In the Supreme Court of Florida

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

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 (FINANCIAL IMPACT STATEMENT)

INITIAL BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES IN OPPOSITION TO THE INITIATIVE

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IDENTITY AND INTEREST OF OPPONENTS

The Florida House of Representatives is part of the Florida Legislature, which is a sovereign branch of this State's government. *See* Art. III, § 1, Fla. Const. The House, with the Senate, possesses and exercises all policymaking authority inherent in the vesting of the State's legislative power. *See id.* The House submits this brief in opposition to the proposed initiative because of the deleterious effect that it, like numerous other policy-centric initiative proposals, would have on both the scope of the Legislature's power and the nature of the Constitution as a charter document.

STATEMENT OF THE CASE AND FACTS

On March 1, 2019, the Attorney General petitioned this Court for an advisory opinion as to whether an initiative petition, entitled "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice," complies with Article XI, section 3, of the Florida Constitution. The initiative proposes the addition of a new section within Article X of the Florida Constitution. The Attorney General's petition sets out the full text of the proposed amendment. The Attorney General also petitioned the Court for an advisory opinion as to the financial impact statement prepared by the Financial Impact Estimating Conference.

On March 28, 2019, this Court consolidated the two cases and established a briefing schedule for opponents and proponents of the initiative.

SUMMARY OF ARGUMENT

The sponsor's current effort at changing Florida's Constitution, if allowed, would be an abuse of the initiative process set out in the text of Article XI. In two ways, the initiative exceeds the limited authority reserved in Article XI, section 3. First, the original meaning of that provision does not allow for initiative proposals that would add policy to the Constitution on matters that the Legislature has the authority to adopt as statutory law. Second, if the Court is not prepared to apply original meaning analysis to this provision, the initiative still fails under a singular function component of the single-subject analysis, because the proposed amendment would exercise the legislative power and at the same time give the judicial branch regulatory authority over the Legislature. Either way, the proposal should be kept off the ballot.

The inclusion of Article XI, section 3, in the 1968 Constitution represented the first time in Florida's history that *any* initiative power had been reserved to Floridians. But the reserved power was a limited one. The framers of the 1968 Constitution at the time intended to avoid the deficiencies of the 1885 Constitution, which had become unwieldy with excessively detailed provisions regarding government functions more suited for statute books than an organic document. They crafted a document that was simpler and more flexible. They did so while aware of the constitutional language used by 20 other states to expressly reserve legislative

power to citizens, in addition to the amendatory power. Instead of granting broad initiative power in Article XI, section 3, the framers included language that expressly reserved to Floridians only the power to "propose amendments" to the Florida Constitution. They declined to include language used by many western states at the time that reserved the broader initiative power to "propose laws." This decision to include one power and not the other intimates an inherent structural limitation on what an initiative can "propose."

Within the context of the circumstances of 1968, the initiative provision included in the new constitution had to have the more narrow meaning of proposing constitutional alterations addressing either the structure of government or individual rights. The framers had access to broader initiative language, used in other states, allowing citizens to share legislative power, but they chose not to include it in Article XI, section 3. This demonstrates the limited scope of the initiative power that it reserves to Floridians. The initiative under review here goes beyond the scope of this power and instead proposes the addition of policy to the Constitution.

Buttressing this "original meaning" interpretation is the initiative provision's use of the terms "amend" and "revise." Following the adoption of the 1968 Constitution, the initiative provision's scope was quickly expanded to allow changes to "any portion or portions" of the Constitution, but the provision's text retained terms of constitutional significance. The initiative power remains limited to the

proposal of a "revision" or "amendment." These terms operate to limit the scope of what may be placed on the ballot by initiative to matters endemic to a charter document. They preclude the addition of policy to the Constitution.

This Court had consistently applied those terms as having a limiting function on how changes to the Constitution can be proposed by the Legislature. In other words, they are terms with esoteric meaning that describe two ways that a *constitution*, qua constitution, can be altered. The current initiative proposes to add what essentially is a legislative policy to the Constitution—rather than address a structural or rights feature of the current charter—so it does not propose to "revise" or "amend" the Constitution. Article XI, section 3, does not authorize the current initiative, and it should be precluded from the ballot.

The initiative under review also fails to meet the single-subject requirement. The Court's early approach to this analysis looked to whether a proposed amendment made more than a singular change to governmental functions as set out in the Constitution. And it requires that the proposal identify the portions of the Constitution to be changed. The current initiative simply purports to add a new section to Article X. It proposes to add a new policy to that article, which is the exercise of legislative power. At the same time, it proposes to transfer authority to the judicial branch to regulate and manage the legislative branch's compliance with the new policy. This initiative, then, would effect changes to Art. II, § 3, Fla. Const.

Article II, section 3's separation of powers mandate (and overturn precedent on the subject) and Article III, section 1's vesting of all legislative power in the Legislature. The initiative fails to reveal that it alters either of these sections or that it purports to amend or revise any portion of the Constitution at all. Instead, the proposed amendment would accomplish a major restructuring of government through a single section addition to Article X, which, over the last 25 years, has become a hodgepodge of essentially "constitutional statutes."

As with many of the policies previously added to Article X, the multiple alterations to government to be effected by this proposal are disguised behind a single choice on whether the electorate prefers a particular policy choice set out in the proposed amendment. The single-subject requirement of Article XI, section 3, precludes placement of the current initiative on the ballot.

ARGUMENT

Net fishing.[1] Pregnant pigs.[2] Smoking bans.[3] These, of course, are just a few of the statute-like policies added to Article X of the Florida Constitution through use of the initiative petition.

At times, justices of this Court have bemoaned the abuse the charter document of Florida's government has suffered at the hands of the popular initiative. *See Advisory Opinion to Attorney Gen.—Ltd. Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993) (observing "that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution") (McDonald, J., with three other justices, concurring); *In re Advisory Opinion to Atty. Gen. ex rel. Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 600 (Fla. 2002) (observing "that the issue of whether pregnant pigs should be singled out for special protection is simply not a subject appropriate for inclusion in our State constitution" and "is a subject more properly reserved for legislative enactment") (Pariente, J., concurring); *Advisory Opinion to the Atty. Gen.*, 642 So.

[1] Art. X, § 16, Fla. Const.

[2] Art. X, § 21, Fla. Const.

[3] Art. X, § 20, Fla. Const.

2d 724, 728 (Fla. 1994) (expressing personal belief "that constitutional amendment by initiative is being overused") (Grimes, C.J., dissenting).[4]

Still, in dicta, this Court claimed that "[t]here is no limitation on matters which can be the subject of a constitutional amendment in Florida." *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997).[5] Despite being dicta, the Court implicitly hews to the principle in its review of initiatives, on more than one occasion concluding—albeit in non-precedential advisory opinions—that it does not have the authority to decide

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[4] Commentators have done the same. *See, e.g.*, P.K. Jameson & Marsha Hoscak, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 Fla. St. U.L. Rev. 417 (1995); Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 Stetson L. Rev. 393 (1995); Ryan Maloney, *Smoking Laws, High-Speed Trains, and Fishing Nets a State Constitution Does Not Make: Florida's Desperate Need for a Statutory Citizens Initiative*, 14 U. Fla. J.L. & Pub. Pol'y 93 (2002); Daniel R. Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 Nova L. Rev. 413 (1995).

[5] It was dicta because there was no need to reach the contention that this Court was addressing. The net fishing ban already had been approved by the voters. The challenge in *Lane* came after that election. *See Lane*, 698 So. 2d at 262 (noting that the suit under review had been filed eight months after "article X, section 16, known as the 'net ban' amendment, was adopted through an initiative petition"). Prior to the election, the Court had issued an advisory opinion that determined the "initiative petition and proposed ballot summary meet the legal requirements of article XI, section 3 of the Florida Constitution, and section 101.161(1), Florida Statutes (1991)." *Marine Net Fishing*, 620 So. 2d at 999. The *Lane* Court also quoted *Smathers v. Smith* out of context for the same proposition. *Lane*, 698 So. 2d at 263. The quoted language, however, came from the Court's description of "alternatives for amendment [] set out in Article XI." Immediately following the Court's description of the alternatives, it indicated that "[t]hese alternatives are not in any way affected by our decision today." *Smathers*, 338 So. 2d 825, 827–28 (Fla. 1976).

whether a proposed amendment should be stricken based on its nature as statutory rather than constitutional. *See In re Advisory Opinion to the Atty. Gen.*, 816 So. 2d 580, 582 (Fla. 2002) (explaining that the Court "does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment"); *Advisory Opinion to Attorney Gen. ex rel. Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So. 2d 367, 368–69 (Fla. 2000) (same). This case presents the Court an opportunity to revisit the point and consider returning to the original meaning of Article XI, section 3.[6] In the historical context within which the provision came to be and from its use of special terms like "amend" and "revise," there can be gleaned an inherent structural limitation within the provision that does support a judicial examination of whether an initiative proposes a sufficiently *constitutional* change.

[6] It is "settled law holding that advisory opinions 'are not binding judicial precedents, [although] they are frequently very persuasive and usually adhered to.'" *Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (quoting *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944)) (brackets in original). This at least is true when the advisory opinion has "never been criticised [sic] or departed from since they were written." *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944). Also, "[a]s a corollary . . . advisory opinions are only persuasive as to issues they actually address, not as to issues . . . that were not addressed at all in a prior advisory opinion." *Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

I. THE ORIGINAL MEANING OF ARTICLE XI, SECTION 3'S TEXT CONTAINS AN INTERNAL STRUCTURAL LIMITATION THAT PRECLUDES INITIATIVE PROPOSALS THAT ADD POLICY TO THE CONSTITUTION. THE PROPOSED AMENDMENT BREACHES THAT LIMITATION.

Article XI, section 3, "reserve[s] to the people" the "power to propose the revision or amendment of any portion or portions of the Florida Constitution by initiative." This reservation is of a very specific power. It is the power to propose alterations to the Constitution.

An analysis of why the current proposal violates Article XI, section 3, should include consideration of the initiative provision's original meaning when it was added to the 1968 Constitution and when it was amended just a few years later. That the initiative power was limited to constitutional amendment proposals and did not include legislative power was a conscious and deliberate choice at the time. Because Floridians' reserved initiative power does not include policymaking power—that remains entirely vested in the Legislature—an initiative proposal exceeds the authority reserved in Article XI, section 3, if it would add a policy to the Constitution in an area where the Legislature already has the power to act. Indeed, to allow such a proposal is to alter the current structure of Florida's constitutional government by transforming it into a hybrid of representative and direct democracy. For this reason alone, the proposal should be precluded from the ballot.

A. Amendatory Power and Legislative Power Are Distinct, and This Distinction Mirrors that Between Constitutional Provisions and Statutory Provisions.

The legislative power differs from the power to propose constitutional amendments. *See Collier v. Gray*, 157 So. 40, 44 (Fla. 1934) (explaining that proposals of constitutional amendments "are not the exercise of an ordinary legislative function"). This is so because a constitution and a statute are different. Each has a distinct function and nature. This distinction drives how each can be changed, and an understanding of this distinction informs the inherent limitation on the amendatory power found in Article XI.

Statutory law "provides a set of legal rules that are specific, *easily amended*, and adaptable to the political, economic, and social changes of our society." *Marine Net Fishing*, 620 So. 2d at 1000 (McDonald, J., with three other justices, concurring) (emphasis supplied). This type of law "is intended to be easily modified whenever the needs of the state and its people change." P.K. Jameson & Marsha Hoscak, 23 Fla. St. U.L. Rev. at 442.

By contrast, "[c]onstitutions are generally considered timeless documents that should be drafted in such a way as to need very little modification. The Constitution is a document that should transcend changes in the political scene, hot issues, and capricious motives." P.K. Jameson & Marsha Hoscak, 23 Fla. St. U.L. Rev. at 442 (internal quotation, footnote, and citation omitted). "The legal principles in the state

constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values." *Marine Net Fishing*, 620 So. 2d at 1000 (McDonald, J., with three other justices, concurring). As this Court observed, the "proposal of amendments to the Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation." *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912).

Inherently, then, constitutional provisions "are *presumed* to include only organic features of permanent character and sufficient significance to warrant placement in the basic law." P.K. Jameson & Marsha Hoscak, 23 Fla. St. U.L. Rev. at 420 n.17 (quoting Albert L. Sturm, Thirty Years of State Constitution-Making: 1938–1968 6 (1970)) (emphasis supplied). It is generally understood that "state constitutions should be brief, limited to fundamentals, and avoid all legislative matters." P.K. Jameson & Marsha Hoscak, 23 Fla. St. U.L. Rev. at 442 (footnotes and citations omitted). This is so because "[t]reating a subject in a state constitution, as opposed to codifying it in statutory law, places the matter beyond change by normal lawmaking processes and at the highest level of the legal authority of the state." *Id.* (footnotes and citations omitted).

This distinction in function is significant to a consideration of what may be proposed under Article XI as a constitutional amendment to Florida's voters. The Florida Constitution, as a structural document, reflects Floridians' choices for the set-up of their government and the allocations of their sovereign power. Section 3's express references to amending and revising the constitution, and its omission of typical references to the exercise of legislative power, anticipates the distinction between constitutions and statutory law. Just as a constitution differs in nature from a statute, the power to propose constitutional amendments differs from the legislative power, which is the power to propose (and adopt) statutory law. Article XI reserves to the initiative only the power propose constitutional amendments. This is the power to propose alterations to a charter as an inherently organic document, such as reallocations of power, restructuring of aspects of government, and creation of individual rights. The provision does not reserve any legislative power to the initiative.

Instead, Article I, section 3, of the Florida Constitution vests all legislative power, without reservation, in the Legislature. This means that "the Legislature may exercise *any* lawmaking power that is not forbidden by the organic law of the land." *Stone v. State*, 71 So. 634, 635 (Fla. 1916) (emphasis supplied). Under the Florida Constitution, then, it must be the Legislature, and only the Legislature, that has the "power to enact laws or to declare what the law shall be." *Chiles v. Children A, B,*

C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991). The Florida Constitution requires that "fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978). "*[O]nly the legislature*, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida." *Chiles*, 589 So. 2d at 267.

This vesting is in full and includes all inherent policymaking power on all matters, not otherwise precluded by the federal constitution, without the need for any enumeration of specific powers. *See State v. Bd. of Pub. Instruction for Dade County*, 170 So. 602, 606 (Fla. 1936) ("The power of the Legislature is inherent, though it may be limited by the Constitution."); *Amos v. Mathews*, 126 So. 308, 315 (Fla. 1930) (noting that Constitution "is a limitation voluntarily imposed by the people themselves upon their inherent lawmaking power, exercised under our Constitution through the Legislature"); *see also Stone*, 71 So. at 635 (noting that Florida's constitution "does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the Legislature"); *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 742 (Fla. 1961) (noting that the Florida Constitution is a limitation on power as distinguished from a specific delegation of powers, "particularly with regard to legislative power") (internal quotation omitted);

id. at 741–41 (same); *Bd. of Pub. Instruction for Sumter County for & on Behalf of Special Tax Sch. Dist. No. 12 v. Wright*, 76 So. 2d 863, 864 (Fla. 1955).

That is to say, while the sovereign power originates with the people, the formal act of ordaining a constitution constitutes a transfer of that power to the organs of government exactly as specified in the charter. The Constitution also is explicit that this legislative authority, fully vested in the Legislature, cannot be reallocated without an express change to the text of the charter. *See* Art. II, § 3, Fla. Const. To make this otherwise, Article II, section 3, would need to be altered to restructure the Constitution's strict separation of powers mandate. As this Court held, "until the provisions of Article II, Section 3 of the Florida Constitution are *altered by the people* we deem the doctrine of nondelegation of legislative power to be viable in this State." *Askew*, 372 So. 2d at 925 (emphasis supplied).

It bears recounting that the legitimacy of lawmaking stems from the citizenry's choice for how to be governed, as reflected in the constitution they choose to adopt. As this Court observed, quoting John Locke:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a *delegated power from the people*, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, *which is by constituting the legislative and appointing in whose hands that shall be*. And when the people have said, we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are

> enacted by those whom they have chosen and authorized to make laws for them.

Chiles, 589 So. 2d at 264 (quoting John Locke, TWO TREATISES OF GOVERNMENT 193 (Thomas I. Cook ed., Hafner Publishing Co. 1947)) (emphasis supplied).

When Floridians ordained their constitution, they specified how they assigned and allocated various aspects of that power. A new transfer of legislative power requires an equally formal and express act by the people, in accordance with the process that they include in the document. The legislative power, once vested by Floridians in the hands of their elected representatives, cannot be exercised by the people or another branch without Floridians expressly choosing to reallocate those powers by changing the charter.

As explained in the next section, in 1968, Floridians bucked the trend among state constitutions and eschewed the opportunity to reserve any legislative power to be exercised through the initiative. Instead, they reserved only some power, on a limited basis, to propose changes to the structure of government as reflected in their constitution. That legislative power cannot now simply be exercised through the use of the initiative under Article XI, section 3, without amending the section first, which would run contrary to the decision the framers made when they included the provision in the new constitution.

B. The Limited Nature of the New Initiative Power Can Be Gleaned from the Framers' Rejection of Direct Democracy When Article XI, Section 3, Was Added to the 1968 Constitution.

"Our much-amended 1885 Constitution was fully revised in 1968 principally because a hodgepodge of disharmonious provisions which had been added over the years had made governance complex, expensive and uncertain." *Smathers v. Smith*, 338 So. 2d 825, 829 n.14 (Fla. 1976) The 1885 Constitution had 19 articles and "contained curiously specific provisions better suited to statutes or even rules." Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What It Has Become*, 18 Fla. Coastal L. Rev. 5, 8 (2016). Moreover, the 1885 Constitution allowed only the Legislature to propose amendments for popular adoption, and only one section at a time. *Id.* at 12. It "was an embarrassment for a swiftly modernizing and urbanizing state." *Id.* at 8–9. "The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the State a workable, accordant, homogenous and up-to-date document." *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970).

When the legislatively created constitution revision commission convened in 1966 (the "1966 CRC"), commissioners and invited presenters gave voice to the concern over the unwieldiness of the 1885 Constitution. Speaking before the 1966

CRC convention, Judge Thomas H. Barkdull, Jr., of the Third District Court of Appeal, observed that unlike the federal constitution, which contained about 5,600 words and had been amended 23 times in over 180 years, the 1885 Constitution contained 53,000 words and had been amended 133 times in 80 years.[7] Former Justice and Stetson College of Law Dean Harold L. Sebring made a similar observation.[8]

Before the commissioners, Judge Barkdull contrasted the constitutions of the original 13 colonies with those of the subsequently admitted 37 states. The early constitutions were simpler and general, he explained, establishing individual rights and basic structures of government without the need for detailed enumerations of power. Not so with the later constitutions, which had "become veritable codes of law dealing with every aspect of administrative detail."[9] He called them "constitutional statute books."[10]

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[7] Transcript at 21, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

[8] Transcript at 35, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

[9] Transcript at 33–35, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

[10] Transcript at 35, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

Judge Barkdull warned of the dangers that flow from adding legislation to a state constitution. As he explained, when "legislation is permitted to infiltrate a constitution, it shackles the hands of the men and women elected by the people to exercise public authority. The longer a constitution, the more quickly it fails to meet the requirements of a society that is never static. The more detail, the more it needs to be amended."[11] He then continued with a reminder about what a state constitution should do, with words that surely rang with as much resonance with the commissioners in 1966 as it does now in the context of initiative proposals like the one now before the Court:

> There should be no place in [a constitution] for legal codes or the appeasement of temporary interest. It should set down fundamental and enduring first principles. It must describe the basic framework of government, assign the institutions their powers, spell out the fundamental rights of man, and make provisions for peaceful change. But, it should do all of these things in general, rather than overly detailed language, and should attempt no more.[12]

The 1966 CRC also heard from Dr. Albert Sturm, the director of Florida State University's Institute of Governmental Research, who spoke to the CRC convention

[11] Transcript at 21, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

[12] Transcript at 23, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

about modern trends in state constitutional revision.[13] He noted that the 1885 Constitution was at least twice the length of the average state constitution, contained "many obsolete provisions" and "excessively detailed provisions on governmental functions."[14] Like Judge Barkdull, Dr. Sturm recommended in favor of "[g]eneral rather than detailed substantive provisions on governmental functions" and a move "toward simplification and flexibility."[15] He, again like Judge Barkdull, warned against "the manacled state that puts a straightjacket and handcuffs upon government."[16]

There presumably was a general understanding among the 1966 CRC commissioners that an effective state constitution should be limited to two functions—restrain the State through the expression of basic and fundamental rights,

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[13] Minutes at 6, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

[14] Transcript at 87–88, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6; *see also* Remarks of Senator Johnson, on behalf of the League of Women Voters, Transcript at 72, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6 (commenting that the new constitution "should be a simple, understandable and integrated statement of basic law, free from obsolete and statutory detail").

[15] Transcript at 86, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

[16] Transcript at 86, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

and prescribe the structure of government, its officers, and the scope of their powers.[17] As to the second function, as Commissioner Earle observed, a state constitution simply should "formulate, in effect, the skeleton of government, which skeleton, of necessity, largely determines both the form and effectiveness of government."[18] The commissioners set out to frame a new constitution, and to consider inclusion of a new initiative provision, with these ideas in mind.

C. The Framers of the 1968 Constitution Knew About State Constitutional Experiments with Direct Democracy. They Rejected It.

As the framers of the 1968 Constitution considered whether to add an initiative provision to the new charter, they knew about the states that incorporated aspects of direct democracy into their constitutions. The idea of "direct democracy" differs from the general idea that all sovereign power originates with the people. *Cf.* Art. I, § 1, Fla. Const. ("All political power is inherent in the people."). There would have been no doubt that because the people are politically sovereign, they would need to approve the new constitution. That a constitution needs to be adopted or altered or rewritten by vote of the citizens does not equate with direct democracy.

[17] *See, e.g.*, Remarks of Commissioner Richard Earle, Transcript at 25–26, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

[18] Transcript at 29, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6.

Direct democracy involves the use of the initiative power. It is a unique power because it can be exercised only by the people.

It is a power of the *people to act* in the exercise of some other sovereign power. But it is intrinsic to any constitution, because it is a power to be allocated or reserved along with other sovereign powers. Consideration of whether to include the initiative power in a constitution, and if so, to what extent, involves a choice of how much of this power to directly act, rather than through officers, remain with the people once they formally adopt a new charter. *Cf.* Preamble, Fla. Const. ("We, the people of the State of Florida . . . ordain and establish this constitution.").

"Direct democracy through initiatives differs significantly from representative democracy." P.K. Jameson & Marsha Hoscak, 23 Fla. St. U.L. Rev. at 421 (footnote and citation omitted). "America's form of representative democracy was developed to balance minority and civil rights against the dangers of popular rule." *Id.* (footnote and citation omitted). As James Madison explained in Federalist Number 10, an important effect of representative government (as opposed to direct democracy) is

> to refine and enlarge the public views, *by passing them through the medium of a chosen body of citizens*, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that *the public voice, pronounced by the representatives of the people, will be*

> *more consonant to the public good* than if pronounced by the people themselves, convened for the purpose.

ALEXANDER HAMILTON ET AL., THE FEDERALIST 133, 356 (Benjamin F. Wright ed., Barnes & Noble Books 2004) (1961) (emphasis supplied).

A government form that allows the initiative power differs from a pure representative democracy. The extent to which it differs will be driven by how much initiative power is reserved to the voters. This is so because initiatives "reserve direct lawmaking power to the voters." P.K. Jameson & Marsha Hoscak, 23 Fla. St. U.L. Rev. at 422. Depending on how the organic document is worded, the initiative can provide a method for amending the constitution, or for enacting statutes, or for doing both. *See id.* (footnote and citation omitted).

In any event, this "[d]irect lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted." *Ariz. State Legis. v. Ariz. Indep. Redistricting Com'n*, 135 S. Ct. 2652, 2679 (2015) (internal quotation and citation omitted). "[I]t was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States." *Arizona State Legislature*, 135 S. Ct. at 2659–2660 (citing Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11 (1997)).

In 1898, South Dakota became the first state to experiment with direct democracy in its constitution. It did so by "affirming in its Constitution the people's power directly to control the making of all ordinary laws by initiative and referendum." *Arizona State Legislature*, 135 S. Ct. at 2660 (internal quotation, brackets, and citation omitted). Oregon became the first state to adopt the initiative both to enact ordinary laws and to amend the state's constitution. *Id.* (citing J. Dinan, The American State Constitutional Tradition 62 (2006)). By 1920, 19 States had explicit constitutional reservations to the people of the power to initiate ordinary lawmaking, and 13 states the people the power to initiate amendments to their state constitutions. *See id.* (citations omitted).

The 1966 CRC and the 1968 Legislature considered the addition of a popular initiative power for proposing constitutional amendments with full awareness of other states' adoption of direct democracy through express inclusion of an expansive initiative power in the state constitutions. Before the 1966 commission considered this new initiative power, it directed that a survey be conducted. *See* Minutes at 14–15, Suffrage and Elections Committee, Feb. 3, 1966, Fla. St. Archives, Record Group 720, Box 8, Folder 10. One article reviewed by the committee detailed how other state constitutions reserved the initiative power to citizens, and to what extent. *See* Letter to Chairman Smith Enclosing "Initiative and Referendum in Wisconsin and Other States," March 7, 1966, Fla. St. Archives, Record Group 720, Box 8,

Folder 2. By the time the 1966 commission settled on language that would give Floridians the power to initiate constitutional amendments, it had had access to constitutional language that would give citizens the power to directly make policy through the initiative power as well.

For example, the Arizona Constitution uses the following language reserving as part of the popular initiative the power to propose both constitutional amendments *and* statutory law:

> The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, *but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls*, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

Art. IV, Pt. 1 § 1, Ariz. Const. Under this language, the electorate is "a *coordinate source of legislation* with the constituted legislative bodies." *Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Sup'rs*, 501 P.2d 391, 393 (Ariz. 1972) (emphasis supplied). Because both its legislature and its citizens have the power to propose statutes, it is fair to say that both "share lawmaking power under Arizona's system of government." *Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152, 1155 (2013) (internal quotation omitted).

Many of the other western states used similar constitutional language to adopt some form of direct democracy by which voters shared legislative power with their legislatures rather than fully vesting those legislatures with the power. *See, e.g.*, Art. 5, § 1, Ark. Const. (along with vesting legislative power in legislature, similar express reservation by the people of power "to propose laws and amendments to the constitution" and "to approve or reject" any act of legislature); Art. 5, § 1, Colo. Const. (same); Art. III, § 1, Idaho Const. (same); Art. 2, § 9, Mich. Const. (same); Art. 3, § 49, Mo. Const. (same); Art. 3, §§ 4–5 and Art. 5, § 1, Mont. Const. (same); Art. III, § 1, Neb. Const. (same); Art. III, § 1, N.D. Const. (same); Art. II, § 1, Ohio Const. (same); Art. V, § 1, Okla. Const. (same); Art. IV, § 1, Ore. Const. (same); Art. III, § 1, S.D. Const. (same); Art. 6, § 1, Utah Const. (vesting legislative power in both Legislature and "the people of the State of Utah"); Art. 2, § 1, Wash. Const. (vesting legislative power in legislature "but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls" and "also reserve power" to submit legislative acts to referendum)

It was against this backdrop that the 1966 commission considered and recommended the core language that became Article XI, section 3, of the new Constitution. The 1966 CRC history discussed above shows that the framers were concerned about the structure of the new constitution. They understood the failures of the 1885 Constitution. As the framers considered whether to allow Floridians, for

the first time in Florida's history, to have a direct path to proposing changes to their charter document, the framers certainly understood that reserving legislative authority to Floridians also was an option. *Cf.* Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What It Has Become*, 18 Fla. Coastal L. Rev. 5, 15 & nn.84–90 (2016); Index, Mar. 25, 1966, Fla. St. Archives, Series 720, Box 1, Folder 7.

The framers ultimately agreed on language that would give Floridians an initiative power that was much more limited than the one used in the direct democracy states out west. To be clear, this new initiative power was not a power to alter the Constitution. As noted above, that power Floridians already had, albeit in a different form. *See* Art. XVII, Fla. Const. (1885 rev.) (requiring that any legislatively proposed constitutional amendments or revisions be submitted to the electors for approval). This new power was one to *propose* a change to the Constitution via petition and to have that change considered by the electorate via the same referendum process as changes proposed by the Legislature and the constitution revision commission. *See* Art. XI, § 5, Fla. Const.

Initially, the reservation was limited to amending a single section of the Florida Constitution via the initiative process. *See* Art. XI, § 3, Fla. Const. (1968). Just a few years later, they expanded their initiative power "to propose the revision or amendment of any portion or portions" of the Constitution. *See* H.J.R. 2835,

adopted 1972. That expansion of the initiative power came with a limitation. "Any such revision or amendment" must "embrace but one subject and matter directly connected therewith." *Id.*

The point here is that when the framers of the 1968 Constitution wrote the initiative language for the new Article XI, they did not include the broader reservation of legislative power. The provision included the power to initiate changes to a *constitution*—using at first just the term "amend," with "revise" being added shortly thereafter—but at all times utilizing language consistent with a power related only to amending a constitution, and not to enacting legislation. At the same time that the 1968 revision included this limited initiative power reservation, the revision gave to the Legislature all legislative power, without any reservation at all. In 1968, then, Floridians chose to leave the structure of their state government with powers clearly separated between three branches and to entrust their representatives with the full power to decide policy for the State and to adjust those policies as needed commensurate with changes in society.

D. To Give Article XI, Section 3 Its Original Meaning, the Court Should Apply the Internal Structure Limitation that It Already Applies to Legislatively Proposed Amendments.

When the Court reviews an amendment proposed by initiative for whether it complies with Article XI, section 3, it should bring to the analysis the same inherent structural concerns that the Court expressed when it reviewed legislative proposals

for amendment. "While citizens have the right to amend the constitution by the methods provided, the citizens have recognized that the power to do so should not be unbridled." *Advisory Opinion to Atty. Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 896 (Fla. 2000). To give the text's limitation its full meaning, and to accomplish the purpose of the 1968 revision when it was considered by the framers, the terms "amend" and "revise" should be given meaning just as much as "but one subject" is given. The first question, in fact, should be whether the initiative proposes to "amend" or "revise" in a constitutional sense at all.

This Court, in turn, has treated the Florida Constitution has having an inherent structural limitation on the placement of changes to the charter. This approach is not new. It could be seen in the Court's application, shortly after the 1968 Constitution was in place,[19] of an "inherent germanity" requirement to legislative proposals for amendment, even though there was no express single-subject requirement in Article XI, section 1. As the Court explained, "[i]nherent *in the amendatory process for the Constitution*, by necessary implication, is the same notion of 'germaneness' which

[19] Indeed, the Court's early cases, just after the adoption of the 1968 Constitution, is a good place to look for the provision's meaning. As Justice Scalia, for the majority in *Heller* noted, a court fairly can "determine the public understanding of a legal text in the period after its enactment or ratification" by looking at contemporaneous sources and examining how the text "was interpreted immediately after its ratification." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). This type of inquiry "is a critical tool of constitutional interpretation." *Id.*

controls the exercise of amendatory powers for general legislation." *Smathers*, 338 So. 2d at 830 (emphasis supplied). Amending the Constitution "demands that the functional unity of sections and articles be preserved to the fullest extent possible, so that, first, ambiguities and contradictions be avoided and, second, cumulative confusion be prevented." *Smathers*, 338 So. 2d at 829. The "people of Florida have recognized the dangers of mis-amendments and expressed their intention to avoid their proliferation." *Id.* The 1968 revision to the Florida Constitution sought to fix the "much-amended 1885 Constitution," which had become "a hodgepodge of disharmonious provisions" added to it over the years. *Id.* That hodgepodge "made governance complex, expensive and uncertain." *Id.*

This Court expressed this inherent structural limitation on amendments in *Smathers*, as follows:

> No persuasive reason has been suggested for permitting wholly random placements of constitutional provisions by legislative amendment. It is not neatness with which the subject of germaneness is concerned; it is respect for the people's declaration that our organic law shall be free from the confusion and uncertainty in operation which inevitably attend constitutional inconsistencies and ambiguities.

Smathers, 338 So. 2d at 830. The Court explained that the "internal germanity of a proposed article revision stands on no different ground than an article revision which adds irrelevant material to an existing provision." *Id.* at 831 n.21.

This shows that within eight years of the 1968 Constitution's adoption, this Court considered Article XI to have inherent limitations on how constitutional amendments could be framed and put before the electorate, with the goal being "to accomplish harmony in language and purpose between articles and to produce as nearly as possible a document free of doubts and inconsistencies." *Smathers*, 338 So. 2d at 830 (internal quotation omitted). "If essential mandatory provisions of the organic law are ignored in amending the Constitution of the state, and vital elements of a valid amendment are omitted, it violates the right of all the people of the state to government regulated by law." *Id.* at 831.

This same inherently structural limitation should apply to initiative proposals. The original version of Article XI, section 3 stated "the power reserved to the people to amend any section of the Constitution, include[d] only the power to amend any section in such a manner that such amendment if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments to the Constitution to accomplish its purpose." *Adams v. Gunter*, 238 So. 2d 824, 831 (Fla. 1970). When the Legislature proposed expanding the initiative authority, and Floridians approved it, the new initiative language still did not include the sharing of legislative power. This change did not expand the power to include legislative power. It changed "any section" to the "portion or portions" single-subject language currently in the Constitution. But

it retained its structural language, allowing singularly functional changes rather than locational changes. *See Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984) (reasoning that "the one-subject limitation of 'any portion or portions' of the constitution was selected to place a functional as opposed to a locational restraint on the range of authorized amendments").

Still, the Court made the distinction between the purpose of a "section amendment," which is "to alter, modify or change the substance of a single section of the Constitution containing particularized statements of organic law," and that of an "article revision," which is "to restructure an entire class of governmental powers or rights, such as legislative powers, taxation powers, or individual rights." *Smathers*, 338 So. 2d at 829. Even though these distinctions are no longer as important now that section 3 has been expanded, it remains that this Court saw in Article XI a "substantively particularized role" for the amendatory powers set out in each section, with each role having its own internal functional limitation. *Cf. id.* ("When the subject matter being proposed for change goes beyond or is unrelated to the context of the section it purports to change, the proposal cannot be a section amendment. It may be an article revision or a revision of the whole document, but it is not a 'section' amendment.").

The terms "amend" and "revise," each of which has specific meaning related to altering a constitution (as opposed to a statute), carry with them meaning of

constitutional import. The Court has read meaning into the words "amend" and "revise" such that the people, in adopting the new constitution, intended there to be a "differentiation . . . not merely between two words" but "between two procedures and between their respective fields of application." *Adams v. Gunter*, 238 So. 2d 824, 831 (Fla. 1970) (quoting *McFadden v. Jordan*, 196 P.2d 787, 797–98 (Cal. 1948)).

It remains, then, that an amendment or revision proposed by initiative must be of a constitutional nature—alter the structure of government or add or subtract a right. This is not to suggest that Floridians do not have the power to propose altering the Constitution to give themselves policymaking power, in whole or in part. As this Court noted, there is no limitation on how Floridians may change their constitution.[20] Within this construct, because Floridians do not have the legislative power that they can exercise through initiative, an initiative that proposes to add a new policy to the Constitution must be treated as a proposal to make a functional change to the Constitution to accomplish this adoption of that new policy. In other words, the initiative-proposed addition of a policy must be preceded by an initiative-

[20] This statement relied on a prior one from the Court, uttered when there was no initiative power. In turn, the reference must have been to the idea that there was no substantive limitation on the type of alteration to the government that could be proposed to the electorate in a referendum election. But there remains a limit on how much of a limitation could be proposed through the initiative process. This Court holds that there can be but one functional change at a time.

proposed constitutional alteration that gives Floridians the power to engage in policymaking on that particular subject.

This approach gives the electorate fair notice of what the proposed amendment really does—fundamentally alters the structure of state government in order to take policymaking authority away from the Legislature so that it can be exercised by Floridians directly. This approach also preserves the Constitution as a rights-and-structure document and stops Article X from becoming a catalog of constitutional statutes. A proposed amendment cannot simply identify a place in Article X. Article X originally was a repository of truly miscellaneous structural items. *See* Art. X, Fla. Const. (1968). Since 1994, it has become a resting place for a proliferation of one-off initiative-proposed policies. *See, e.g.*, Art. X, §§ 16, 17, 20, 21, 23, 24, 25, 26, 27, 28, 29, Fla. Const. (2018). As this continues to occur, the requirement that initiative proposals identify the portions of the Constitution that they alter will become meaningless.

Where, as here, a proposed amendment purports to enact a policy that the Legislature has the authority to enact, it constitutes an exercise of legislative authority that was not reserved in Article XI, section 3, when it was included in the 1968 Constitution. *Cf.* Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 Stetson L. Rev. 393, 409–10 (1995) (proposing, given constitution's role as "defining and power-limiting document,"

rule that limits initiative amendments to those that accomplish purpose not already with Legislature's power "to accomplish by law"); *see Coleman v. State ex rel. Race*, 159 So. 504, 507 (Fla. 1935) (suggesting that electorate had power to establish law by constitutional amendment that "the Legislature is inhibited to enact by other provisions of the Constitution").

Given that the framers of the 1968 Constitution consciously omitted lawmaking power from the popular initiative,[21] the Court should apply the inherent limitation of Article XI, section 3, and preclude the current initiative from the ballot. The Court can do so by considering its original meaning and purpose within the context of the Constitution as a whole. Construction of any constitutional provision requires consideration of "the document as a whole in order to effect its overall purpose." *Smathers*, 338 So. 2d at 827. As this Court has said, the "purpose of the people in adopting the Constitution should be deduced from the Constitution as an entirety." *Amos*, 126 So. at 316. "Therefore, in construing and applying provisions of the Constitution, such provisions should be considered, not separately, but in co-ordination with all other provisions." *Id.*

[21] Indeed, "Florida is one of only three states that allow constitutional initiatives without allowing statutory initiatives." P.K. Jameson & Marsha Hoscak, 23 Fla. St. U.L. Rev. at 440 (footnote and citation omitted).

II. THE PROPOSAL FAILS THE SINGLE-SUBJECT TEST BECAUSE IT EXERCISES LEGISLATIVE POWER AND ALTERS THE SEPARATION OF POWERS.

The current initiative fails to propose a true amendment or revision in the constitutional sense, and it should not be on the ballot for this reason. But the initiative also is not limited, functionally, to a single subject. It fails to comply with Article XI, section 3, for this reason as well. The proposal performs and alters multiple functions. It exercises legislative authority by creating a new statewide policy on electricity markets. It also mandates how the policy must be implemented and automatically voids a range of statutes without any judicial involvement. It also alters the constitutionally mandated separation of powers by giving the judiciary the power to manage the Legislature in how it legislates.

Unlike any other amendatory power in Article XI, the initiative power is subject to a significant single-subject limitation. Any initiative-proposed revision or amendment (with one exception not relevant here) must "embrace but one subject and matter directly connected therewith." This requirement "is a rule of restraint." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). The limitation "allow[s] the citizens, by initiative petition, to propose and vote on *singular* changes in the functions of our governmental *structure*." *Id.* (emphasis supplied). This Court "require[s] strict compliance" with the single-subject rule "because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature." *Id.* at 989. "[W]here a proposed

amendment changes more than one government function, it is clearly multi-subject." *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984).

The requirement "mandates 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." *Fine*, 448 So. 2d at 988. To this end, an initiative proposal must "identify the articles or sections of the constitution substantially affected" so that the electorate can "comprehend the contemplated changes in the constitution" and so this Court can avoid having to "interpret[] the initiative proposal to determine what sections and articles are substantially affected by the proposal." *Id.* This Court explained that "the single-subject restraint on constitutional change by initiative proposals is intended to direct the electorate's attention to one change" affecting "only one subject" and directly related matters. *Fine*, 448 So. 2d at 989. "[E]nfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." *Evans*, 457 So. 2d at 1353.

In *Fine* this Court held that the initiative violated the single-subject requirement because the proposed amendment would have affected three separate functions of government. *See id.* at 986. According to the Court, the proposal affected how the state and local government could tax; restricted "all government

user-fee operations"; and affected "the funding of capital improvements through revenue bonds." *Id.*

Here, the proposed amendment would affect several functions of government and effectively alter several constitutional articles. First, the proposed amendment adds a policy to the Constitution. This is the exercise of legislative power through the initiative process, and it is a change to what otherwise is the plenary policymaking power left to the Legislature in Article III. It also mandates "complete and comprehensive legislation" from the Legislature that does at least the following: a) limits activities of investor-owned utilities; b) limits market power in order to promote competition; c) protects consumers; d) prohibits monopolies and franchises; and e) creates a market monitor. It also repeals *all* laws that conflict with the proposed amendment upon the Legislature's enactment of *any* law pursuant to the amendment. Finally, it alters the separation of powers by giving the judiciary the power to monitor and manage the exercise of legislative power and to compel the Legislature to adopt laws that the judiciary determines are sufficient to accomplish the purposes of the amendment.

This Court looks "to the functional effect" of the proposal "to determine whether it satisfies the single subject requirement." *Id.* at 1354. A proposed amendment can violate the single subject restriction by affecting multiple legislative functions, like in *Fine*, or it could do so by affecting "the function of the legislative

and the judicial branches of government." *Id.*. "But where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation the people have incorporated into article XI, section 3, Florida Constitution." *Id.*[22]

The current proposal's hidden effects on multiple parts of the Constitution stands in stark contrast to the initiative amendment that now appears at Article X, section 30, of the Florida Constitution. That provision does not adopt any policy for the State, and it does not exercise any legislative authority. Rather, it expressly reserves to Floridians "the exclusive right to decide whether to authorize casino gambling in the State of Florida." Art. X, § 30, Fla. Const. It "requires a vote by citizens' initiative pursuant to Article XI, section 3, in order for casino gambling to

[22] This should remain the operative standard. However, from time to time over the years, the Court, without explanation or consistency, has lifted language it has used to explain the purpose behind the standard and used it to narrow the standard. For instance, this Court in one case stated that "the rationale of the single-subject restriction in general is to guard against 'precipitous' or 'cataclysmic' changes to the government structure." *Advisory Opinion to Attorney Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo*, 959 So. 2d 210, 213 (Fla. 2007). Before and after that decision, however, the Court has approved initiatives because the structural changes to governmental functions—which presumably would have run afoul of the Court's earlier standard—were not grave enough to cause change that was "precipitous" or "cataclysmic" enough. *See, e.g., Advisory Opinion to Atty. Gen. re Rights of Elec. Consumers regarding Solar Energy Choice*, 188 So. 3d 822, 830 (Fla. 2016); *In re Advisory Opinion to the Atty. Gen.*, 816 So. 2d 580, 583 (Fla. 2002). This altered standard risks becoming subjective. The earlier, objective standard should prevail and apply here.

be authorized under Florida law." *Id.* And it specifies that it has an effect on Article XI "by making citizens' initiatives the exclusive method of authorizing casing gambling." *Id.*

At bottom, of course, Article XI insists that the people being asked to approve a proposed change to their Constitution "be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976). The current proposal impedes this comprehension because it does not specify which section or article it "amends" or "revises." Instead, it adds a new section to Article X.

The current proposal's approach of dropping a massive new policy into Article X without specification about its effect on the current governmental structure would leave to the courts to decide how much power the Legislature still had to regulate electricity markets, how much power the electorate had exercised to place a new policy in the Constitution, and how this reallocation power would be managed. The principle that "the most recent amendment necessarily supersedes any existing provisions which are in conflict" will not save a proposal that does not sufficiently identify the constitutional provisions that it purports to change. *Id.* at 989. The intent behind Article XI, section 3, was not to place this Court "in the position of

redrafting substantial portions of the constitution by judicial construction," which "would be a dangerous precedent" indeed. *Fine*, 448 So. 2d at 989.

As this Court once observed, "if an article revision or a rewrite of the whole Constitution could be characterized, equated with or disguised as a mere section amendment, then the people's deliberate choice of terms is wholly without significance." *Smathers*, 338 So. 2d at 828. In other words, to give the original meaning to the use of the terms "revise" and "amend" as esoteric constitutional terms—Floridians have the power to propose doing either via initiative—this Court should continue to insist that a proposal state up front what the scope of its alteration is. The proposal needs to be clear as to how far it seeks to change the existing Constitution. Does it seek to alter portions of the Constitution as more limited "amendments," or does it seek to make more sweeping changes as "revisions"? In this way, the single-subject limitation serves as a useful tool to give meaning to the words surrounding it. "[H]ow an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal." *Fine*, 448 So. 2d at 990.

By tasking the courts with the authority to manage whether the Legislature has sufficiently enacted comprehensive legislature to accomplish the new policy, the proposal would constitute a rewrite of recent precedent regarding separation of

powers as applied to the courts. Indeed, a "strict separation of powers supports the foundation and logic of the political-question doctrine, in that Florida's organic law does not permit a 'dispersal of decisional responsibility' which would allow the courts to dictate [] policy choices and their implementation to the other two branches of government, absent specific authorization by law." *Citizens for Strong Sch., Inc. v. Florida State Bd. of Educ.*, 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017), *approved*, 262 So. 3d 127 (Fla. 2019). "*Absent explicit constitutional authority to the contrary*, the legislative and executive branches possess exclusive jurisdiction in such matters, as the legislative branch has sole power to appropriate and enact substantive policy, and the executive branch has the sole power to faithfully execute the substantive policies and budgetary appropriations enacted by the legislative branch." *Id.* (emphasis supplied). "The judiciary cannot dictate the manner of executing legislative policies or appropriations in any particular way." *Id.*

In *Coalition* this Court refused to determine whether the Legislature met the constitutionally guaranteed standard of "adequate" education. Doing so would violate the Constitution's separation of powers because there was a "lack of judicially discoverable and manageable standards." *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996). This in turn would "present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature." *Id.*. The Court reiterated this point in *Citizens*,

explaining that the absence of "any manageable standard" risks "judicial intrusion into the powers of the Legislature," *Citizens for Strong Sch., Inc. v. Florida State Bd. of Educ.*, 262 So. 3d 127, 141 (Fla. 2019), and it will not "evaluate, and either affirm or set aside" legislative policy decisions without sufficient standards, *id.* at 140 (internal quotation and citation omitted).

As Justice Canady explained, "the fundamental structure of our constitutional system" and the "very nature of judicial power" require that the judiciary reject "broad call[s] on judicial power to assume continuing regulatory jurisdiction over the activities of a coordinate branch of government." *Id.* at 145 (Canady, J., joined by two justices, concurring) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973)) (internal marks omitted). The proposed amendment will alter a function of the judiciary and changing the Constitution's mandated separation of powers by creating causes of action that would have the courts assume "continuing judicial review of substantive political judgments entrusted expressly to a coordinate branch of government." *Id.* (internal marks omitted).

"[N]o single proposal can substantially alter or perform the functions of multiple branches." *In re Advisory Opinion to the Attorney Gen.—Save Our Everglades*, 636 So. 2d 1336, 1340 (Fla. 1994). The approach utilized in *Save Our Everglades* helps here. In that case, the Court concluded that the initiative performed functions of multiple branches of government because it "implement[ed] a public

policy decision of statewide significance and thus perform[ed] an *essentially legislative function*" and at the same time performed a judicial function. *Id.* at 1340.

The "single-subject provision is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." *Id.* at 1339. The Court should consider whether the proposed amendment hews to the single-subject requirement by looking at the structural changes it necessarily would cause to the current form of Florida's government. Included in the analysis should be the oft-ignored structural change caused by the enactment of new policies directly into the Constitution via initiative. Use of the initiative to do so without first separately altering the Constitution to reserve that legislative power to the people, is an abuse of the initiative power that was carefully added to the Constitution in 1968. For this reason, the proposed initiative fails the single-subject limitation of Article XI, section 3.

CONCLUSION

The proposed amendment should be precluded from placement on the ballot.

Respectfully submitted,

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I HEREBY CERTIFY that on this 18th day of April, 2019, a true copy of the foregoing brief was furnished Clerk of the Court through the Florida Courts eFiling Portal, which shall serve a copy via e-mail to the counsel listed below, constituting compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b), Florida Rule of Appellate Procedure 9.420(c).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief was generated by computer using Microsoft Word 2016 with Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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