health care providers, and also took away the right of currently licensed doctors and nurses to be providers, those provisions would surely be viewed as separate and distinct subjects from patient choice of health care providers.

In his dissenting opinion *In re Voter Control of Gambling,* 215 So. 3d 1209, 1218 (Fla. 2017), Justice Polston, joined by Justice Lewis, cited the holding *In re Right of Citizens to Choose Health Care Providers*, 705 So. 2d at 565-66, that an

initiative amendment should not force the voter who may favor or oppose "an aspect" of the ballot initiative to vote on the health care provider issues in an all or nothing manner.

Subjects #2 and #3 are not necessary to implement or bring about subject #1, *i.e.*, consumer choice of retail providers, but rather they are "aspects" of the initiative having significant disparate impacts, and the interests of the voters may be substantially different for each. Forcing voters to accept separate, disparate impacts in order to vote on a right of energy provider choice is logrolling.

In short, subject #s 2 and 3 are not part and parcel of, and in some ways are inconsistent with and antithetical to, the primary subject #1 of the initiative amendment to allow energy choice by the right of customers to choose their electricity provider. The proposal forces the voter to cast one vote for or against all three subjects, and hence violates the constitutional single subject requirement.

Point II

THE INITIATIVE AMENDMENT SUBSTANTIALLY ALTERS OR PERFORMS MULTIPLE FUNCTIONS OF GOVERNMENT

The single-subject requirement of Art. XI, § 3 of the Florida Constitution also prevents an initiative amendment from "substantially altering or performing the functions of multiple branches of government and thereby causing multiple 'precipitous' and 'cataclysmic' changes in state government." *Local Gov't. Comprehensive Land Use Plans*, 902 So. 2d 763, 767 (Fla. 2005).

Initiatives that substantially alter or perform different functions of one branch of state government, or functions of different branches of government, or functions of different levels of government, are invalid. *See, e.g., Fine*, 448 So. 2d at 988-89 (striking initiative that affected different legislative functions, *i.e.*, taxes, user fees and revenue bonds); *Restricts Laws Related to Discrimination*, 632 So. 2d. at 1020-21 (striking initiative that affected state executive functions and municipal home rule); *People's Property Rights*, 699 So. 2d at 1308 (Fla. 1997) (striking initiative that would provide compensation for restrictions on property use as affecting legislative and executive functions at state and local levels).

The "Choice" initiative here substantially alters or performs multiple functions or aspects of government, or at various levels of government, in the following ways:

1) Performs the legislative function of providing for competitive choice among new retail providers.

2) Usurps the Legislature's power to regulate public utility pricing and areas served.

3) Performs a legislative function to void current laws and regulations for public utility electricity service, and to eliminate vertically integrated retail providers and limit them to maintenance and operation of transmission and distribution lines.

4) Alters legislative regulatory control over public utility through the Public Service Commission, as an administrative function.

5) Requires legislative action to compensate electricity providers necessitated by an amendment's divestiture of their power generation facilities and other property that will be rendered useless or obsolete, *see State v. Basford*, 119 So. 3d 478 (Fla. 1st DCA 2013) (farmer must be compensated for lost value of property rendered economically useless by Constitutional Amendment); and/or for impairment of their contract rights regarding franchise service, *see Physician Charges*, 880 So. 2d 659, 663 (where proposed amendment seeks to alter or impact existing contract rights, it affects constitutional rights under Art. I, § 10).

6) Affects municipal home rule powers by precluding municipalities from starting an exclusive electric utility, or expanding a municipal utility service area beyond existing boundaries, or combining with another municipal electricity utility

provider for exclusive service, or contracting with electric utilities to use their public right of way in exchange for a franchise fees on retail service revenues.

7) Performs the legislative function of requiring laws for an independent market monitor to ensure competitiveness of the wholesale electric market (or, as described in the ballot summary, to adopt laws providing for competitive wholesale market for electricity generation and supply), creating a new regulatory function using a new apparatus.

8) Creates a judicial rule for any citizen to have standing to seek judicial relief to compel the Legislature to enact legislation as a constitutional duty under the proposed amendment, *see* section (e) of the text.

These changes are precipitous and substantial in affecting various aspects of government in completely restructuring state energy electricity policy. They are not just remote ramifications of a new program.

By comparison, recent decisions of this Court with respect to solar energy initiative proposals support the position that the changes resulting from the proposed amendment here are substantial. *Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235 (Fla. 2015), approved an initiative to limit state and local authority to regulate non-utility solar providers, but the Court stated that opponents "do not indicate how the amendment would interfere with or take over the state's energy policy." *Id*. at 244-45. Similarly, *Rights of Electricity Consumers*

re Solar Energy Choice, 188 So. 3d 822 (Fla. 2016), held that opponents had not indicated how the proposed amendment for persons to generate solar energy for their own use would interfere with or take over state energy policy. *Id*. at 829-30. In contrast, the proposed amendment here substantially alters or performs multiple functions and aspects of government, at multiple levels, by definitively interfering with and taking over entirely the state's energy policy with respect to electricity.

Point III

THE BALLOT SUMMARY DOES NOT ADEQUATELY INFORM VOTERS OF THE IMPORTANT CONSEQUENCES OF THE AMENDMENT AND LEAVES VOTERS TO GUESS AT ITS MEANING AND EFFECT

Fla. Stat. § 101.161(1) (2018) requires the ballot summary to, in "clear and unambiguous language," provide "… an explanatory statement … of the chief purpose of the measure." This requirement is an essential remedial check to make sure that the public clearly understands what it is voting for; otherwise the initiative process is easily manipulated and abused by well-financed special interests. *See Additional Homestead Tax Exemption*, 880 So. 2d 646, 653–54 (Fla. 2004) (without a proper summary, the citizen-driven process of amending the constitution becomes the den of special interest groups seeking to impose their own narrow agendas); *Adams v. Gunter*, 238 So. 2d 824, 832-33 (Fla. 1970) (Thornal, J., joined by three other Justices, concurring) (noncompliant initiatives are properly screened so that

the burden of making decisions on idealistic or far-reaching pronouncements is not transferred to the public without notice of effects).

The ballot summary must explain the important consequences of the proposed amendment without omission and cannot be vague, ambiguous, misleading, or leave voters guessing at what is intended or whether rights granted are illusory. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020-21 (§ 101.161 assures the electorate is advised of the effects of a proposed amendment); *In re Right of Citizens to Choose Healthcare Providers*, 705 So. 2d at 566 (summary indicated an illusory right to choose a health care provider when proposed amendment severely limited individuals' ability to enter into health care contracts); *Tax Limitation et al.*, 644 So. 2d at 494-95 (summary failed to inform voters that it would require government entities to use tax revenue to compensate owners or businesses for damages to their property allegedly caused by exercise of police powers); *Roberts v. Doyle*, 43 So. 3d 654, 659-61 (Fla. 2010) (summary failed to fully and accurately explain proposed homestead exemption eligibility requirement and would mislead voters to believe they qualify for exemption).

Even if its statements are correct, a ballot summary that omits necessary information is invalid. *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) (problem lies not with what the summary says, but, rather, with what it does not say); *id*. at 158 (Ehrlich, J., joined by two other Justices, concurring) (although summary

contains an absolutely true statement, it omits to state a material fact necessary to make the statement not misleading). *Accord, Fish & Wildlife Conservation Comm'n.*, 705 So. 2d 1351, 1355 (Fla. 1998) (summary does not sufficiently inform the public of the transfer of the Legislature's power over marine life to the Commission); *Dep't of State v. Fla. Greyhound Ass'n., Inc.*, 253 So. 3d 513, 520 (Fla. 2018) (ballot language may be clearly and conclusively defective either in an affirmative sense, because it misleads voters as to the material effects of the amendment, or in a negative sense, by failing to inform voters of those material effects).

Public information about a proposed amendment (*i.e.*, campaign literature) cannot substitute for a proper ballot summary. *Smith v. Am. Airlines*, 606 So. 2d 618, 621 (Fla. 1992).

The ballot title and summary for the proposed initiative amendment here is deficient and fails to comply with § 101.161(1) in the following ways:

1. The ballot summary does not disclose that the Initiative limits competition

The ballot title and summary emphasize that the amendment grants the right to competitive choice for energy, an objective that voters may believe is desirable. But it is not clearly disclosed that the amendment will actually limit consumer choice and may undermine this stated purpose.

First, it is not clearly disclosed that "IOUs" (Florida retail utility companies) will be barred from providing service. Statement that the proposed amendment would limit IOUs to construction, operation and repair of electrical transmission and distribution systems does not tell the average voter that private utility companies will not be providers of electricity. In essence, the summary does not tell voters that by voting for competition, they are really voting against competition.

Second, it is not disclosed that "investor-owned utilities" barred from retail competition include all privately owned providers. The term "investor-owned utility" is not defined in the proposed amendment or the summary, but as commonly used, it means any privately owned electricity business. Wikipedia defines "investor-owned utility" to mean "a business organization, providing a product or service regarded as a utility (often termed a public utility regardless of ownership), and managed as a private enterprise. Examples may range from a family that owns a well on their property to international energy conglomerates."[2] Under this definition, both current Florida retail utilities[3] and future investor-owned retail utilities would be "IOUs" excluded from competition. If the intended effect is to exclude only existing IOUs, this is not stated anywhere, and is contrary to the plain meaning.

---

[2] https://en.wikipedia.org/wiki/Investor-owned_utility, checked Feb. 17, 2019.

[3] The Court refers to an investor owned retail electricity provider as a "Florida retail utility." *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 431-32 (Fla. 2000).

A ballot summary cannot use significant terms whose meaning is not defined or commonly understood, where voter confusion about the intended purpose may result. *Compensation for Restricting Real Property Use*, 699 So. 2d 1304, 1309, 1312 (Fla. 1997) (summary defective because it used the terms "common law nuisance" and "loss of fair market value which in fairness should be borne by the public," which were not defined); *Roberts v. Doyle*, 43 So. 3d at 660 ("new homestead owners" is ambiguous as it could mean persons who have not had a residence during preceding 8 years or those who never claimed homestead before); *Detzner v. League of Women Voters*, 256 So. 3d 803, 809 (Fla. 2018) (phrase "established by the school board" is not commonly or consistently used, and cannot be commonly understood by voters); *Smith v. American Airlines*, 606 So. 2d at 621 (summary concerning variable taxation of leases is ambiguous, as it did not explain different taxation of real vs. intangible property; and assumed voters understood ad valorem tax).

By the summary's use of the undefined term "investor-owned utility," without any other clarification in context, voters will necessarily be confused or misled as to what the proposed amendment is supposed to do. Are they voting for choice of providers that includes any investor-owned providers (retail utility companies), or none, or only those that were not pre-existing Florida retail utility companies? Depending on the interpretation, any so-called right of "energy choice" is limited or

illusory. *See, Right of Citizens to Choose Healthcare Provider*, 705 So. 2d at 566 (summary cannot indicate right to choose healthcare providers when the proposed amendment actually limits that ability). Again, voters will necessarily be confused as to the effect of what they are voting on, and this violates the statutory requirement for clear explanation.

Even if it uses the same or similar terms as the amendment (*i.e.*, "Choice" and "Limits Investor Owned Utilities"), a ballot summary that obscures the main purpose and effect of the amendment, confuses the voter's understanding about what is proposed and does not satisfy the statute's requirement. *Compare Compensation for Restricting Real Property Use*, 699 So. 2d 1304, 1309, 1312 (Fla. 1997) (terms essential to understand the purpose for the initiative were not defined); and *Detzner v. League of Women Voters*, 256 So. 3d at 805, 810 (same).

2. The ballot summary does not disclose that there may be no choice of suppliers and no cost savings or improved service

The ballot summary states the proposed amendment confers the right of "Choice" but does not disclose that this "right" may not extend to all electricity customers. Some may have only one supplier or no supplier. All suppliers can choose to serve customers only where it is financially advantageous, so that some consumers may only be served by one supplier, or left unserved, and have no choice in either circumstance, or in the absence of regulated service, customers may be left

without adequate supply of power in emergency conditions, or in times of population influx, or upon supplier failures. Because the summary fails to disclose that "Choice" may result in no choice or restricted service to many consumers, it is misleading.

Likewise, "Choice" of electricity suppliers implies competition to benefit electricity customers by reducing energy costs and improving service. However, the ballot summary does not explain that cost savings and improved service objectives may not be realized, or that there is a strong likelihood to the contrary.

Average and residential regulated rates across the country have consistently been substantially lower than deregulated rates.[4] The voter is nowhere informed that in the retail competition market under the proposed amendment, middlemen and resellers will proliferate and pass their marketing costs and multiple layers of unregulated profit margins to consumers.[5]

---

[4] *See* https://www.publicpower.org/system/files/documents/Retail-Electric-Rates-in-Deregulated-States-2017-Update%20%28003%29.pdf, comparing average rates and residential rates per kilowatt hour in regulated and deregulated states from 1997 to 2017. *Also see* App. pp. 6-7.

[5] There will likely be profit margins for purchase of generated power, for each reseller in the chain, and for transmission / distribution line owners or operators in the chain. In comparison, presently regulated Florida retail utilities that are vertically integrated, pass on only one regulated profit margin to customers for all functions to deliver electricity.

The proposed amendment will also necessitate compensation of existing retail utilities for its deprivation of their property. This will likely result in the imposition of a surcharge on electricity sales for a long period of time that will significantly increase customers' cost, despite choice of providers. Yet again, there is no mention or disclosure that electricity cost to customers may well increase from the proposed amendment.

The Initiative choice retail market will also allow confusing price structures that may produce higher rates for continued service, or for use above a certain level, or for late payment. And, if a retail supplier reduces or terminates service, consumers may have no effective backup supply for emergencies.

None of the likely effect of higher cost or less reliable service is disclosed by the ballot summary to offset the strongly implied benefits of "Competition Market" and "Energy Choice" that are stated. Voters not versed in the electricity industry cannot be expected to understand or foresee the undisclosed or misinformed effect of the proposed amendment.

To the contrary, the ballot title and summary mislead voters to believe that voting "yes" will provide competitive and reliable electric service at less cost, when in fact, the initiative actually eliminates responsible competitors and does not assure price advantage or reliable service to a customer, especially not for small business

and residential consumers. The summary thus fails to clearly inform voters that the effect of the Initiative may be disparate from its apparent primary purpose.

3. The ballot summary is ambiguous as to who can generate and sell electricity

The summary indicates that "customers" of IOUs have the right to generate and sell electricity; however, this requires understanding of who is an "IOU customer," a term that is also not defined or otherwise clarified in the initiative or the summary. *See e.g., Roberts v. Doyle*, 43 So. 2d at 660 (significant term whose meaning is not defined or commonly understood is ambiguous). Ambiguity abounds. If IOUs cannot sell electricity, how can there be any IOU customers at all? Notwithstanding this logical conundrum, will status as an "IOU customer" be permanently fixed, or can "customers" gain or lose status by relocating? The ballot summary does not provide any guidance on the self-generation right of an "IOU customer," leaving voters in confusion whether such right is meaningful.

4. The ballot summary misstates that the proposed amendment grants electricity customers the right to sell electricity

While the ballot summary states that customers of investor owned utilities are granted the right to sell electricity, such right is not explicitly or definitely conferred by the text of the proposed amendment. The text at the end of subsection (b), provides only that "nothing in this section shall be construed to limit the right of electricity customers to buy, sell, trade, or dispose of electricity." No right to sell

electricity is granted, and the amendment would not preclude legislative prohibition of individual sale of electricity.

The summary does not provide a truthful explanation with regard to right of electricity customers to sell electricity, and thus fails to comply with the statute's requirement.

5. The ballot summary misstates the effect on current regulations

The summary is inconsistent with the text of the proposed initiative amendment as to the time for the Legislature to act and the effect of its action on existing statutes, rules and orders. The initiative text states that the Legislature shall adopt comprehensive new laws to implement this section by June 1, 2023; and that upon enactment of any law pursuant to this section, all statutes, regulations and orders in conflict with this section shall be void. In contrast, the ballot summary states that the initiative requires the Legislature to adopt new laws by June 1, 2025, and repeals inconsistent laws. The summary does not disclose that the initiative requires the Legislature to act by 2023, not 2025, or that all policies that may be in conflict with the amendment are automatically rendered immediately void at that time, even if not repealed by a new law.

This is a material difference as there is less time for planning, consumer education, or transition or phase-in than the summary describes. If the experiment does not work as hoped, the text leaves no legal retreat or safe haven because all

laws in conflict with the amendment are voided by the amendment when any law is enacted to implement the amendment, or as of June 1, 2023, when new laws must be passed. The summary does not accurately describe this either.

Nor are voters informed, as they should be, at least in general terms, of which laws, regulations and orders are in conflict with the amendment and will be automatically voided when the Legislature enacts any new law pursuant to the amendment by June 1, 2023. *See Restricts Laws Related to Discrimination*, 632 So. 2d at 1020-21 ("Both the summary and the text of the amendment omit any mention of the myriad of laws, rules, and regulations that may be affected by the repeal of 'all laws inconsistent with this amendment'").

In sum, the integrity of the electoral process is compromised when a proposed amendment is placed on the ballot accompanied by a summary that fails to inform or misleads voters in several regards concerning the effect or consequence of the proposed amendment. *See Use of Marijuana*, 132 So. 3d 786, 822 (Fla. 2014) (Justices Canady and Polston, dissenting). Here, the ballot summary is ambiguous and misleading, fails to explain important effects and consequences of the amendment, and leaves the voter to guess what is intended or what rights are granted, all in violation of the requirement of Fla. Stat. § 101.161(1) for clear and unambiguous explanation of the purpose of the proposed amendment.

Conclusion

The proposed initiative amendment is clearly and conclusively noncompliant with constitutional and statutory safeguards and should not be allowed on the ballot.

Respectfully submitted this 22nd day of April, 2019.

s/ M. Stephen Turner
M. STEPHEN TURNER
Florida Bar No. 095691
NELSON MULLINS BROAD AND CASSEL
215 South Monroe Street, Suite 400 (32301)
P.O. Drawer 11300
Tallahassee, FL 32302
Tel. 850-681-6810; Fax 850-681-9792
stephen.turner@nelsonmullins.com
maria.ubieta@nelsonmullins.com
cassandra.finn@nelsonmullins.com

Counsel for Floridians for Affordable Reliable Energy, Inc. (FARE), Urban League of Palm Beach County, Jacksonville Urban League, and the Central Florida Urban League

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed through the Florida Courts E-Filing Portal, and a true and correct copy served by E-Mail on counsel listed below, this 22nd day of April, 2019.

The Honorable Ashley Moody
Attorney General of Florida
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
citizenservices@myfloridalegal.com

James A. Patton, Jr., Chairperson
Citizens for Energy Choices (Sponsor)
Post Office Bgox 1101
Alachua, Florida 32616

Laurel M. Lee
Secretary of State
c/o Bradley McVay, General Counsel
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
Laurel.lee@dos.myflorida.com
Brad.mcvay@dos.myflorida.com

The Honorable Jose Oliva
Speaker, Florida House of Representatives
c/o Adam Tanenbaum
The Capitol, Room 420
402 S. Monroe St.
Tallahassee, FL 32399-1300
Adam.tanenbaum@myfloridahouse.gov

The Honorable Ron DeSantis
Governor, State of Florida
c/o Joe Jacquot, General Counsel
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399-0001
governorron.desantis@eog.myflorida.com
joe.jacquot@eog.myflorida.com

Christopher J. Baum
Deputy Solicitor General
The Capitol, PL-01
Tallahassee, FL 32399-1050
christopher.baum@myfloridalegal.com

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY this this brief complies with the font requirements as designated in Fla. R. App. P. 9.210(a)(2).

s/ M. Stephen Turner
Attorney