IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC19-328; SC19-479

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

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

UPON REQUEST FROM THE ATTORNEY GENERAL FOR AN ADVISORY OPINION AS TO THE VALIDITY OF AN INITIATIVE PETITION

INITIAL BRIEF OF FLORIDA CHAMBER OF COMMERCE AND FLORIDA ECONOMIC DEVELOPMENT COUNCIL IN OPPOSITION TO THE INITIATIVE PETITION

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IDENTITY AND INTEREST OF THE FLORIDA CHAMBER OF COMMERCE AND THE FLORIDA ECONOMIC DEVELOPMENT COUNCIL

The Florida Chamber of Commerce (the "Chamber") is the state's largest federation of employers, chambers of commerce and associations advocating for Florida businesses and working to secure Florida's future. Its efforts to make Florida more competitive include advocating among all branches of government for effective policies that encourage private-sector job creation. The Florida Economic Development Council (the "Council") is a not-for-profit corporation whose more than 500 members engage business and government leaders in key economic development initiatives that improve local communities and elevate Florida's global competitiveness.

The Chamber and the Council generally oppose amending the Florida Constitution to achieve policy goals that can be accomplished through the legislative process, as is the case with the proposed Ballot Initiative. They also support all types of energy production, and oppose government policies that could increase the cost of doing business in Florida, including those that would require businesses to absorb higher energy costs. Thus, the Chamber and the Council have a vested interest in this Initiative because, if adopted, it could cost billions of dollars, substantially increase the cost of energy, make Florida less competitive, and lower tax revenues for local governments. Accordingly, they submit this brief opposing the Initiative.

STATEMENT OF THE CASE AND FACTS

The Attorney General has requested this Court's advisory opinion to determine the validity of an initiative petition to amend the Florida Constitution, titled "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" (the "Ballot Initiative" or "Proposed Amendment"). This Court has jurisdiction. *See* Art. V, § 3(b)(10), Fla. Const.

This Court reviews the Ballot Initiative to determine whether: (1) it satisfies the single-subject requirement of article XI, section 3 of the Florida Constitution; and (2) the ballot title and summary use sufficiently "clear and unambiguous language" to satisfy section 101.161(1), Florida Statutes. *See In re Advisory Op. to the Attorney Gen. re: Save Our Everglades Tr. Fund,* 636 So. 2d 1336, 1339, 1341 (Fla. 1994) (citation omitted). This brief focuses on the single-subject requirement. We demonstrate that the Ballot Initiative does not present a single subject because it engages in logrolling. Also, by upending decades of legislation and executive rulemaking, it substantially alters and performs the functions of multiple branches of government—even though such an upheaval is unnecessary. Indeed, the Florida electricity market is highly regulated, highly reliable, and highly functional, and it delivers electricity to Florida residents at rates far below the national average. The Chamber also adopts and supports those briefs filed by Associated Industries of

Florida, investor-owned utilities, and other opponents, which demonstrate that the title and summary of the Ballot Initiative are neither clear nor unambiguous.

A. The Ballot Initiative

The Ballot Initiative is titled "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" (A. 7).[1] The ballot summary announces that the Amendment "[g]rants customers of investor-owned utilities the right to choose their electricity provider" (*id*.). And the Amendment's policy declaration states that "[i]t 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" (*id*.) (emphasis added). Thus, the Ballot Initiative announces that its paramount purpose is a competitive electric market. But the Amendment also requires the legislature to implement language that would "limit the activity of investor-owned electric utilities to the construction, operation, and repair of electrical transmission and distribution systems" (A. 8). As a result, investor-owned utilities ("IOUs") would be *excluded* from competing in the market for electricity production. Thus, the Initiative would upend Floridians' access to electricity—IOUs provide approximately 79% of the electricity capacity used by Florida customers

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

(A. 10)—as well as the already-highly regulated and competitive energy marketplace that provides affordable and reliable electricity throughout the state.

B. The Florida Electricity Market Is Extensively Regulated Under the Public Service Commission's Oversight

Before 1951, local governments and municipalities regulated electric utilities in Florida on a piecemeal basis, granting franchise rights to private utilities to service all or part of a community. *See* Richard C. Bellak & Martha Carter Brown, *Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida*, 19 FLA. ST. U. L. REV. 407, 409 (1991). The result was often that customers paid different rates for the same electrical services, even within the same communities. *Id.* at 409. In 1951, the Public Service Commission (the "PSC") was given the responsibility to oversee "Investor-Owned Electrics," and Florida adopted a model of regulated public and private utilities that provides electricity pursuant to territorial agreements. *Id.* at 408.

Territorial agreements grant one utility the exclusive right to generate and distribute electricity in a particular territory, and require that utility to provide service to any customer in the territory. *See Storey v. Mayo*, 217 So. 2d 304, 306-08 (Fla. 1968). Under such agreements, utilities aggregate their operation and maintenance costs and spread them among all of their customers in the area by charging a single rate per kilowatt hour. *See* Alexander D. White, Comment, *Compromise in Colorado: Solar Net Metering and the Case for "Renewable*

Avoided Cost," 86 U. COLO. L. REV. 1095, 1108-09 (2015) (explaining how a utility's costs to provide energy are factored into the rates set by public utilities commissions, so that those rates "include[] not only the cost of producing one kWh of energy, but also a portion of the cost of the infrastructure needed to produce and deliver that kWh of energy"). As this Court has recognized, territorial agreements prevent redundant distribution systems, which "mar[] the appearance of the community," "increase[] the hazards of servicing the area," and "increase the cost of service per customer." *Storey*, 217 So. 2d at 306. Therefore, "a regulated or measurably controlled monopoly is in the public interest" where "public utility operations competition alone has long since ceased to be a potent or even a reasonably efficient regulatory factor." *Id.* at 307.

The source of that regulation is Chapter 366, Florida Statutes, titled "Public Utilities," created in 1951. It governs all aspects of electricity generation and sale. *See* §§ 366.01, 366.041(2), 366.81, 366.92, Fla. Stat. Chapter 366 also outlines the PSC's specific powers and responsibilities. *See id.* §§ 366.04, 366.05. The PSC "has broad authority . . . over transmission grid-related matters" and "over the planning, development, and maintenance of a coordinated electric grid throughout Florida" (A. 15). The PSC "facilitate[s] the efficient provision of safe and reliable utility services at fair prices," by (1) regulating utility rates; (2) conducting

competitive market oversight; and (3) implementing procedures to ensure the safety, reliability, and service of Florida's utilities (A. 31).

C. IOUs Currently Provide About 79% of the Electricity Floridians Use, at Some of the Lowest Rates in the Country

The PSC's regulatory authority extends over both public and private utilities, including IOUs (A. 33). IOUs are "[t]hose electric utilities organized as tax-paying businesses usually financed by the sale of securities in the free market, and whose properties are managed by representatives regularly elected by their shareholders," and "are usually corporations owned by the general public" (A. 128). The PSC regulates "all aspects of operations, including rates and safety" of five IOUs, as well as the "safety, rate structure, territorial boundaries, bulk power supply, operations, and planning" of 35 municipally owned electric utilities and 18 rural electric cooperatives (*see* A. 140).

As of 2017, IOUs provided electricity to 7,846,761 customers, of which 6,937,595 were residential (A. 143). But it is likely that they provide electricity to over 18 million Floridians, because that number does not account for census figures showing that each Florida home houses, on average, 2.64 persons (A. 176). IOUs have invested more than $60 billion in electric infrastructure to serve Florida residents, including low-income residents and those in remote areas (A. 187, 199, 200, 207, 337, 350, 357); and they deliver "approximately 79 percent of all electricity sold to retail customers in Florida," with the "remaining 21 percent []

provided by 33 municipal electric utilities and 16 rural electric cooperatives" (*see* A. 10). Moreover, many local entities rely on IOUs to provide them electricity, as they have been doing for over 100 years (A. 202). Lee County Electric Cooperative, for example, one of the country's largest cooperatives, purchases 100% of its energy under a long-term contract with Florida Power & Light Company (A. 149, 200, 350).

IOUs, combined with Florida's system of territorial agreements, ensure that virtually every Floridian has access to electricity. Recent data shows that Florida customers receive electricity at some of the most affordable rates in the country. As of December 2018, the national average retail price of electricity ranged from 9.01 to 34.43 cents per kilowatt hour, while the average rate in Florida was 11.86 cents (*see* A. 327-28). Florida's IOUs also deliver highly reliable service with minimal interruption, and have received numerous national and industry awards for outstanding performance in reliability, storm restoration and emergency recovery, innovation, and customer service (A. 256-62). In 2017, for example, outages were so low that Florida residents, on average, had working electricity 99.9% of the time (A. 492-95).

D. Other States That Have Restructured Their Energy Markets Have Done So Through a Painstaking Legislative Process, Not Through a Ballot Initiative

In about a page of text, the Proposed Amendment would do something that no state has done—restructure an already legislatively and administratively regulated

energy marketplace by constitutional amendment (*see* A. 7-8, 17-26, 243-45). Every other state to restructure its energy market has done so through a legislative or regulatory process (*see* A. 17-26, 243-45). The Florida legislature, in fact, has considered and rejected restructuring, in part due to the extensive costs of implementation (A. 337); F. S. COMM. ON REG. INDUS., PCB 1888 (1998); FLA. CONSTITUTIONAL REVISION COMM'N P51 (2017).

Florida is not plagued by the issue that spurred other states to deregulate—high electricity prices. For example, in 1996, when California passed deregulation legislation, the "average revenue per kilowatt hour (a proxy for price) of electricity sold in California was 9.48 cents, the 10th highest among the 50 States and the District of Columbia," whereas the "U.S. average price was 6.86 cents per kilowatthour" (A. 646). When Texas legislators announced their plans for deregulation, they noted that Texans "spen[d] more money on electricity than the national average," and that their intent was to "bring down the cost of electricity for all Texans" (A. 663).

Texas makes a good comparison because Texas and Florida are the two highest net electricity-generating states in the country (*see* A. 789). Texas's experience demonstrates the necessary complexity of any overhaul of an energy market. The Texas legislature began to restructure the energy market in 1995, when it passed Bill 373, which "requir[ed] transmission owners to provide non-

discriminatory access to the electric grid and require[ed] utilities to consider power purchases from independent power producers as a low-cost alternative to ratepayer-financed new plant construction" (A. 802, 805-06). A major part of the process was a structural overhaul of administrative agencies such as the Electric Reliability Council of Texas ("ERCOT"), a "non-profit corporation serving as the independent system operator of the Texas Interconnection, a power region covering approximately 85 percent of Texas" (A. 799-800, 926). Years later, after "thousands of hours of meetings and mark-up sessions" to develop ERCOT protocols, a "major transaction system upgrade," and a market system transition (*see* A. 670, 705, 926), the Texas Legislature passed a comprehensive bill that resulted "in some of the most significant changes to the state's electricity market in history" (A. 663). That bill "included more than a half dozen major provisions, [such as] a wide expansion of wholesale electric deregulation, the first-ever authorization for competition among retail electric providers, new renewable energy mandates and a green light for utilities to seek billions of dollars in 'stranded costs' payments'" (*id*.).

Despite years of effort and expense, however, Texans in deregulated residential energy marketplaces continue to pay significantly higher average rates than those in regulated areas—including Florida (*see* A. 930). For example, in 2016, Texans in deregulated areas paid, on average, 11.38 cents per kilowatt hour for residential electricity, while residents in regulated areas paid 10.45 cents.

(A. 937). The national average was 12.55 cents (*id.*). And the corresponding rate in Florida was 10.98 cents (A. 950).

In short, consumers in "deregulated areas could have saved thousands of dollars individually—and billions of dollars in the aggregate—had they paid the same average prices as those observed in areas exempt from the deregulated system" (A. 953).

SUMMARY OF THE ARGUMENT

As the Court is aware, a proposed citizen initiative to amend the constitution must comply with the single-subject rule, which requires that the amendment (1) not engage in logrolling; and (2) not substantially alter or perform the functions of multiple aspects of government. If an amendment does either, it must be stricken. The Proposed Amendment does both.

First, although the Proposed Amendment declares that the public policy of Florida is that its "electricity markets be fully competitive" (A. 7), the ballot summary announces a second subject: that IOUs—which provide about 79% of the electricity capacity Floridians use (A. 10)—would be *prohibited* from generating or selling electricity. Those two subjects—(1) a competitive market that (2) would exclude established market participants from competing—have no oneness of purpose and are not component parts of a single plan. Nevertheless, the Ballot Initiative would force voters—who may favor competition but not want to put their

current electricity provider out of business, or vice versa—to vote either yes or no to both. That is classic logrolling. And the Proposed Amendment cannot be saved by an argument that its oneness of purpose is "competition," which is too broad to satisfy the single-subject rule.

Second, the Proposed Amendment substantially alters and performs the functions of multiple branches of government. It mandates "complete and comprehensive legislation" to implement its provisions, and provides that the new legislation—whatever form it might take—would *void* any conflicting legislation (A. 8). Thus, there would likely be nothing left of the extensive and detailed regulatory framework governing public utilities in Chapter 366, Florida Statutes, with its nearly 40 subsections that have been amended literally hundreds of times since its enactment in 1951. It is equally clear that the PSC's authority over the electricity market—which derives from Chapter 366—would be sharply curtailed or eliminated. Indeed, the PSC would likely be replaced by the "independent market monitor" that would be created by the Proposed Amendment, which would give the market monitor extremely broad powers to "ensure the competitiveness of the wholesale and retail electric markets" (A. 8). Such an upending of existing law and regulation is precisely the sort of precipitous and cataclysmic change to Florida's organic law that the single-subject rule is designed to avoid.

ARGUMENT

The Florida Constitution provides that a proposed citizen initiative to amend the constitution "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. The single-subject requirement is a "rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." *Save Our Everglades*, 636 So. 2d at 1339. It applies to the citizen-initiative method of amending the Florida Constitution because that process "does not provide the opportunity for public hearing and debate that accompanies other methods of proposing amendments." *Advisory Op. to Attorney Gen. re: Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 891 (Fla. 2000).

To comply with the single-subject requirement, "the proposed amendment must manifest a 'logical and natural oneness of purpose.'" *In re Advisory Op. to Attorney Gen. – Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994) (citation omitted). To do so, it must "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 the Attorney Gen. re: Fairness Initiative*, 880 So. 2d 630, 634 (Fla. 2004) (citation and internal alterations omitted). Thus, the "single-subject rule prevents an amendment from engaging in either of two practices: (1) logrolling, or (2) substantially altering

or performing the functions of multiple branches of state government." *Id.* at 633. If a proposed amendment does either, it must be stricken. *See Advisory Op. to Attorney Gen. Re: Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Dists.*, 926 So. 2d 1218, 1225-27, 1229 (Fla. 2006) (striking a proposed amendment from the ballot where it engaged in logrolling, even though it did not violate the "substantially altering" requirement).

The Court should strike the Ballot Initiative because it violates both prongs of the single-subject rule.

I. THE BALLOT INITIATIVE VIOLATES THE SINGLE-SUBJECT RULE

As we show below, the Ballot Initiative violates the single-subject rule for two reasons: (A) it constitutes a paradigmatic case of logrolling because it purports to promote "competition" in the electricity market even as it simultaneously *excludes* from that market an entire category of existing competitors; and (B) it substantially alters and performs the functions of multiple aspects of government because it would effectively nullify the existing legislative and administrative structure that regulates the provision of electricity in Florida, and it performs legislative and executive functions.

A. The Proposed Amendment Engages in Logrolling Because It Combines the Creation of a Competitive Market for the Sale of Electricity with the Forced Removal from that Market of an Entire Category of Electricity Providers

"Logrolling" occurs when "several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." *Save Our Everglades*, 636 So. 2d at 1339. It is prohibited so that voters are not forced "to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). But that is precisely what the Ballot Initiative does, allowing voters just one "yes" or "no" vote on two diametrically opposed subjects.

First, the Ballot Initiative claims to be an engine of competition. Indeed, the first five words of the ballot title are "Right to *Competitive* Energy Market" and the last three are "Allowing Energy *Choice*" (A. 7 (emphasis added)). The ballot summary announces that the Amendment "[g]rants customers of investor-owned utilities the *right to choose* their electricity provider" (*id*. (emphasis added)). And the policy declaration of the Proposed Amendment states that "[i]t 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*" (*id*. (emphasis added)). But at the same time, the Proposed Amendment expressly requires the legislature to implement language designed to "limit the activity of investor-owned electric utilities to the

construction, operation, and repair of electrical transmission and distribution systems" (A. 8). Therefore, the Proposed Amendment would *prohibit* IOUs—which, as shown above, provide about 79% of the electricity capacity Floridians use and have invested more than $60 billion in the electric infrastructure necessary to serve them—from generating and selling electricity. The Amendment effectively prohibits IOUs from owning the very infrastructure they have built—they could only "construct[], operat[e] or repair" transmission and distribution systems.

These two subjects—(1) a "competitive" electricity market that would (2) prohibit established market participants from competing in it—do not have a "logical and natural oneness of purpose," and cannot be viewed as "component parts or aspects of a single dominant plan or scheme." *See Advisory Op. to Attorney Gen. Re: Indep. Nonpartisan Comm'n*, 926 So. 2d at 1225 (internal quotation marks omitted). A Florida voter might like the idea of competition, with its implicit, if optimistic, promise of lower rates. But that same voter might not want to vote her current electricity provider out of business.

This Court has repeatedly rejected ballot initiatives in similar circumstances. For example, in *Save Our Everglades*, 636 So. 2d at 1341-42, the Court rejected a proposed amendment that announced its purpose as restoring the Everglades but also would have required the sugar industry to fund the entire restoration. As the Court explained, one subject—restoring 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.

Similarly, in *Advisory Opinion to the Attorney General re: Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998), this Court rejected a ballot initiative that would have prohibited laws limiting an individual's choice of health care providers, but also would have "prohibit[ed] private parties from entering into contracts that would limit health care provider choice." The Court held that, by combining those "two distinct subjects," the proposed 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." *Id.* As a result, the "proposed amendment has a prohibited logrolling effect and fails the single-subject requirement." *Id.*

This Court considered another ballot initiative that presented voters with an untenable choice in *Advisory Opinion to Attorney General re: Independent Nonpartisan Commission to Apportion Legislative & Congressional Districts*, 926 So. 2d 1218, 1225-26 (Fla. 2006). The proposed amendment created a new redistricting commission while also changing the standards for drawing legislative districts. *Id.* at 1120-21. This Court found that 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," while a "voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place." *Id.* at 1226. But a "voter would be forced to vote in the 'all or nothing' fashion that the single subject requirement safeguards against." *Id.*

Here, voters would be in precisely the same position: a vote in favor of "competition" would also be a vote in favor of eliminating an entire market segment from that competition. And it does not save the Proposed Amendment to argue that its "oneness of purpose" is "competition," which is so broad and general a subject that it could encompass almost anything. Indeed, this Court has warned that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." *Advisory Op. to Attorney Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d at 1020 (citation omitted). A similar argument was attempted in *Save our Everglades*—that cleaning up the Everglades and making the sugar industry pay for it fell under the single subject of "restoring the Everglades." *See* 636 So. 2d at 1341. But this Court rejected that argument, finding that the attempt to combine the two subjects in one ballot initiative was "precisely the sort of logrolling that the single-subject rule was designed to foreclose." *Id.*

The Proposed Amendment must be stricken because it engages in logrolling.

B. The Proposed Amendment Substantially Alters and Performs the Functions of Multiple Branches of Government by Abolishing Decades of Florida Law that Regulates the Provision of Electricity to Florida Residents and by Performing Government Functions that Are the Province of the Legislative and Executive Branches

To determine whether a ballot initiative has a "oneness of purpose," the Court also "must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution." *Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d at 892 (internal quotation marks omitted). Although a "proposal that affects several branches of government will not automatically fail," it violates the single-subject rule when it "substantially alters or performs the functions of multiple branches" of government; and when a "proposed amendment changes more than one government function, it is clearly multi-subject." *Id.* at 892, 895 (citations omitted).

As we show below, the Proposed Amendment would effect precisely the "cataclysmic change" to Florida's organic law that the single-subject rule prohibits because it would (1) wipe out decades of Florida law that regulates the provision of electricity to Florida residents and fundamentally reorder that industry, and (2) perform functions that are the province of the legislative and executive branches.

1. The Proposed Amendment would upend decades of legislation and executive rulemaking

The Proposed Amendment mandates that the "Legislature shall adopt complete and comprehensive legislation to implement this section . . . no later than

June 1, 2025" (A. 8). What that "complete and comprehensive legislation" might be, however, is largely left unaddressed. The only guidance the Proposed Amendment provides is that the legislation shall "implement language that entitles electricity customers to purchase competitively priced electricity, including but not limited to provisions" that would:

> (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.

(A. 8). That is all. But "complete and comprehensive legislation" that governs and regulates the provision of electricity in Florida already exists.

Indeed, Chapter 366, Florida Statutes creates an "extensive and detailed regulatory framework." *See GTC, Inc. v. Edgar*, 967 So. 2d 781, 789 (Fla. 2007). Chapter 366, in its present form, was created in 1951, *see Sierra Club v. Brown*, 243 So. 3d 903, 910 (Fla. 2018). It contains nearly 40 subsections—which have been amended literally hundreds of times in the decades since—governing all aspects of generating and selling electricity. Chapter 366 contains detailed statements of public

policy. *See* §§ 366.01, 366.41(2), 366.81, 366.92, Fla. Stat. It establishes procedures for changing and fixing rates and penalties, as well as the process for judicial review of rate determinations. *Id.* §§ 366.04, 366.041, 366.095, 366.10. It addresses energy efficiency, energy conservation, solar energy, fuel diversity, and compliance with federal laws related to environmental protection and clean energy and air. *Id.* §§ 366.05, 366.81, 366.825, 366.8255, 366.91. It also outlines the PSC's specific powers and responsibilities. *See id.* §§ 366.04, 366.05.

The PSC, created in 1887 and given the responsibility to oversee "Investor-Owned Electrics" in 1951, (A. 33), is the extensive regulatory authority that the Legislature vested with the power to ensure that electric public utilities throughout the state maintain affordable rates, quality service, and safety standards. *See* §§ 366.04(6), 366.05(1)(a), Fla. Stat. The PSC, which appears in nearly every subsection of Chapter 366 and is referenced more than 360 times, is mandated to, among other things, "prescribe uniform systems and classifications of accounts," § 366.04(2)(a); "prescribe a rate structure for all electric utilities," *id.* at (2)(b); "require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes," *id.* at (2)(c); approve territorial agreements among sovereigns, *id.* at (2)(d); and "resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas," *id.* at (2)(e).

Chapter 366 also grants the PSC jurisdiction "over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes," *id.* at (5); and it requires the PSC "to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities." *Id.* at (6). In the "exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, including the ability to adopt construction standards that exceed the National Electrical Safety Code, for purposes of ensuring the reliable provision of service, and service rules and regulations to be observed by each public utility." § 366.05(1)(a), Fla. Stat. Using its authority to "adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter," *id.*, the PSC has promulgated hundreds of rules. *See* Fla. Admin. Code Chs. 25-1-25-40.

The Proposed Amendment, which requires the Legislature to adopt "complete and comprehensive legislation" governing Florida's "wholesale and retail electricity markets" (A. 7-8), would necessarily upend all of the above. Indeed, the Proposed Amendment provides that, "[u]pon 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. 8 (emphasis added)). If the Legislature had to implement the Proposed Amendment, it is difficult to imagine what would be left of Chapter 366. It is equally clear that the PSC's authority would be sharply curtailed, if not eliminated. Indeed, its authority in this sphere *derives* from Chapter 366. If the Amendment voids Chapter 366, it also eliminates the PSC's authority over the electricity markets. Moreover, Chapter 366 provides that PSC jurisdiction "shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail," § 366.04(1), Fla. Stat.; *see also Fla. Power Corp. v. Seminole Cty.*, 579 So. 2d 105, 106-07 (Fla. 1991) (noting that the PSC has "broad powers in the exercise of its 'exclusive and superior' jurisdiction"). But the Proposed Amendment would create an "independent market monitor" (A. 8). Although its precise duties are not detailed, its broad duty—"to ensure the competitiveness of the wholesale and retail electricity markets" (*id*.)—would plainly intrude upon the PSC's mandate.

Those sweeping changes to Chapter 366 and the PSC's duties regarding electricity—indeed, the likely elimination of both the Chapter and the PSC—are precisely the sort of "precipitous and cataclysmic change" to "Florida's organic law" that the single-subject rule is designed to avoid. And this Court has objected to far less a disruption of existing law. *See Treating People Differently Based on Race in*

Pub. Educ., 778 So. 2d at 894 (striking a ballot initiative in part because it "alter[ed] the available remedies for an existing constitutional protection").

2. The Proposed Amendment would perform legislative and executive functions

As noted above, a proposed amendment also violates the single-subject rule where it "substantially . . . performs the functions of multiple branches of government." *Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d at 892 (citation omitted). Such is the case here, where the Proposed Amendment would perform legislative and executive functions.

Indeed, the Proposed Amendment includes a "Policy Declaration" that "[i]t 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" (A. 7). But such a policy declaration is not the province of a ballot initiative; rather, it "implements a public policy decision of statewide significance and thus performs an essentially legislative function." *See Save Our Everglades*, 636 So. 2d at 1340. Moreover, as shown above, the Proposed Amendment would create an "independent market monitor" and would give it extremely broad powers to "ensure the competitiveness of the wholesale and retail electric markets." That monitor would essentially replace the PSC in regulating electricity markets. As this Court has recognized, however, the PSC "has been and shall continue to be an arm of the legislative branch of

government," *S. All. v. Graham*, 113 So. 3d 742, 748 n.3 (Fla. 2013) (citing § 350.001, Fla. Stat. (2010)), and "some of the functions given the [PSC] are executive in nature." *Chiles v. Pub. Serv. Comm'n Nominating Council*, 573 So. 2d 829, 832 (Fla. 1991). Thus, the "independent market monitor" would likely be an arm of the Legislature that also performs executive functions and, when exercising powers that the PSC currently exercises—apparently including rulemaking authority—it would also "impinge on the powers of existing agencies." *See Save Our Everglades*, 636 So. 2d at 1340.

Thus, the Proposed Amendment also violates the single-subject rule by impermissibly performing legislative and executive functions.

II. THE PROPOSED AMENDMENT PURPORTS TO FIX A PROBLEM THAT DOES NOT EXIST BECAUSE FLORIDA'S ELECTRICITY MARKET IS HIGHLY REGULATED AND HIGHLY FUNCTIONING

As noted above, the single-subject requirement is a "rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." *Save Our Everglades*, 636 So. 2d at 1339. The cataclysmic change the Ballot Initiative would impose would also destabilize an industry that provides electricity to Floridians at rates well below the national average. Indeed, as shown above, IOUs collectively provide about 79% of the electricity capacity Floridians use (A. 10); and they have invested more than $60 billion in electric infrastructure to serve Florida residents, including low-income residents and those in remote areas (A. 187, 199,

200, 207, 337, 350, 357). The Initiative would effectively force the sale of 50 IOU power plants, 150,000 miles of transmission and distribution lines, and other critical infrastructure (A. 187). Forcing IOUs to sell these unique assets, in a new and uncertain market structure, would result in a virtual fire sale that could result in losses of *billions* of dollars (*id*.). Florida residents would ultimately shoulder those losses, which the State would have to compensate to avoid unconstitutional takings.

Moreover, although the Amendment provides that nothing in it "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," (A. 8), its prohibition on IOUs generating or selling electricity will have a profound effect on the existing rights or duties of electric cooperatives and municipally owned electric utilities—not to mention the rights and duties of IOUs (A. 187-88, 200-01). Indeed, those local entities rely on IOUs to provide them with electricity, as they have been doing for over 100 years (A. 202). Lee County Electric Cooperative, for example, one of the country's largest cooperatives, purchases 100% of its energy under a long-term contract with Florida Power & Light (A. 200). That contract could not stand under the Proposed Amendment, and entities like the Lee County Cooperative would be forced to find their electricity elsewhere—even though no one knows what that "elsewhere" might look like or what its rates might be.

The Proposed Amendment would also result in significantly lower revenues to local government, because IOUs would be paying no, or sharply reduced, property taxes and franchise fees. For example, IOUs paid $682 million in franchise fees to local governments in 2018 (A. 986). Depending on how the Legislature or local governments change the tax structure to offset revenue losses from energy deregulation, local governments could lose, based on 2018 revenue figures, (1) $18 to $197 million in property taxes; (2) $43 to $129 million in public service taxes; and (3) $1.4 to $4.2 million in sales taxes. (A. 986-87). The State government would see similar declines—(1) $14 to $279 million in gross receipt taxes; (2) $18.5 to $55 million in state taxes; and (3) an unquantifiable amount of losses from corporate income taxes (A. 987-88).

There is simply no justification for wreaking such havoc in the Florida electricity market. As shown above, Floridians already enjoy some of the lowest energy costs in the nation, well below the national average. Florida is not Texas, and the deregulation of the Texas market—accomplished not by ballot initiative but by years of legislative deliberation—shows that deregulation is no guarantee of lower prices, which is the ostensible promise of the Proposed Amendment.

CONCLUSION

For the reasons stated, this Court should strike the Proposed Amendment from the ballot because it violates article XI, section 3 of the Florida Constitution.

Dated: April 18, 2019

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the requirements of Rule 9.210(a)(2) and is written in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's e-filing system and served by electronic mail on this 18th day of April 2019, on the following:

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