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IN THE SUPREME COURT OF FLORIDA

Case No. SC 19-328; SC 19-479

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 OPPONENT JEA

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STATEMENT OF THE CASE AND FACTS

On March 1, 2019, the Florida Attorney General requested this Court's advisory opinion as to whether the text of the Right to Competitive Energy Market for Customers of Investor-Owned Utilities Amendment complies with Article XI, section 3 of the Florida Constitution, and whether the proposed Ballot Title and Summary complies with the provisions of section 101.161, Florida Statutes. The Ballot Title, Ballot Summary and Full Text of the proposed amendment (the "Amendment") are as follows:

> **BALLOT TITLE**: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice.
>
> **BALLOT SUMMARY**: Grants customers of investor-owned utilities the right to choose their electricity provider and to generate and sell electricity. Requires the Legislature to adopt laws providing for competitive wholesale and retail markets for electricity generation and supply, and consumer protections, by June 1, 2025, and repeals inconsistent statutes, regulations, and orders. Limits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems. Municipal and cooperative utilities may opt into competitive markets.
>
> **FULL TEXT OF THE PROPOSED CONSTITUTIONAL AMENDMENT:**
>
> (a) POLICY DECLARATION. It is the policy of the State of Florida that its wholesale and retail electricity markets be fully competitive so that electricity customers are afforded meaningful choices among a wide variety of competing electricity providers.
>
> (b) RIGHTS OF ELECTRICITY CUSTOMERS. Effective upon the dates and subject to the conditions and exceptions set forth in subsections (c), (d), and (e), every person or entity that receives

electricity service from an investor-owned electric utility (referred to in this section as “electricity customers”) has the right to choose their electricity provider, including, but not limited to, selecting from multiple providers in competitive wholesale and retail electricity markets, or by producing electricity themselves or in association with others, and shall not be forced to purchase electricity from one provider. Except as specifically provided for below, nothing in this section shall be construed to limit the right of electricity customers to buy, sell, trade, or dispose of electricity.

(c) IMPLEMENTATION. By June 1, 2023, the Legislature shall adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad purposes and stated terms, which shall take effect no later than June 1, 2025, and which shall:

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

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

(d) EXCEPTIONS. Nothing in this section shall be construed to affect the existing rights or duties of electric cooperatives, municipally-owned electric utilities, or their customers and owners in any way, except that electric cooperatives and municipally-owned electric

> utilities may freely participate in the competitive wholesale electricity market and may choose, at their discretion, to participate in the competitive retail electricity market. Nothing in this section shall be construed to invalidate this State's public policies on renewable energy, energy efficiency, and environmental protection, or to limit the Legislature's ability to impose such policies on participants in competitive electricity markets. Nothing in this section shall be construed to limit or expand the existing authority of this State or any of its political subdivisions to levy and collect taxes, assessments, charges, or fees related to electricity service.
>
> (e) EXECUTION. If the Legislature does not adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad purposes and stated terms by June 1, 2023, then any Florida citizen shall have standing to seek judicial relief to compel the Legislature to comply with its constitutional duty to enact such legislation under this section.

On March 15, 2019, the Financial Impact Estimating Conference, in accordance with section 100.371(5)(a), Florida Statutes, forwarded the Financial Impact Statement on the Amendment. On March 29, 2019, this Court issued its Order establishing the briefing schedule on the Amendment.

STATEMENT OF INTEREST

JEA is a municipal electric utility owned by the City of Jacksonville. Currently the largest community-owned utility in Florida and the eighth largest in the United States, JEA serves an estimated 466,000 electric customers. The Amendment, both in its Ballot Title and Ballot Summary, seeks to wrap itself in the mantle of an enhanced competitive energy market that will allow greater energy choice; however, the true impacts of the Amendment are to completely

restructure both the provision of electricity and the long-established system regulating electric utilities within the State of Florida.

Though the Amendment purports to allow JEA and other municipally-owned electric utilities and electric cooperatives (hereafter collectively referred to as "municipal utilities") the choice of whether or not to participate in the competitive wholesale and retail electricity markets upon the restructuring proposed by the Amendment, such choice is illusionary. Municipal utilities will not be insulated from the Amendment's effects by virtue of their ability to "opt-out" of wholesale and retail competition. Rather, as a result of the extensive integration of the electric energy market throughout the state, JEA and other municipal utilities will be unable to escape the destabilizing effects of the Amendment and will face substantial economic exposure under the massive restructuring that will result.

JEA and its customers have a serious and abiding interest in a properly coordinated and stabilized vertically integrated market for electricity. The Amendment will cause a substantial disruption of the provision of electric energy supplies within the state. Further, the proposed Amendment will impact established contractual relationships between JEA and investor-owned utilities that provide electric power and stabilize the provision of service to its customers. These include an exclusive electric franchise agreement between JEA and the City of Orange Park, power purchase agreements between JEA and Florida Power and

Light, and a service territory agreement between JEA and Florida Power and Light pursuant to which JEA agreed to provide electric service outside the territorial boundaries of the City of Jacksonville. The substantial interests of JEA and its customers would be directly affected by the provisions of the Amendment.

SUMMARY OF THE ARGUMENT

The proposed Amendment violates the single-subject limitation contained within Article XI, section 3, of the Florida Constitution. Additionally, the Ballot Title and Ballot Summary are misleading and fail to inform the voter of the Amendment's chief purpose, in violation of section 101.161, Florida Statutes.

First, the Amendment infringes upon Article XI, section 3, Florida Constitution, through its logrolling of multiple distinct subjects that do not share a common "oneness of purpose," and further by altering or performing the functions of multiple aspects of state and local government in a manner that would result in precipitous and calamitous changes. While some subjects touched on by the Amendment appear politically favorable, such as promoting competition and consumer choice, others are problematic, such as prohibiting investor-owned utilities from selling electricity and forcing them to divest of their electricity generating assets. As a result, the Amendment forces voters into an "all or nothing" choice and impermissibly engages in logrolling.

The Amendment's broad sweeping and substantial restructuring of the provision and regulation of electric utility service in the state will also alter multiple functions and branches of state government and various levels of local government. In fact, it is hard to imagine any prior proposed initiative petition that would have as many precipitous and cataclysmic changes as the current Amendment.

At the state level, the Amendment's comprehensive restructuring of the system pursuant to which electricity is generated, transmitted, and sold will necessarily alter multiple functions of state government, including the Legislature, which is tasked with implementation of the Amendment's broad mandates, and several executive branch agencies including the Division of Emergency Management and Attorney General.

At the local level, the Amendment would disrupt numerous existing contractual agreements relating to the provision of electric utility services. These include exclusive franchise agreements, which are expressly banned under the Amendment, power purchase agreements, which municipal utilities, including JEA, have entered into to provide a stable electrical supply for its customers, easements, and agreements concerning disaster planning and recovery.

In addition to violating Article XI, section 3, Florida Constitution, the Amendment's Ballot Title and Ballot Summary violate section 101.161, Florida

Statutes, by failing to clearly and accurately inform the voter of the Amendment's chief purpose. Instead, the Ballot Title and Ballot Summary resort to political rhetoric, sloganeering, and advocacy language designed to mislead rather than educate and inform.

In sum, the Amendment violates the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes, and should be struck by this Court.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

The issues before the Court are questions of law. Fine v. Firestone, 448 So. 2d 984, 987 (Fla. 1984). Accordingly, the standard of review is *de novo*. Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000), cert. denied, 532 U.S. 958 (2001).

As this Court has noted, when considering whether an initiative proposal complies with the provisions of Article XI, section 3 of the Florida Constitution, and section 101.161, Florida Statutes, an amendment will only be invalidated when "the proposal is clearly and conclusively defective on either ground." Advisory Opinion to the Att'y Gen. re Protect People, Especially Youth From Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So. 2d 1186, 1190 (Fla. 2006) (Quoting Advisory Opinion to the Att'y Gen. re Amendment to Bar

Government From Treating People Differently Based on Race in Public Education, 778 So. 2d 888, 890-91 (Fla. 2000)).

Notwithstanding that standard, amendments proposed by citizen initiative are necessarily subject to a rigorous analysis as that process does not "provide a filtering legislative process for the drafting of any specific proposed constitutional amendment or revision." Advisory Op. to the Att'y Gen. re Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994); Fine, 448 So. 2d 984, at 988.

II. THE AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT

A. The Single-Subject Requirement

Article XI, section 3, Florida Constitution, reserves to the people the power to propose amendments or revisions to the Constitution. However, such power is restricted by the single-subject requirement contained within that provision which limits citizen initiatives to one subject and those matters directly connected therewith. Specifically, Article XI, section 3 provides:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue shall embrace but one subject and matter directly connected therewith.

The single-subject limitation exists to "insulate Florida's organic law from precipitous and cataclysmic change." Save Our Everglades, 636 So. 2d at 1339.

The single-subject requirement prevents a proposed amendment from engaging in either of two practices: (a) logrolling; or (b) substantially altering or performing the functions of multiple branches of state government. Advisory Op. to the Att'y Gen. re Water and Land Conservation, 123 So. 3d 47, 50-51 (Fla. 2013).

The primary rationale for limiting the citizen initiative process by requiring compliance with the single-subject requirement is "because the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing amendments." Fine, 448 So. 2d at 988; Treating People Differently Based on Race in Pub. Educ., 778 So. 2d at 891. The single-subject restriction provides a mechanism to address the concern that voters could be misled into impulsively changing the organic law of our state that could have broad and sweeping impacts of the various functions and levels of government. It also inherently recognizes that the initiative process allows special interest groups the ability to draft a proposed amendment without any public, legislative, or judicial input and thereafter submit the proposal to a vote of the electorate with nothing more than the required number of signatures. To place some limitations on this process, the constitutional 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 (quoting Fine, 448 So. 2d at 988).

When evaluating a proposed constitutional amendment for compliance with the single-subject requirement, this Court has stated:

> A proposed amendment meets this test when 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 object and plan is the universal test.

Advisory Op. to Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose (Fairness Initiatives), 880 So. 2d 630, 634 (Fla. 2004).

Because the single-subject requirement is a "rule of restraint" incorporated in the constitution to protect the organic law of our state from precipitous changes, Fine, 448 So. 2d at 993, the Court requires "strict compliance" with the rule. Treating People Differently, 778 So. 2d at 891 (quoting Fine, 448 So. 2d at 989).

B. The Proposed Amendment Does Not Have a Logical and Natural Oneness of Purpose

As discussed above, the first purpose of the single-subject provision of Article XI, section 3 of the Florida Constitution is to prevent logrolling. Logrolling is a practice that combines separate issues into a single proposal to secure passage of an unpopular issue. Advisory Op. to Att'y Gen. re Fish and

Wildlife Conservation Comm'n, 705 So. 2d 1351, 1353 (Fla. 1998). In essence, voters are forced to "accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." Fine, 448 So. 2d at 988. In determining whether an initiative satisfies the single-subject requirement as to this first purpose, the Court will determine whether the amendment "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 object and plan is the universal test." Advisory Op. to Att'y Gen. re Patients' Right to Know About Adverse Med. Incidents, 880 So. 2d 617, 620 (Fla. 2004). In this case, the proposed Amendment engages in logrolling by encompassing multiple, distinct subjects that lack the requisite oneness of purpose and it should be struck by this Court.

First, the Amendment grants customers of investor-owned utilities the constitutional right to choose their electricity provider or multiple providers in a competitive market. This appears to be the primary thrust of the Amendment. However, the Amendment quickly introduces several unrelated and distinct topics covering subjects as diverse as forced market and asset divestiture and consumer protection.

Specifically, section (1)(c) of the Amendment requires the Legislature to adopt language "protect[ing] against unwarranted service disconnections,

unauthorized changes in electric service, and deceptive or unfair practices . . . ." While the sponsor may have included these provisions to require the Legislature to mitigate potential negative impacts of the Amendment based upon the experience in other states that have adopted similar legislation, there is no clear connection or oneness of purpose between these mandates related to consumer protection and ensuring reliable electricity service and the creation of a competitive electricity market.

The Amendment's logrolling of multiple disparate subjects is most clearly pronounced in its provisions pertaining to investor-owned utilities. The Amendment mandates that the Legislature adopt comprehensive legislation that restricts "the activity of investor-owned utilities to the construction, operation, and repair of electrical transmission and distribution systems." Notably absent from this list is the generation and sale of electricity. As a result of this restriction, investor-owned utilities would be prohibited from generating electricity and participating in the competitive wholesale and retail electricity markets that are mandated by the Amendment. Investor-owned utilities would further be required to fully divest of their electricity generating facilities.

It is entirely unclear how prohibiting investor-owned utilities from generating electricity and participating in the competitive wholesale and retail electricity markets is naturally and logically related to granting investor-owned

utility customers the right to choose their electricity provider. Not only are these separate and distinct subjects covered within the Amendment, they are also in conflict with one another. Prohibiting many utility customers from choosing their current electricity provider does not further the purported intent of the Amendment to increase retail competition or the range of electricity providers available to customer. Rather, it has the opposite effect by removing multiple existing electric utilities from the field of electricity providers from which a customer may choose. A utility customer who supports having the ability to choose their electricity provider in a competitive retail electricity market may look unfavorably at being restricted from selecting their current electricity provider. As a result, the Amendment forces the voter to vote "in the 'all or nothing' fashion that the single-subject requirement safeguards against." Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Dists., 926 So. 2d 1218, 1226 (Fla. 2006) (proposed constitutional amendment creating re-districting commission for legislative and congressional district and also creating new standards to be used for apportioning districts violated single-subject requirement where "[a] voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts").

The logrolling effect of the Amendment is especially evident when viewed in context with this Court's Opinion in Save Our Everglades, which concerned a proposed amendment creating a trust fund for the purpose of restoring the Everglades funded by a fee imposed on the sugar industry. Save Our Everglades, 636 So. 2d at 1337. In holding that the proposed amendment "embodies precisely the sort of logrolling that the single-subject rule was designed to foreclose," the Court objected to the combination of one "politically fashionable" purpose—Everglades restoration—with a second distinct purpose that involved singling out the sugar industry as responsible for funding such restoration efforts. Id. at 1341. The Court noted that "[m]any 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.

The Amendment at issue in the present case similarly attempts to merge one purpose—the creation of competitive electricity markets—with a second distinct purpose whereby investor-owned utilities are singled out for disparate treatment through the Amendment's provisions excluding investor-owned utilities from the newly-created competitive markets and forcing them to divest from their electricity generating assets.

Given the multiple subjects logrolled into this single Amendment, a voter may very well be forced to "accept part of an initiative proposal which they

oppose in order to obtain a change . . . they support." Fine, 448 So. 2d at 988. For example, a voter in support of consumer protections for electricity customers would also be required to accept all the provisions relating to retail deregulation and the prohibitions on existing investor-owned utilities. This practice is prohibited by the single-subject requirement of Article XI, Section 3, Florida Constitution, and the Amendment should be struck.

C. The Proposed Amendment Substantially Alters the Functions of More Than One Branch of Government as Well as Multiple Levels of Government

In addition to the prevention of logrolling, the single-subject requirement embodied in Article XI, Section 3, Florida Constitution, also protects against a single constitutional amendment altering or performing the functions of multiple aspects of government. Advisory Op. to Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So. 2d 367, 369 (Fla. 2000). In determining whether an initiative satisfies the single-subject requirement as to this second purpose, merely impacting multiple aspects of government is not disqualifying; however, a proposal that alters or performs the functions of more than one branch or level of government will run afoul of the single-subject requirement. Save Our Everglades, 636 So. 2d at 1340. The Amendment at issue in this case runs afoul of the constitutional single-subject requirement on this basis.

In applying the single-subject rule, a proposed amendment may not substantially alter or perform the functions or operations of the multiple government branches and thereby cause multiple precipitous and cataclysmic changes in state government. See Advisory Op. to Att'y Gen. re Right to Treatment & Rehabilitation for Non-Violent Drug Offenses, 818 So. 2d 491, 496 (Fla. 2002); Save Our Everglades, 636 So. 2d at 1340; Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984); Fine, 448 So.2d at 990; Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ., 778 So. 2d at 892. Therefore, the single-subject requirement further requires an inquiry as to "whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution." In re Advisory Opinion to the Atty. Gen. – Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994). Where a proposed amendment "changes more than one government function, it is clearly multi-subject." Evans, 457 So. 2d at 1354; Save Our Everglades, 636 So. 2d at 1340 ("[N]o single proposal can substantially alter or perform the functions of multiple branches.") (Emphases omitted).

This Court has consistently held that initiatives which substantially alter the function of more than one branch of government or more than one level of government will violate the single-subject requirement. In Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018

(Fla. 1994), the Court considered an initiative that provided that the state, political subdivisions of the state, municipalities, or any other governmental entity shall not enact or adopt any law that would restrict any anti-discrimination protection to ten specifically enumerated classifications of people. Id. at 1019. The Court rejected this initiative and in discussing one of the bases for the rejection, stated:

> [T]he subject of discrimination in the proposed amendment is an expansive generality that encompasses both civil rights and the power of all state and local governmental bodies. By including the language "any other governmental entity," the proposed amendment encroaches on municipal home rule powers and on the rulemaking authority of executive agencies and the judiciary.

Id. at 1020.

As further discussed above, in Advisory Opinion to the Attorney General - Save Our Everglades, 636 So. 2d 1336 (Fla. 1994), this Court rejected an initiative creating a trust that would seek to restore the Everglades by using funds collected as fees from sugarcane growers. In addition to rejecting the proposed initiative on logrolling grounds, this Court found that the proposed initiative would impact multiple branches of government, in that the trustees of the fund under the amendment would be performing both legislative and executive

functions and would render a judgment and *de facto* liability, as part of the exercise of a judicial function.

Similarly, in Advisory Opinion to the Attorney General re Tax Limitation, 644 So. 2d 486 (Fla. 1994), the Court struck from the ballot an initiative that entitled owners to full compensation when governmental action damaged the value of their vested property rights. In setting forth its rationale, the Court stated:

> This initiative not only substantially alters the functions of the executive and legislative branches of state government, it also has a very distinct and substantial [e]ffect on each local governmental entity.

Id. at 494-95.

In Advisory Op. to Att'y Gen. Re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So. 2d 888 (Fla. 2000), the Court rejected various initiatives which barred the state, cities, counties, districts, public colleges or universities, or other political subdivisions or governmental instrumentalities of or within the state from treating persons differently based on race, color, ethnicity, national origin or sex in the areas of education, employment, and contracting. The Court held that "the proposed amendments' substantial effect on local government entities, coupled with its curtailment of the powers of the legislative and judicial branches, renders it

fatally defective and violative of the single-subject requirement." Id. at 896. See also Advisory Opinion to the Att'y Gen. re Voter Approval Required for New Taxes, 699 So. 2d 1304 (Fla. 1997) (rejecting an initiative providing that "[n]o new taxes may be imposed except upon approval in a vote of the electors of the state, local or other taxing authority seeking to impose the tax," as it substantially affected several levels of government).

In the present case, the Amendment would substantially change the structure of the electric utility markets within the State of Florida. As set forth within the Florida Financial Impact Estimating Conference's Financial Information Statement, those changes were described as follows:

> The proposed amendment will require transition to a restructured electricity market that profoundly differs from the vertically integrated structure that is in place today. Under the current structure, each investor-owned utility can own and control its own power generation facilities, the transmission and distribution of its electricity and sale to customers.

If passed, the Amendment would constitutionally limit investor-owned utilities to providing only for the transmission and distribution of electricity and prohibit them from engaging in the generation or sale (wholesale or retail) of electricity. In doing so, the Amendment will directly alter numerous functions of state government. The Amendment itself expressly directs that legislation must be

adopted to implement the Amendment consistent with the broad purposes of the Amendment. As a result, because it is unknown at this time how the Legislature will ultimately choose to implement the Amendment, it is difficult to ascertain the Amendment's full impacts. However, it is clear that the changes will be significant and that multiple functions of state government will be directly altered by the Amendment.

Currently, the electric utility system within the State of Florida, as to the sale, transmission, distribution, and generation of electricity is regulated and controlled by the Public Service Commission, an arm of the legislative branch of government. See section 350.001, Florida Statutes. The Public Service Commission would clearly be substantially impacted by the Amendment. Investor-owned utilities within the State of Florida operate through a consolidated and vertically integrated structure that includes the sale, generation, transmission and distribution of electricity. As discussed above, the Amendment will mandate the divestiture of the generation components of this integrated utility system by all investor-owned utilities and will prohibit them from participating in the wholesale or retail electricity markets. As a result, the Public Service Commission's regulatory role will be altered and it will be required to substantially modify its regulatory processes.

In addition to the Public Service Commission, the Division of Emergency Management ("FDEM"), an arm of the executive branch of government, would be substantially impacted and its functions altered by the Amendment. See section 252.32, Florida Statutes. FDEM is responsible for "maintaining a comprehensive statewide program of emergency management" and for coordinating with other state departments and agencies, local governments, and private entities—such as investor owned utilities—that have a role in an emergency response and recovery. See section 252.35(1), Florida Statutes. The disaster planning and recovery powers granted to FDEM by section 252.35, Florida Statutes, are comprehensive and necessarily encompass pre-disaster planning and post-disaster response and recovery. FDEM is responsible for developing and implementing the State Comprehensive Emergency Management Plan, which is the "master operations document for the State of Florida in responding to all emergencies, and all catastrophic, major, and minor disasters." See Rule 27P-2.002, Fla. Admin. Code. An essential component of FDEM's function is to promulgate the policies and plans and direct their implementation during disasters to ensure the state recovers from "shortages or disruptions in the supply and delivery of electricity." State Comprehensive Emergency Management Plan (https://www.floridadisaster.org/globalassets/cemp/2018-state-cemp.pdf).

In addition to FDEM and the Public Service Commission, the state's emergency support functions for electrical power impact multiple governmental and private entities, including the Nuclear Regulatory Commission, the Florida Rural Electric Cooperative Association, the Florida Municipal Electric Association, the Florida Reliability Coordinating Council, investor-owned utilities, the Florida Department of Environmental Protection, and the Florida Department of Health. Id. The Amendment will significantly alter this complicated and interrelated system of disaster planning, response and recovery concerning the restoration of electrical power. Not only will FDEM be required to modify the State Comprehensive Emergency Management Plan and its processes outlined therein for disaster response and recovery, but potentially every local disaster preparedness plan in the state that is adopted by a county or city will also require major revision to account for the major changes wrought by this Amendment. See Rule 27P-6.0023, Fla. Admin. Code.

As addressed in section (c)(1) of the Amendment, a new and substantial regulatory process will need to be adopted to facilitate the restructuring of the electric utility market within the State of Florida. At a minimum, the divestiture of the generation facilities will require the development of an independent market monitor to manage or regulate the market or require participation in an existing out of state market. That entity will perform essentially executive functions in the

development of various regulatory controls to manage the wholesale market for sale of electricity from the generation systems, including the development of alternative default electric services and backup generation plans to make certain that areas have sufficient electrical service available in all areas of the state.

The Amendment will further require a significant rewriting of the laws and regulations to promote competition, limit market power, protect against deceptive and unfair trade practices, and provide consumer protections. This will impact numerous state agencies and entities, including the Attorney General.

Finally, the Amendment will likely result in litigation concerning its provisions mandating that investor-owned utilities divest from their electricity generating assets, which is likely to result in significant "stranded costs," as well as the numerous existing contracts that will be impaired by the Amendment. As such, the Amendment's implementation requirements will significantly impact and alter the functions of the executive, legislative, and judicial branches of state government.

Apart from the extensive changes to state government wrought by the Amendment, it will also significantly impact local governments and alter their current operations. The most obvious impact concerns existing electric franchise agreements that local governments have with utility providers. By way of

example, JEA has entered into an exclusive franchise agreement to provide electric service to the City of Orange Park.

Such franchise agreements are generally premised upon a variety of contractual considerations, including use of public rights-of-way, an agreement not to compete and the payment of a fee. The Amendment expressly eliminates the ability of counties and cities to enter into exclusive franchise agreements. JEA's franchise agreement to serve the City of Orange Park would accordingly be prohibited. Though the issue of the loss of revenue from the elimination or diminution of the franchise fees may be subsequently addressed by the Legislature, the clear impact of the Amendment on local governments would be the impairment of those franchise agreements and interference with an established revenue source that has been relied on by many local governments.[1]

Numerous municipal utilities, including JEA, have also entered into power purchase agreements with investor-owned utilities to acquire electricity supplies to ensure that there is a consistent and reliable supply of electricity available to serve

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[1] According to the Financial Impact Estimating Conference, "[i]n local fiscal year 2016-17, 334 municipal governments reported $733.5 million in franchise fee revenues, of which $570.3 million, or 77.7 percent, was electric utility service-related." Florida Financial Impact Estimating Conference, Financial Information Statement: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice, Serial No. 18-10, March 15, 2019, at p. 14.

their customers. Under the Amendment, these agreements will likely become void, as investor-owned utilities who have been supplying electricity to JEA under a power purchase agreement will now be required to divest ownership of their electricity generation facilities. This will cause a significant impairment of JEA's rights and responsibilities under these contracts, as well as considerable financial impact to the parties to those agreements.

Apart from the Amendment's addition of a new section to Article X of the Florida Constitution, the Amendment would also impact other sections of the constitution that are not identified within the Ballot Summary. For example, the Amendment would impact Article I, section 10 of the Constitution which provides:

> Section 10 Prohibited Laws – No Bill of Attainder, Ex Post Facto Law or Law Impairing the Obligations of Contract Shall Be Passed.

The Amendment would expressly allow the impairment of some contracts and necessarily implicate others. In addition to franchise fee agreements and power purchase agreements described above, counties and cities throughout the state have disaster staging and response agreements, mutual aid agreements,

service territory agreements,[2] easements, and other contractual arrangements with investor-owned utilities that will be impaired by the Amendment.

D. The Amendment's Impacts on State Law are Precipitous and Calamitous

The changes mandated by the Amendment can hardly be considered inconsequential. The Amendment will require a complete restructuring of the way in which electric service is provided, funded, and regulated, thereby disrupting an integrated system that has operated within the State of Florida for decades. The Amendment will also significantly impact investor-owned utilities by requiring their divestiture of generation facilities provided through millions of dollars of investment and further prohibit their participation in the electrical retail and wholesale markets. As a result, the Amendment will disrupt existing contractual arrangements between these investor-owned utilities and municipal utilities, counties, and cities throughout the State, causing multiple branches and levels of government to completely alter their functions.

The Amendment will necessitate a substantive overhaul of the state and local governments' disaster planning and response procedures and requires the

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[2] By way of example, JEA has entered into a service territory agreement with Florida Power and Light pursuant to which the parties agreed to specific service areas within St. Johns County. Because exclusive franchises and service areas will be prohibited by the Amendment, this agreement would be directly impaired if the Amendment becomes law.

development of an entirely new regulatory system to provide oversight of the newly established generation market. All of these changes rise to the level of precipitous and calamitous to state law.

III. THE BALLOT TITLE AND SUMMARY VIOLATE SECTION 101.161, FLORIDA STATUTES

This Court's analysis of the Ballot Title and Summary must focus on two questions: (1) whether the title and summary clearly and accurately inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, is likely to mislead the public. See e.g., Advisory Opinion to Att'y Gen. re Florida Marriage Protection Amend., 926 So. 2d 1229, 1236 (Fla. 2006).

Section 101.161, Florida Statutes, requires that the substance of a proposed constitutional amendment be expressed in the ballot summary in clear and unambiguous language in the form of an explanatory statement "of the chief purpose of the measure" so that "the electorate is advised of the true meaning, and ramifications, of an amendment." Askew v. Firestone, 421 So. 2d. 151, 155 (Fla. 1982). A ballot summary is fatally defective if it omits material facts that are essential to understanding the changes to be affected by the proposed amendment. Fla. League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992); Advisory Op. to Att'y Gen.- Ltd. Political Terms in Certain

Elective Offices, 592 So. 2d 225, 228 (Fla. 1991); Wadhams v. Bd. of Cnty. Comm'rs, 567 So. 2d 414,416-17 (Fla. 1990); Askew, 421 So. 2d at 155-56. All of these requirements are intended "so that 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." Save Our Everglades, 636 So. 2d at 1341. The Amendment's Ballot Title and Ballot Summary fall well short of these requirements.

The proposed Ballot Title and Ballot Summary are misleading and will not provide meaningful notice to the voters as to the extent and scope of the Amendment. Though the Amendment complies with the word limitations of the statute, it fails to identify the Amendment's logically connected components, which would work together to accomplish its purpose. Further, the Ballot Title and Summary use advocacy language, sloganeering, and political rhetoric to provide persuasive rather than educational-type terminology.

Initially, the Ballot Summary states that it grants customers of investor-owned utilities the right to "choose their electricity provider and to generate and sell electricity." However, that is not the case. As described above, under the Amendment, current customers of investor-owned utilities will no longer have the ability to purchase electricity from the same provider, as the Amendment prohibits investor-owned utilities from both generating electricity and participating in the

competitive wholesale and retail markets. The language in the Ballot Summary fails to alert the voter of this fact. Rather, the Ballot Summary—as well as the Full Text of the Amendment—attempt to "hide the ball" by providing that investor-owned utilities are limited to "construction, operation, and repair of electrical transmission and distribution systems." It is left to the voter to educate themselves on the complicated structure of the multi-level electrical market in the State and deduce that by virtue of this limitation, investor-owned utilities will in fact no longer be able to generate and sell electricity to their current customers, and will actually have to divest themselves of their electricity generating facilities.

This Court has stated on several occasions that a voter is presumed to have "a certain amount of common understanding and knowledge." Roberts v. Doyle, 43 So. 3d 654, 659 (Fla. 2010). However, it is unrealistic to expect an average voter of reasonable intelligence to have a sophisticated understanding of the structure pursuant to which electricity is generated, transmitted, distributed, and sold, and further to make the connection that the limitation on investor-owned utilities contained in the Amendment will have the effect of forcing roughly 7.8 million electricity customers across the state to find a new electricity provider. The omission of this fact is fatal to the Ballot Summary. This Court has previously invalidated proposed ballot summaries based on similar omissions of key details. Askew, 421 So. 2d at 156 ("The problem, therefore, lies not with what the

summary says, but, rather with what it does not say.") Similarly, by cloaking itself as a pro-consumer choice measure when in reality the Amendment would eliminate the State's primary providers of electricity, the Ballot Summary "flies under false colors." Id. at 156.

As the Amendment relies so heavily on future legislative action, the Ballot Summary can in no way provide meaningful understanding of exactly the nature of utility systems that will exist once the Legislature has adopted implementing legislation. The Amendment mandates significant structural changes to the provision of electrical utilities within the State, but is silent as to all other aspects as to what that means and how the new system will operate. That would include who would ultimately operate the generation facilities, how the electricity markets would be regulated, or whether in fact it would cause additional rates and costs to the consumer.[3]

Like the Ballot Summary, the Ballot Title is also defective. The Ballot Title clearly utilizes salesman, political rhetoric to cast the Amendment as a "right" to

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[3] Notably, the Financial Impact Estimating Conference concluded that the Amendment would result in "significant costs to state and local governments . . . ." Florida Financial Impact Estimating Conference, Financial Impact Statement: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice, Serial No. 18-10, March 15, 2019.

competitive energy market for customers and allowing “energy choice.” However, the Ballot Title fails to describe in any meaningful manner the purpose of the Amendment, rather it seeks to utilize terminology intended to convince voters rather than educate them. The use of the term “energy choice” in the title misleads the voter by implying that the consumer would be granted a choice of the type of energy production (i.e. renewable energy, nuclear energy) and fails to explain that the “choice” only pertains to an energy provider, not the type of “energy.”

In sum, both the Ballot Title and Ballot Summary are defective and in violation of section 101.161, Florida Statutes. They jointly mislead the voter with politically motivated language and fail to inform the voter of the true meaning and the far-reaching and calamitous ramifications of this Amendment. As such, the Amendment should be struck for its failure to comply with section 101.161, Florida Statutes.

CONCLUSION

For the above stated grounds, the Court should find that the proposed Amendment to the Constitution titled “Right to Competitive Energy Market for Customers of Investor Owned Utilities; Allowing Energy Choice” is in violation of the single-subject requirement contained in Article XI, section 3 of the Florida Constitution and that the Ballot Title and Summary violated section 101.161.

Florida Statutes. As such, the proposed Amendment should be held invalid and stricken from the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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