IN THE SUPREME COURT OF FLORIDA

Case Nos. : SC19-328; SC19-479

Upon Request From the Attorney General
For An Advisory Opinion As To the
Validity Of An Initiative Petition

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
The Florida Electric Cooperatives Association, Inc.
(Filed in Opposition to the Initiative Petition)

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STATEMENT OF INTEREST

> In 1936, at the depth of the Great Depression, many homes in rural America had no electricity. Congress adopted the Rural Electrification Act in that year to serve an important national goal: to bring electric power to parts of the country not adequately served by commercial companies. Toward that end, the Act included provisions designed to encourage the formation of rural electric cooperatives. In 1939, the State of Florida adopted its Rural Electric Cooperative Law, which is codified as chapter 425 of the Florida Statutes. The relevant provisions have not been changed since that time.

Simmons v. W. Fla. Elec. Coop. Ass'n, No. 5:15cv321-RH/GRJ, 2017 WL 901102, at *1 (N.D. Fla. Mar. 7, 2017) (internal quotation marks and citation omitted).

Rural electric cooperatives have played, and continue to play, a special role in the provision of electric service to the people of Florida. Empowered by federal and state law, residents, local farmers, and businesses joined together to create their own not-for-profit electric utilities and brought electricity to areas that other commercial utilities would not serve. Today these electric cooperatives remain not-for-profit utilities, owned and governed by the consumer-members they serve, and still provide electric service to their consumer-members at the lowest cost possible.

In fact, Florida's electric cooperatives currently serve approximately 2.4 million Floridians in 57 counties throughout the state. And though electric cooperatives serve only 10% of Florida's population, their service territories cover more than 60% of Florida's land mass.

The Florida Electric Cooperatives Association, Inc. ("FECA") submits this brief regarding the initiative petition entitled "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" ("Initiative").[1] FECA is a not-for-profit trade association and functions as the service organization for fifteen electric distribution cooperatives that sell retail electricity directly to their consumer-members, and two generation and transmission electric cooperatives that transmit, generate, and purchase electricity for sale at wholesale to their member distribution cooperatives.[2]

Electric distribution cooperatives obtain electricity by entering into wholesale power supply agreements with investor-owned electric utilities ("IOUs"), generation and transmission cooperatives, and other electric service

[1] The Initiative does not define "investor-owned utilities," which could lead to voter confusion. For purposes of this Initial Brief, FECA uses the term "investor-owned utilities" or "IOUs" to refer to the for-profit commercial electric utility companies with which the cooperatives have territorial and wholesale power supply agreements.

[2] FECA's electric distribution cooperative members include: Central Florida Electric Cooperative, Inc., Choctawhatchee Electric Cooperative, Inc., Clay Electric Cooperative, Inc., Escambia River Electric Cooperative, Inc., Florida Keys Electric Cooperative Association, Inc., Glades Electric Cooperative, Inc., Gulf Coast Electric Cooperative, Inc., Okefenoke Rural Electric Membership Corporation, Peace River Electric Cooperative, Inc., Sumter Electric Cooperative, Inc., Suwannee Valley Electric Cooperative, Inc., Talquin Electric Cooperative, Inc., Tri-County Electric Cooperative, Inc., West Florida Electric Cooperative Association, Inc., and Withlacoochee River Electric Cooperative, Inc. FECA's generation and transmission cooperative members include PowerSouth Energy Cooperative and Seminole Electric Cooperative, Inc. Lee County Electric Cooperative, a distribution cooperative serving parts of Lee, Charlotte, Hendry, Collier, and Broward Counties, is not a member of FECA.

providers. The Florida Public Service Commission ("PSC") determines and regulates the monopoly franchise areas within which distribution cooperatives are exclusively authorized to provide electric service to their consumer-members in two ways. The PSC approves cooperatives' territorial boundary agreements with IOUs and other electric service providers. And where there are no territorial agreements, the PSC resolves territorial disputes among cooperatives and IOUs on a case-by-case basis.

The proposal before this Court would fundamentally alter the way cooperatives obtain electricity for, and provide electric service to, their consumer-members. It also would dismantle the governmental framework under which electric cooperatives and other retail electric utilities have been regulated for decades. FECA therefore presents this brief in opposition to the placement of the Initiative on the ballot.

INTRODUCTION

The Initiative's title and ballot summary sing a siren song to voters with feel-good phrases like "allowing energy choice" and "right to choose." But ultimately, the Initiative tries to do too much, affecting far too many disparate subjects, altering and performing the functions of multiple branches of government, and misleading the voters as to the true meaning and ramifications it will have on them, on our state, and on provisions of Florida's Constitution.

The ballot summary is particularly misleading to voters who rely on cooperatives for their electric power, as it states that electric cooperatives "*may* opt into competitive markets." (Emphasis added). Given the highly integrated nature of Florida's electric grid, however, there is no realistic way the cooperatives can opt out. Regardless of whether a cooperative elects to opt into competitive markets, the Initiative prohibits IOUs from owning electric generating facilities, and it prohibits the State from "granting of monopolies or exclusive franchises for the generation and sale of electricity." These two provisions alone will substantially impair many cooperatives' power supplies and invalidate their territorial boundary agreements with IOUs. And the voter is none the wiser.

STATEMENT OF THE CASE AND FACTS

The Court's advisory opinions on constitutional initiatives are limited to whether a proposed amendment complies with the single-subject requirement of article XI, section 3 of the Florida Constitution; whether the ballot title and summary comply with section 101.161(1), Florida Statutes; and whether the Financial Impact Statement complies with section 100.371, Florida Statutes. A copy of the Ballot Title, Summary, and the full text of the proposed amendment are attached in the appendix to this brief. [A. 8-9].[3]

[3] "[A. #]" refers to the page number of the appendix filed with this brief.

By order entered on March 29, 2019, this Court has authorized interested parties to file briefs on or before April 18, 2019, addressing the Initiative's compliance with the requirements for its placement on a general election ballot. FECA is such an interested party, and respectfully submits that the Initiative does not comply with either the single-subject or the ballot summary requirements.

SUMMARY OF ARGUMENT

The Initiative should not appear on the ballot because the ballot summary affirmatively misleads the voters and omits necessary and material facts, thus violating the requirements of section 101.161(1), Florida Statutes.

The electric cooperatives contend that the ballot summary attempts to dupe voters into believing that cooperatives and their consumer-members will be unaffected unless they choose to "opt into competitive markets." But in reality, cooperatives will be unable to avoid the Initiative's immediate and far-reaching impacts. Regardless of whether a cooperative opts into the new competitive markets, the Initiative will substantially impair a cooperative's wholesale power supply agreements with IOUs and invalidate a cooperative's territorial boundary agreements with IOUs—all while misleading the voter to believe that cooperatives will be afforded a safe harbor.

The ballot summary also misleads voters by hiding the true meaning and ramifications of many of the Initiative's key provisions, including those that would

substantially erode the constitutional prohibition on the impairment of contracts and the state's separation of powers protections. Next, the ballot summary leaves it to voters to guess as to the "inconsistent statutes, regulations, and orders" that will become void. Moreover, the ballot summary fails to mention the creation of an independent market monitor to ensure competitive markets. Nor does it inform voters that "any Florida citizen" would have standing to sue the Legislature or that it permits the courts to *compel* the Legislature to act.

The Initiative also violates the single-subject requirement found in article XI, section 3 of the Florida Constitution for at least two reasons. First, it substantially alters or performs the functions of all three branches of government: it directs the Legislature to enact laws consistent with overhauling our state's existing electricity market; it erodes current constitutional separation of powers protections and mandates that the *courts* serve in a policymaking role by compelling the *Legislature* to act when "any Florida citizen" decides to sue, regardless of injury; and it creates an independent market monitor, giving unspecified executive enforcement powers to an entity charged with ensuring—without explanation—the competitiveness of the new electric markets.

Second, the Initiative commits impermissible logrolling by combining multiple subjects, ranging from increasing the competitiveness of Florida's electricity markets, to prohibiting IOUs from generating electricity, to eroding

separation of powers protections, to creating an independent market monitor—to name but a few of its wildly disparate directives. By bundling such divergent issues, the proposed amendment places the voters in the unfair position of having to accept changes which they may oppose to obtain a change which they support.

Any of the above defects are sufficient to prevent the proposed amendment from appearing on the ballot. Cumulatively, they leave no doubt that the Initiative is clearly and conclusively defective.

ARGUMENT

I. THE BALLOT SUMMARY IS MISLEADING, IN VIOLATION OF SECTION 101.161(1), FLORIDA STATUTES.

"The burden of informing the public should not fall only on the press and opponents of the measure—the ballot title and summary must do this." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). Florida law requires that "a ballot summary . . . shall be printed in clear and unambiguous language on the ballot . . . ." § 101.161(1), Fla. Stat. Section 101.161's purpose "is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." *Askew*, 421 So. 2d at 156; *see also Advisory Op. to Att'y. Gen. re Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 892 (Fla. 2000).

A. The Ballot Summary Falsely Implies that Electric Cooperatives Will Be Unaffected Unless They Opt Into Competitive Markets.

The ballot summary misleads cooperative consumer-members to believe that their cooperative will be unaffected by the proposed amendment, unless the cooperative elects to "opt into competitive markets." This, however, ignores the highly interconnected and interdependent nature of Florida's electric grid, and it erroneously assumes that cooperatives could be excluded from this new competitive model without undermining the integrity of Florida's overall electric system. In reality, the Initiative's drastic and sweeping reforms to Florida's electricity markets could not possibly occur without significantly impacting the cooperatives and their consumer-members, regardless of whether they chose to "opt into" the competitive markets.

1. The Initiative Will Impair the Cooperatives' Existing Contracts Governing the Purchase of Wholesale Electricity from IOUs.

The Initiative will have an immediate and substantial impact on cooperatives' wholesale power supply agreements with IOUs, upon which cooperatives rely to provide electricity to their consumer-members.

The proposed amendment requires the Legislature to pass implementing legislation, which must take effect by 2025. That legislation must preclude IOUs from generating and selling electricity in the market and instead limit their activities "to the construction, operation, and repair of electrical transmission and

distribution systems." [A. 9, Initiative § (c)(1)(i)]. Thus, beginning in 2025, IOUs will no longer be able to generate and sell electricity, and they will not be able to perform their obligations under their wholesale power supply agreements with electric cooperatives. This is of significant concern to the cooperatives, who are dependent on their long-term wholesale power supply agreements with the IOUs for the provision of electric service long after the amendment's 2025 effective date.[4]

For example, the Florida Keys Electric Cooperative Association has a long-term agreement with an IOU for all of its electricity requirements, which runs at least until December 31, 2031, and may be extended until December 31, 2051.[5] Similarly, Seminole Electric Cooperative and Lee County Electric Cooperative have long-term power supply agreements with IOUs that run well beyond the amendment's effective date and will be directly and adversely affected.[6]

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[4] *See* Fla. Pub. Serv. Comm'n, Statistics of the Florida Electric Utility Industry, at 8 (Oct. 2018), *available at* http://www.psc.state.fl.us/Files/PDF/Publications/Reports/Electricgas/Statistics/2017.pdf (last visited Apr. 18, 2019).

[5] *See* Fed. Energy Regulatory Comm'n, Letter Order Accepting Florida Power & Light Co.'s 2/25/11 Filing of an Executed Long-Term Agreement for Full Requirements Electric Service under ER11-2928 (Apr. 14, 2011) (hereinafter, the Florida Keys Agreement"). [A. 11-12]. The Florida Keys Agreement has been amended several times, but these amendments did not alter the agreement term.

[6] *See* Fed. Energy Regulatory Comm'n, Letter Order Accepting Duke Energy Florida, LLC's 9/23/2016 Filing of Revised Rate Schedule No. 194 et al. with Seminole Electric Cooperative, Inc. under ER16-2657 (Nov. 14, 2016) [A. 14-15]; Fed. Energy Regulatory Comm'n, Letter Order Accepting Florida Power Corp.'s

The Initiative states that nothing in it shall be construed to affect the existing rights of the electric cooperatives and their "customers." [A. 9, Initiative § (d)]. But this assurance is false, as the Initiative prohibits IOUs from generating and selling electricity to cooperatives after the implementing legislation takes effect. Thus, the ballot summary's assertion that cooperative utilities may elect to opt into the competitive markets—and by implication will not be affected until they act—is misleading.

Furthermore, the Initiative's immediate and substantial impairment to the existing wholesale power supply agreements between cooperatives and IOUs violates the provisions of article I, section 10 of the Florida Constitution, which prohibits impairment of the obligation of contracts.. As discussed further below, voters are not informed about this constitutional impact. *See Treating People Differently*, 778 So. 2d at 898 ("[T]he ballot summaries are defective for not identifying the initiative petitions' effect on these existing constitutional provisions.").

3/15/10 Filing of an Amendment to the Agreement for the Sale & Purchase of Capacity & Energy with Seminole Electric Cooperative, Inc. under ER10-887 (Apr. 13, 2010) [A. 17-18]; Fed. Energy Regulatory Comm'n, Letter Order Accepting Florida Power & Light Co.'s 4/16/09 Filing of an Executed Long-Term Agreement for Full Requirements Electric Service with Lee County Electric Cooperative, Inc. under ER09-1006 (June 8, 2009) (hereinafter, the "LCEC Agreement") [A. 20-21]. The LCEC Agreement has been amended several times but these amendments did not alter the agreement term.

The Initiative will also make it impossible for cooperatives to extend or enter into any new long-term wholesale power supply agreements with IOUs, since the IOUs could no longer generate or sell electricity. The ballot summary provides none of this vital information to the voters. Instead, the voter is misled into believing that his or her electric cooperative will be unaffected by the new commercial markets unless the cooperative decides to "opt into" the new system.

2. The Initiative Will Eliminate the Cooperatives' Existing Territorial Agreements with IOUs.

The Initiative will also substantially impact cooperatives by eliminating their existing territorial agreements with IOUs. Currently, the service areas of most cooperatives, within which they have the exclusive right to serve, are determined through territorial agreements with IOUs, which the PSC must approve. *See* Fla. Admin. Code. R. 25-6.0440(1). These agreements are designed to protect against hazardous conditions, ensure a reliable electric grid, and avoid uneconomic duplication of facilities. *See generally City of Homestead v. Beard*, 600 So. 2d 450 (Fla. 1992); *see also Lee Cty. Elec. Coop. v. Marks*, 501 So. 2d 585, 586 (Fla. 1987); Richard C. Bellack & Martha Carter Brown, *Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida*, 19 Fla. St. U.L. Rev. 407 (1991).

If a cooperative has a territorial agreement with an IOU that established its own exclusive franchise service area, the Initiative will dismantle that agreement

because it "prohibit[s] *any* granting of either monopolies or exclusive franchises for the generation and sale of electricity." [A. 9, Initiative § (c)(1)(iv) (emphasis added)]. In addition, once the Legislature enacts "any law" pursuant to the Initiative, "all . . . orders which conflict with this section shall be void." [*Id.*, Initiative § (c)(2)]. Thus, the Initiative will automatically void all PSC orders approving the existing territorial agreements between cooperatives and IOUs, which certainly impacts the cooperatives and could expose their consumer-members to hazardous conditions and increased costs from uneconomic duplication of facilities.

Moreover, cooperative service areas throughout Northwest Florida where no territorial agreements exist are currently determined on a neighborhood-by-neighborhood basis by the PSC through its authority to resolve territorial disputes and establish exclusive service areas. *See, e.g.*, *W. Fla. Elec. Coop. Ass'n v. Jacobs*, 887 So. 2d 1200 (Fla. 2004). Because the Initiative will abolish exclusive franchise service areas for IOUs, there will be no way to determine in advance where a cooperative's exclusive service area ends and where the IOU's service area begins. In that case, nothing will stop a new competitive electricity provider from providing electricity to a cooperative's consumer-members. Thus, there will be no realistic way for a cooperative to carve itself out of the new competitive

electricity market once exclusive franchise service areas are banned by the Initiative.

Furthermore, even if the Legislature passed legislation to provide a new method for determining the geographical boundaries of the cooperatives, those boundaries will necessarily end up permanently fixed, and there will be no ability for a cooperative to expand its service area boundaries without participating in competitive markets, even if such boundary expansion were needed to ensure the safety and reliability of the grid. That is because any former IOU customers would have the constitutional right to "choose their electricity provider" and could not become the exclusive members of a cooperative via territorial agreement, as is the case now.

In other words, there is no viable way for a cooperative to decline to "opt into" the competitive markets, because the new competitive market model will know no bounds. And once again, voters are misled as to the Initiative's unavoidable impacts on cooperatives.

B. The Ballot Summary Is Misleading Because It Fails to Inform the Voter as to Its True Meaning and Ramifications.

A ballot summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Treating People Differently*, 778 So. 2d at 892 (internal quotation marks and citation omitted). Here, the Initiative's ballot

summary fails to provide voters with fair notice as to the "true meaning, and ramifications" of the proposed amendment. *Id.*

1. The Ballot Summary Fails to Inform the Voter that It Substantially Affects Other Constitutional Protections.

The ballot summary (as well as the Initiative itself) fails to inform the voter as to the numerous substantial effects the Initiative has on other provisions of the Florida Constitution. A ballot initiative "should identify the articles or sections of the constitution substantially affected." *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984) ("This is necessary for the public to be able to comprehend the contemplated changes in the constitution and to avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal."). Ballot summaries are misleading when they fail to inform the voters that the proposed amendment affects other constitutional provisions. *See, e.g.*, *Advisory Op. to Att'y. Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009); *Treating People Differently*, 778 So. 2d at 899-900; *Advisory Op. to Att'y. Gen. re Tax Limitation*, 644 So. 2d 486, 490 n.1 (Fla. 1994).

Here, the Initiative fails to inform the voter about at least two different constitutional protections that will be substantially affected by its passage. First, as explained above, the Initiative substantially affects and impairs both the territorial agreements that establish the cooperatives' exclusive service areas, as well as the

cooperatives' power purchase agreements to obtain IOU-generated power. Voters are not informed that implementing legislation will substantially affect article I, section 10 of the Florida Constitution, which prohibits impairment of contracts.

Second, the Initiative empowers the courts to force the Legislature to legislate—without telling voters that this is a dramatic deviation from the existing separation of powers provision found in article II, section 3 of the Florida Constitution. [A. 9, Initiative § (e) (providing that judicial relief can be sought in the courts by "any Florida citizen" to *compel* the Legislature to enact "complete and comprehensive legislation" that implements the Initiative "in a manner fully consistent with its broad purposes and stated terms")].

The Initiative thus transforms the judiciary into a policy maker. Words like "complete" and "comprehensive" are capaciously vague terms. [*Id.*, Initiative § (e)]. So too is a determination as to whether any legislation was adopted "in a manner fully consistent with [the Initiative's] broad purposes and stated terms." [*Id.*]. These are not "judicially manageable standards." *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

Although the courts currently can ensure that the Legislature complies with any constitutional mandate, the Initiative strays well beyond the courts' traditional role and invites the judiciary to sit at the policy table, supervise the Legislature's actions, and measure whether legislation implementing the Initiative meets certain

unmanageable standards. *See, e.g.*, *Dade Cty. Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972) ("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. This Court has been diligent in maintaining and preserving the doctrine of separation of powers mandated by our Constitution."); *Adequacy & Fairness in Sch. Funding*, 680 So. 2d at 407 (holding the separation of powers doctrine prohibits the courts from making legislative value judgments such as appropriation decisions).

Manifestly, the Initiative puts the electric policy of the State of Florida "firmly under the control of the judiciary." *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 143-44 (Fla. 2019) (Canady, C.J., concurring) ("[T]here is every reason to believe that arrogating such policy choices to the judiciary would do great violence to the separation of powers established in our Constitution."). Instead of exercising judicial restraint in an area of legislative policy making, the Initiative mandates a legislative role for the courts, substantially affecting existing separation of powers law. The Initiative misleads voters by failing to inform them as to this change in constitutional law.

As was the case in *Tax Limitation*, the Initiative substantially affects several unnamed constitutional protections, which the ballot summary fails to disclose.

See Tax Limitation, 644 So. 2d at 490 (citing *Fine*, 448 So. 2d 989). It thus misleads the voters and must be stricken from the ballot.

2. The Ballot Summary Fails to Advise Voters of the Statutes, Regulations, and Orders that Will Automatically Become Void.

The ballot summary or amendment text should inform the voter as to the "the myriad of laws, rules, and regulations that may be affected by the repeal of" all statutes, regulations, or orders that conflict with Section (c) of the Initiative. *In re Advisory Op. to Att'y Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994) (holding that it was misleading to state that "all laws inconsistent with this amendment" would be repealed without even mentioning any of the laws, rules, and regulations "that may be affected").

But here, neither the ballot summary, nor the Initiative's text, allow voters to make an informed choice by identifying the statutes, regulations, or orders that will automatically become void. The Initiative merely states: "Upon enactment of *any* law by the Legislature pursuant to this section, all statutes, regulations, or orders which conflict with this section *shall be void*." [A. 9, Initiative § (c)(2) (emphasis added)]. Similarly, the ballot summary vaguely states that the proposed amendment "repeals inconsistent statutes, regulations, and orders."

At a minimum, the automatic voiding of inconsistent law would include PSC orders approving cooperatives' territorial agreements with IOUs. But many other

undisclosed statutes and regulations will be voided, of which the voter has no idea.[7] *See Advisory Op. to Att'y. Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229 (Fla. 1991) ("A ballot summary may be defective if it omits material facts necessary to make the summary not misleading."); *see also Treating People Differently*, 778 So. 2d at 892 (holding that voters are supposed to receive "fair notice" of the ballot initiative's content so they "can cast an intelligent and informed ballot" (internal quotation marks and citation omitted)); *Advisory Op. to Att'y Gen. re Casino Auth., Taxation, & Regulation*, 656 So. 2d 466, 468-69 (Fla. 1995) (holding that a ballot summary can be "misleading not because of what it says, but what it fails to say"). Voters cannot make an educated decision about the true meaning and ramifications of the Initiative when they are unaware of its impact on the existing electric system.

3. The Ballot Summary Fails to Inform Voters About the Independent Market Monitor.

Section (c)(1)(v) requires the Legislature to "establish an independent market monitor to *ensure* the competitiveness of the wholesale and retail electric markets." (Emphasis added). That Section does not simply call for an individual or entity to passively observe and provide reports as to the new electric market system. Instead, the Initiative requires the Legislature to create an entirely new

[7] For example, substantial portions of Chapter 366, Florida Statutes, and Chapter 25-6, Florida Administrative Code, which govern the sale of electricity by IOUs, would be voided since the Initiative prohibits IOUs from selling electricity.

entity that "contemplates the exercise of vast executive powers," as it has teeth to *ensure* that the new competitive market system is sufficiently competitive. *See, e.g.*, *In re Advisory Op. to Att'y. Gen.—Save Our Everglades*, 636 So. 2d 1336, 1340 (Fla. 1994) (holding that a ballot initiative necessitated the use of executive powers through a trust established to enforce Everglades restoration).

By creating a new entity with authority to ensure the competitiveness of a market system, the Initiative would construct a new regulatory framework to replace the old. Yet the ballot summary makes no mention whatsoever about the creation of an independent market monitor and leaves the voter to believe that the Initiative will result in less regulation, not more. This omission fails to provide the voter with the material facts necessary to cast an intelligent, informed ballot. *See Casino Auth., Taxation, & Regulation*, 656 So. 2d at 468-69.

4. The Ballot Summary Fails to Inform Voters About the Changes to Citizen Standing.

The ballot summary fails to inform voters as to the drastic changes to citizen standing in Section (e) of the Initiative, which states that "*any* Florida citizen shall have standing to seek judicial relief to compel the Legislature to comply with its constitutional duty to enact" the provisions of the Initiative. (Emphasis added). This is a dramatic change to citizen standing. *See, e.g.*, *Herbits v. City of Miami*, 207 So. 3d 274, 281 (Fla. 3d DCA 2016) ("The Florida Supreme Court has repeatedly held that citizens and taxpayers lack standing to challenge a

governmental action unless they demonstrate either a special injury, different from the injuries to other citizens and taxpayers, or unless the claim is based on the violation of a provision of the Constitution that governs the taxing and spending powers." (internal quotation marks and citation omitted)).

Indeed, the Initiative provides a cause of action to "*any* Florida citizen," regardless of whether he or she has suffered a special injury—or, in fact, any injury at all—as a result of that citizen's perceived failure by the Legislature to adequately implement the ballot initiative. [A. 9, Initiative § (e) (emphasis added)]. Section (e) could not be more broad in its impact of standing and the resultant damage to our court system. On no more than a whim, any person could haul the Legislature into court, demanding the judiciary to make policy choices and compel the Legislature to enact those choices. Even more alarming, courts around the state could be handling hundreds of suits at the same time, in different jurisdictions, all brought by individuals with no injuries.

Voters have a right to know about this fundamental change to standing and its potential to clog our already overburdened courts. The omission of this dramatic, precipitous change makes the Initiative's ballot summary misleading and fails to give the voters fair notice as to the Initiative's true meaning and ramifications. *See Casino Auth., Taxation, & Regulation*, 656 So. 2d at 468-69.

II. THE INITIATIVE VIOLATES THE FLORIDA CONSTITUTION'S SINGLE-SUBJECT REQUIREMENT.

Special interest groups have unbridled discretion to draft a proposed amendment without any public, legislative, or judicial input. To combat this danger, the framers were careful to require that "the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution." *Save Our Everglades*, 636 So. 2d at 1339 (internal quotation marks and citation omitted); *see also Treating People Differently*, 778 So. 2d at 891 (noting the single-subject rule is "designed to insulate Florida's organic law from precipitous and cataclysmic change" (internal quotation marks and citation omitted)); *Fine*, 448 So. 2d at 988 ("[T]he authors of article XI realized that the initiative method did not provide a filtering legislative process for the drafting of any specific proposed constitutional amendment or revision.").

The single-subject requirement prohibits (1) "substantially altering or performing the functions of multiple branches of state government" and (2) logrolling. *Advisory Op. to Att'y. Gen. re Extending Existing Sales Tax to Non-Taxed Servs.*, 953 So. 2d 471, 477 (Fla. 2007). This Court requires "strict compliance" with the single-subject rule "because our constitution is the basic document that controls our governmental functions." *Fine*, 448 So. 2d at 989.

A. The Initiative Substantially Alters and Performs the Functions of Multiple Branches.

The Initiative violates the single-subject requirement because it substantially alters and performs the duties and rights of all three branches of government. "Although a proposal may *affect* several branches of government and still pass muster, no single proposal can substantially *alter* or *perform* the functions of multiple branches . . . ." *Save Our Everglades*, 636 So. 2d at 1340 (footnote and citation omitted). "[W]here a proposed amendment changes more than one government function, it is clearly multi-subject." *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984).

First, the Initiative has a substantial legislative function, as Sections (a) through (d) fundamentally reforms the state's energy policy, and Section (c) explicitly requires the Legislature to "adopt complete and comprehensive legislation to implement" the proposed amendment. [A. 8-9]. A myriad of legislative policy determinations are required to implement the Initiative's directive that the Legislature pass laws entitling former IOU customers to purchase "competitively priced electricity" in a manner that also: bars IOUs from generating and selling electricity, promotes competition in the generation and sale of electricity, adopts consumer protections, prohibits exclusive monopolies or franchises, and creates an independent market monitor. *See, e.g.*, *Save Our Everglades*, 636 So. 2d at 1340.

Second, the Initiative has a substantial judicial function because Section (e) permits "any Florida citizen [to] have standing to seek judicial relief to compel the Legislature to comply with its constitutional duty to enact" the Initiative if the citizen believes that the Legislature has failed to "adopt complete and comprehensive legislation." [A. 9]. Multiple judicial functions are at work here. The Initiative drastically expands the concept of citizen standing, affecting the number of individuals who may seek relief in the courts without requiring a personal injury.

In addition, the Initiative alters the separation of powers provisions in our constitution by permitting the judiciary to *compel* the Legislature to act. As previously discussed, the courts do not have the power to compel the Legislature to enact legislative prerogatives. *See, e.g.*, *Dade Cty. Classroom Teachers Ass'n*, 269 So. 2d at 686. Nor are the courts permitted to make legislative value judgments. *See Adequacy & Fairness in Sch. Funding*, 680 So. 2d at 407. But the Initiative requires the courts to develop "judicially manageable standards" where none exist and puts the courts at the policy table to determine whether the Legislature has enacted "complete and comprehensive legislation." The judiciary currently declines to exercise this level of control over matters of legislative policy. *See Citizens for Strong Schs.*, 2019 WL 98253, at *13 (Canady, J., concurring).

Third, the Initiative performs or substantially affects executive functions. As previously discussed, the Initiative requires the creation of "an independent market monitor to ensure the competitiveness of the wholesale and retail electric markets." [A. 9, Initiative § (c)(1)(v)]. A legislatively-created entity with the power to *ensure* competition in the wholesale and retail electric markets will necessarily perform executive functions. *See, e.g.*, *Save Our Everglades*, 636 So. 2d at 1340.

Because the Initiative substantially alters and performs the functions of all three branches of government, it is constitutionally infirm.

B. The Initiative Violates the Prohibition on Logrolling.

The Initiative is also a prime example of logrolling, which occurs when "several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." *Extending Existing Sales Tax to Non-Taxed Servs.*, 953 So. 2d at 477 (internal quotation marks and citation omitted). The prohibition on logrolling "avoid[s] voters having to accept part of a proposal which they oppose in order to obtain a change which they support." *Fine*, 448 So. 2d at 993; *see also Advisory Op. to Att'y. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (noting that voters are forced to make an "all or nothing" decision on multiple subjects); *Save Our Everglades*, 636 So. 2d at 1339 (noting that logrolling "does not give the people an

opportunity to express the approval or disapproval severally as to each major change suggested" (internal quotation marks and citation omitted)).

The Initiative contains multiple purposes and mandates a number of widely different policies and proposals, including: (1) mandating a new competitive market system for electricity consumers; (2) prohibiting IOUs from generating and selling electricity; (3) creating an independent market monitor; (4) expanding citizen standing to sue Legislature if statutes are not "complete and comprehensive" enough; (5) giving the Court the ability to "compel" the Legislature to pass legislation; (6) prohibiting the granting of monopolies or exclusive franchises; (7) limiting the market power of IOUs; and (8) repealing unidentified inconsistent statutes, regulations, and orders.

In *Save Our Everglades*, the Court held the ballot initiative violated the single-subject rule where the objective of Everglades restoration was combined with a requirement that the sugar industry provide the funding. *See* 636 So. 2d at 1341; *see also Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994) (reiterating that general tax revenue was a "clearly separate subject[]" than user fee revenue). As was the case in *Save Our Everglades*, the Initiative fails because it has attempted to combine a politically fashionable concept—the formation of competitive electricity markets—with ones that are more problematic—for example, prohibiting IOUs from generating and selling electricity, expanding citizen

standing to bring lawsuits, and constructing new layers of regulation through the creation of an independent market monitor. The mandate to create competitive energy markets is separate and unconnected to these other directives.

Many voters might support the notion of more competitive electricity markets, but would oppose a system that excludes them from obtaining electricity from their existing IOU-supplier. Likewise, voters might support more competitive electricity markets but completely oppose the Initiative's gutting of separation of powers protections and its hasty expansion of citizen standing.

Notably, the Initiative should not be considered as consisting of only one subject simply because each of these provisions might, somehow, relate to the single concept of a competitive electricity market. A proposed amendment constitutes logrolling where the multiple provisions have a "substantial, yet disparate, impact." *Advisory Op. to Att'y. Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions & Exclusions Serve a Pub. Purpose*, 880 So. 2d 630, 634 (Fla. 2004). In *Fairness Initiative*, the Court held that a ballot initiative "constitute[d] impermissible logrolling" where it would have (1) ordered a review of sale tax exemptions; (2) instituted sales taxes on untaxed services; and (3) required the Legislature to identify public purposes on sale tax exemptions. *See id.* at 634-35 (rejecting the notion that the proposed amendment

constituted only one subject because "all of these goals arguably relate to sales taxes").

Instead of allowing the voters to choose which of the disparate provisions they approve, the Initiative forces voters to make an "all or nothing" decision at the ballot box in violation of the Florida Constitution's single-subject rule.

Finally, this court has consistently required that a proposed amendment identify the articles or sections of the Florida Constitution which it substantially affects. *See, e.g.*, *Treating People Differently*, ("[T]he proposed amendments have a substantial effect on article I, section 21, and the failure to identify this substantial effect violates the single-subject requirement."); *Fine*, 448 So. 2d at 989 ("[A]n initiative proposal should identify the articles or sections of the constitution substantially affected."). As noted earlier, the Initiative substantially affects—without disclosing its impacts on—two key constitutional provisions: (1) the prohibition on the impairment of contracts under article I, section 10; and (2) the state's separation of powers, under article II, section 3. These significant impacts on Florida's constitution are further evidence that the Initiative violates the single-subject requirement.

CONCLUSION

For the foregoing reasons, the Initiative must not be authorized for placement on the ballot.

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