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

REPLY OF FLORIDA CHAMBER OF COMMERCE AND FLORIDA ECONOMIC DEVELOPMENT COUNCIL IN SUPPORT OF INITIAL BRIEF OPPOSING THE INITIATIVE PETITION

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Concessions made by the proponents of the Ballot Initiative—Citizens for Energy Choices ("CEC") and the Energy Suppliers—confirm the Florida Chamber of Commerce ("Chamber") and the Florida Economic Development Council's ("FEDC") showing that the Initiative violates the single subject rule. The proponents admit that the only "logical and natural oneness of purpose" that they can describe is "competition," which is far too broad and general to satisfy the single-subject rule. They also concede that the amendment involves two disparate subjects: (1) to promote "competition" in the electricity market; while at the same time (2) eliminating an entire category of existing competitors (IOUs) from that market. They argue that the Court should defer to their subjective belief that the Initiative will foster greater competition, but their argument is based on a standard that applies only to *legislatively* proposed amendments, not to amendments proposed by citizen initiatives like the Ballot Initiative.

The proponents also do not dispute the Chamber and FEDC's showing that the Ballot Initiative and its implementing provisions create statewide constitutional Florida policy, thus substantially altering and performing the function of the Legislature. They argue that the Ballot Initiative gives the Legislature "substantial discretion" to implement the "complete and comprehensive legislation" required to overhaul the currently existing legislative and regulatory framework. But that

discretion is sharply limited by the Initiative's implementing provisions, which create the cataclysmic and precipitous change that violates the single subject rule.

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 in the initial brief and below, the Ballot Initiative violates the single subject rule because it (A) engages in logrolling; and (B) substantially alters and performs functions of multiple branches of government.[1]

A. The Proposed Amendment Engages in Logrolling

The only "single unifying purpose" of the Ballot Initiative that the proponents can identify is "competition." Indeed, they argue that the Amendment has the "'single unifying purpose' of giving customers of IOUs the right to choose their energy provider within a fully competitive energy market" (CEC at 22; *see also id.* at 4, 20), and "of providing the customers of investor-owned utilities with the right to choose their electricity provider in a competitive market" (ES at 41). However, as the Chamber and FEDC demonstrated, a subject such as "competition"

[1] The Chamber and FEDC's brief will be cited as "init. br. at #." "CEC at #" refers to the Citizens for Energy Choices' brief and "ES at #" refers to the Energy Suppliers' brief.

necessarily violates the single subject rule because it is so broad and general that it could encompass almost anything (*see* init. br. at 15-17).

The proponents also concede that the Ballot Initiative includes two diametrically opposed subjects. On the one hand, they argue that the Initiative is "trying to bring choice and competition to electricity markets" (ES at 43), that "[e]very element of the [Initiative] is a critical component to giving ratepayers of [IOUs] the right to choose their electricity provider in a fully competitive market" (*id.* at 4), and that the Initiative will "require[] the Legislature to enact laws that 'promote competition in the generation and retail sale of electricity'" (CEC at 27-28). On the other hand, they concede that the Ballot Initiative would *eliminate* competition, that it would "bar[] the [IOUs] themselves from participating in competitive markets" (ES at 28) and "prevent the entrenched incumbent from thwarting competition" (CEC at 25), such that "[t]he only entity from whom the customer cannot choose is the incumbent IOU" (*id.* at 32).

Thus, the Initiative encompasses at least two very disparate subjects—purportedly promoting "competition" in a restructured energy marketplace while at the same time eliminating IOUs from competing in that marketplace. As the Chamber and FEDC demonstrated, those opposing subjects would force a Florida voter into making an "all or nothing" choice—for example, if she likes the idea of competition but also likes her current electricity provider, she would have to vote

that provider out of business if she wants to cast a vote for "competition"—which is precisely what the single-subject rule is designed to prevent (*see* init. br. at 15-17).

The proponents argue that the Ballot Initiative would not force such an "all or nothing" choice because they "believe" that the Ballot Initiative is the "only method of achieving a fully competitive wholesale and retail electricity market" (CEC at 26-27; *see also id.* at 25). And they argue that the Ballot Initiative is entitled to "extremely deferential" judicial review, complaining that the Initiative's opponents "ignore[] the principle that if '*any reasonable theory*' can support an amendment's placement on the ballot, it should be upheld" (*id.* at 9, 25 (emphasis added)). But the "any reasonable theory" standard on which they rely does not apply to citizens' ballot initiatives. Indeed, their case, *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), did not involve a citizens' ballot initiative. Instead, this Court explained why "we traditionally have accorded a measure of deference to the *Legislature*." *Id.* at 14 (emphasis added). And even *that* "deference [] is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." *Id.* Thus, the proponents' "beliefs" that the Ballot Initiative will create "real competition in Florida" (CEC at 29), and that there is "no 'unpopular' issue being swept along" by the Initiative (*id*. at 23), ignores the fact that the Initiative "enfold[s] disparate subjects within the cloak of a broad generality[, which] does not satisfy the single-

subject requirement" (init. br. at 17 (quoting *In re Advisory Op. to Attorney Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994))).

The proponents cannot rely on the *Solar Energy* and *Medical Marijuana* cases to support their argument that the Initiative's "enumerated provisions have a logical and natural connection to the single plan" (CEC at 23). In the *Solar* cases, unlike here, the ballot initiatives did "not involve a popular, desirable provision combined with one that is undesirable." *Advisory Op. to Attorney Gen. re Rights of Elec. Consumers Regarding Solar Energy Choice*, 188 So. 3d 822, 828 (Fla. 2016), ("*Solar Energy II*"); *Advisory Op. to the AG re: Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So. 3d 235, 243 (Fla. 2015) ("*Solar Energy I*") (explaining that the purpose of the amendment was solely to remove legal and regulatory barriers to local solar electricity suppliers and to clarify how the amendment accomplished that purpose). Similarly, there was only one purpose in the *Medical Marijuana* cases—"whether Floridians wish to include a provision in [the] constitution permitting the medical use of marijuana"—and the provisions in the amendment that the Department of Health would oversee and license the medical use of marijuana, and that certain state-imposed penalties would be removed, "were directly connected with the amendment's purpose." *Advisory Op. to the AG Re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 477 (Fla. 2015) ("*Medical Marijuana*

II"); *Advisory Op. to the Attorney Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 796-97 (Fla. 2014) ("*Medical Marijuana I*").

B. The Proposed Amendment Substantially Alters and Performs the Functions of Multiple Branches of Government

CEC claims that the "arguments about the Amendment changing existing law are unfounded" and that it is "not accurate" to characterize the amendment as "'wiping out decades of Florida law'" (CEC at 44-45). That argument relies on two caveats in the Proposed Amendment: that it will not "invalidate this State's public policies on renewable energy, energy efficiency, and environmental protection, or limit the Legislature's ability to impose such policies on participants in competitive electricity markets;" and that it will not "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" (*id.* at 45-46).

As the Chamber and FEDC demonstrated, however, the Initiative would affect the existing legislative and regulatory framework of Florida's energy marketplace far beyond those two discrete areas (init. br. at 18-24). And the proponents *admit* that, by requiring the Legislature to "adopt complete and comprehensive legislation" to implement the Ballot Initiative's broad purpose of overhauling Florida's energy marketplace in favor of a "fully competitive energy market" (*see* CEC at 22, 32, 58), the Initiative will upend that legislative and regulatory framework.

Indeed, the proponents concede that the Ballot Initiative "touches on complex subject matter in trying to bring choice and competition to electricity markets," and is specifically designed to "transform[] the portion of Florida's retail electricity market served by [IOUs]," which has been in place for "over a century" (ES at 5, 43). They acknowledge that, "[g]iven the breadth of involvement of state and local governments in electricity regulation, it is certain that the Energy Choice Amendment will have some effects on them" (*id.* at 45-46). And they also concede that "the introduction of retail competition *will eliminate* the need for the PSC to set rates for retail electricity providers," and that "American citizens . . . *should reasonably be expected to understand that a government agency can no longer be dictating rates in a truly competitive free market*" (CEC at 5, 37 (emphasis added)). Thus, the proponents effectively concede that the "PSC's authority over the electricity market . . . would be sharply curtailed or eliminated" (init. br. at 11). And they do not dispute that the broad duty of the "independent market monitor"—which the Ballot Initiative would create "to ensure the competitiveness of the wholesale and retail electricity markets" (A. 8)—would intrude upon the PSC's mandate.

Instead, the proponents argue the Ballot Initiative is constitutional because it "leaves to the Legislature the proper task of crafting the Legislation necessary to allow for a competitive energy market" (CEC at 50), and that "the ultimate form of the FPSC and the independent market monitor is up to the Florida Legislature" (ES

at 22; *see also id.* at 44 (the "Amendment does not attempt to change the FPSC specifically, but rather leaves its future role exclusively for the Legislature to define."); CEC at 49 ("While the amendment requires the creation of an independent market monitor, it leaves that action to the legislature, along with the specific details of how such an entity would be formed, and what powers it will have.")). But the Legislature's discretion is sharply curtailed by the "limiting features in subsection (c)" (CEC at 50), which impose "sweeping changes to Chapter 366 and the PSC's duties regarding electricity" that would cause "the sort of 'precipitous and cataclysmic change' to 'Florida's organic law' that the single subject rule is designed to avoid" (init. br. at 22).

The proponents also argue that the "major impact of the Energy Choice Amendment is on the Legislature" (ES at 46), and that the "PSC, the current energy overseer, is a *legislative* entity" (CEC at 49-50 (citing *Chiles v. Pub. Serv. Comm'n Nominating Council*, 573 So. 2d 829, 832 (Fla. 1991)). But they admit that there may be "[o]ther impacts . . . depend[ing] upon the form of the legislation that the Legislature eventually implements" (ES at 46). And *Chiles* explains that "some of the functions given the [PSC] are executive in nature." 573 So. 2d at 832. Thus, like the PSC, the "independent market monitor" would function as an arm of the Legislature that also performs executive functions (*see* init. br. at 23-24).

The proponents cite several cases to support their argument that the "opponents' fears of cataclysmic or precipitous policy changes are [] unfounded because the amendment affords the implementing branch far more time to effectuate purposes than other proposals approved by the Court" (CEC at 5, 43-44 (citing *Solar Energy I*, 177 So. 3d at 244; *Medical Marijuana II*, 181 So. 3d at 475; *Medical Marijuana I*, 132 So. 3d at 793; *Advisory Op. to Attorney Gen. re: Protect People From the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 418 (Fla. 2002) ("*Protect People From Second-Hand Smoke*"); *Advisory Op. to the Attorney Gen. re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1189 (Fla. 2006) ("*Protect People From Tobacco*"))). But nothing in those opinions suggests that, in determining whether there would be cataclysmic or precipitous change, the Court considered how much time the Legislature was given to implement the initiative.

The proponents attempt to analogize the Ballot Initiative to the initiatives in several other cases (*see* CEC 40-48), but in those cases there was a clear single subject and the legislative and executive impacts were comparatively minor. *See Medical Marijuana I*, 132 So. 3d at 796-97 (noting that the Department of Health was only required to perform "regulatory oversight" that did not have a "substantial impact on legislative functions or powers," and that the Department of Health "would not be empowered . . . to make the types of primary policy decisions

that are prohibited under the doctrine of nondelegation of legislative power"); *Medical Marijuana II*, 181 So. 3d at 477-78 (same); *Protect People From Tobacco*, 926 So. 2d at 1192 (noting that the "executive branch's prime function is the enforcement of the laws" and "[a]ll this component of the amendment requires is the enforcement of these laws"); *Protect People From Second-Hand Smoke*, 814 So. 2d at 422 (finding that amendment only "respect[ed] the legislative function by making allowance for the Legislature to enact statutes to implement the constitutional provision" and did "not perform any judicial functions"). Moreover, in none of those cases would the initiatives have replaced an agency or regulatory authority. In the *Medical Marijuana* cases, the initiatives gave additional authority to the Department of Health. 132 So. 3d at 796-97; 181 So. 3d at 477-78. In *Protect People From Second-Hand Smoke*, 814 So. 2d at 416-18, and *Protect People From Tobacco*, 926 So. 2d at 1189-90, the initiatives had no direct effect on *any* agency.

II. THE PROPONENTS CONFIRM THAT THEY ARE RELYING ON THE "TEXAS MODEL," BUT TEXAS RESTRUCTURED ITS ELECTRICITY MARKET BY A PAINSTAKING LEGISLATIVE PROCESS, NOT BY BALLOT INITIATIVE

The proponents spend dozens of pages explaining how and why the Ballot Initiative is an attempt to apply Texas's "proven approach" to the "complex subject matter" of "full competition in electricity markets" (*see* ES at 3-35, 43). But they fail to acknowledge, as the Chamber and FEDC demonstrated, that the restructuring in Texas was accomplished by the legislature, not by ballot initiative (*see* init. br. at

8-10). The proponents also fail to acknowledge the complexity of the Texas effort, and how much time it took (*see id.*). And none of the other deregulation efforts touted by the proponents—Federal Energy Regulatory Commission ("FERC") regulatory reform, airline deregulation, and the divestiture of AT&T (*see* ES at 7-10)—were achieved by constitutional amendment.

The proponents' only argument for why the Initiative is the "*only means* by which a restructuring of the energy market can be achieved" (CEC at 3 (emphasis added)) is that Florida IOUs have contributed to the Chamber, "state level candidates, political parties and political committees" and have "impressive political and economic strength" (*id*. at 15). But they cannot seriously argue that Texas IOUs had no lobbyists or political power, and they necessarily admit that Texas was able to restructure its energy marketplace legislatively (ES at 13).

The proponents also criticize the opposition briefs for "impermissibly argu[ing] the merits and wisdom of this initiative" (CEC at 3). But the Energy Suppliers' brief spends 35 pages explaining the benefits of competitive markets (ES at 3-38) and how Texas achieved "the most successful competitive electricity market in America today" (*Id.* at 11). And CEC asked this Court for extra pages so that it could spend ten pages arguing that the "juggernaut of opposition" has prevented legislative energy deregulation (CEC at 3, 10-18). The proponents' own briefs (*see* ES at 3; CEC at 3) claim that such arguments are irrelevant.

Finally, the proponents both quote (CEC includes a long block quote) *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008), to support their argument that, in the early 2000s, the FERC "sought to promote competition by preventing utilities (chiefly investor-owned) from using the advantages of their remaining 'natural monopoly'" (ES at 29), and that "technology now allows for 'competitive markets in the generation component of the electric utility industry'" (CEC at 3, 13). But the quote in the Energy Suppliers brief stops just short of including two sentences—which CEC simply *omits* from its block quote without acknowledging it—showing that the FERC accomplished that objective through methods that look nothing like the Ballot Initiative. Indeed, the missing sentences show that the "FERC required in Order No. 888 that each transmission provider offer transmission service to all customers on an equal basis by filing an 'open access transmission tariff,'" which "prevent[ed] the utilities that own the grid from offering more favorable transmission terms to their own affiliates and thereby extending their monopoly power to other areas of the industry." *See Morgan Stanley*, 554 U.S. at 536 (citations omitted).

CONCLUSION

For the reasons stated here and in the Chamber and FEDC's initial brief, this Court should strike the Proposed Amendment from the ballot because it violates article XI, section 3 of the Florida Constitution.

Dated: June 21, 2019

Respectfully submitted,

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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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