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IN THE SUPREME COURT OF FLORIDA

Case No. SC14-1603

FLORIDA BANKERS ASSOCIATION,

Petitioner, L.T. Case No. CA14-548

v.

STATE OF FLORIDA, *et al*.,

Respondents.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

BRIEF OF AMICUS CURIAE SIERRA CLUB IN SUPPORT OF APPELLEES

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I. IDENTITY AND INTEREST

In accordance with Florida Rule of Appellate Procedure 9.370 and conditioned on the Court granting the *Motion for Leave to file as Amicus Curiae* filed by Sierra Club on December 5, 2014, Sierra Club hereby files this brief as *amicus curiae* in the above-captioned docket on behalf of itself and its approximately 29,000 Florida members. Sierra Club is a national nonprofit organization dedicated to the protection of public health and the environment. Sierra Club files this brief in support of Appellees on behalf of itself and the approximately 29,000 Sierra Club members who are residents of Florida.

Sierra Club's advocacy advances the development of energy efficiency and renewable energy policies, which eliminate or reduce pollution, reduce utility bills, and generate renewable energy. Sierra Club works to drastically reduce carbon dioxide emissions from fossil-fueled power plants, one of the largest sources of global warming pollution in the United States. Sierra Club's work includes advocating for the implementation of robust incentive programs that assist its members and the public to generate their own renewable energy and increase energy efficiency.

In Florida and nationwide, Sierra Club champions policies that help overcome the market barriers to conservation, efficiency, and renewable energy measures. In particular, Sierra Club has advocated for robust incentive programs to help the

general public and Sierra Club members gain access to clean energy measures and the associated environmental and economic benefits, including reduced pollution and reduced electric bills.

Sierra Club and its members have a direct and substantial interest in this proceeding because the Florida Property Assessed Clean Energy ("PACE") Act, § 163.08, Fla. Stat. (2014), provides a powerful incentive for Florida homeowners to invest in precisely those measures that will help reduce pollution and electric bills: energy conservation, efficiency, and renewables. Appellant's attack on the validity of the Florida PACE Act would, if successful, undermine Florida law and policy to promote enhanced conservation and efficiency measures, *see e.g.*, § 187.201(11), Fla. Stat. (2008) ("State Master Plan: Energy"), and to protect consumers from the costs and risks of conventional, centralized power plants, *see e.g.*, § 377.601(2)(j), Fla. Stat. (2008), § 366.81, Fla. Stat. (2014).

II. SUMMARY OF ARGUMENT

Sierra Club supports government policies such as the Florida PACE Act that facilitate the deployment of conservation, efficiency, and renewable energy measures. These policies reduce the overall demand for energy, which in turn reduce the environmental, public health, and other harms due to energy production, particularly from fossil fuel burning power plants. Reducing residential energy consumption by retrofitting homes with energy-saving measures such as improved

insulation or efficient appliances, and by installing distributed renewable energy measures such as rooftop solar panels are some of the most cost-effective ways to conserve energy.

The promulgation and implementation of the Florida PACE Act are legitimate exercises of government authority and the resulting public benefits are substantial. Lower energy use results in lower greenhouse gas pollution, lower pollution of harmful air pollutants such as sulfur-dioxide and mercury from power plants, and fewer impacts to species and habitat resulting from avoided construction of new power plants. Homeowners also benefit by enjoying more comfortable living conditions, lower electric and gas bills, and increased value to their homes. In short, programs such as PACE are win-win policies that create benefits for both the public and individuals.

Contrary to Appellant's assertions, there is no evidence in this record or elsewhere to support the contention that PACE programs substantially impair the value of existing mortgages. Appellant mischaracterizes actions taken by the Federal Housing Finance Administration ("FHFA") and overstates the relevance of those actions. (Appellant Br. at 29-32.) Appellant improperly attempts to introduce new facts into the record to suggest that federal regulators have determined that PACE is risky. However, FHFA has never made a determination in its role as a

federal regulator that a PACE program with priority lien status creates risks for existing mortgage holders.

Parties in this proceeding have not had the opportunity to provide evidence to counter Appellant's claims. However, in other PACE-related proceedings, evidence suggests that programs may actually reduce the risk to existing mortgage holders because participating homes generally have increased values. Also, the risk of default drops as homeowners save electricity and pay lower electric bills, thereby gaining greater cash flows.

Sierra Club respectfully recommends that this Honorable Court deny Appellant's appeal and affirm the judgment of the trial court in this proceeding.

III. ARGUMENT

There is a wide range of public benefits associated with renewable energy generation and energy conservation—including reduced harmful air pollution and climate impacts, as well as reduced overall electric system costs and individual utility bills. These public benefits give the Florida Legislature and local governments a compelling reason to exercise their lawful authority to implement the Florida PACE Act.

Further, Appellant Florida Bankers Association's factual case rests on the unfounded assumption that PACE programs are bad for existing mortgage holders because they allegedly impair the value of those mortgages. However, this

fundamental assumption is unsupported by the facts in the record in this proceeding and is directly contrary to the findings made by the trial court.

A. The Florida PACE Act Creates Public Benefits

The Florida Legislature passed the Florida PACE Act with the intent to create public benefits. The Legislature determined that "the installation and operation of qualifying improvements not only benefit the affected properties for which the improvements are made, but also assist in fulfilling the goals of the state's energy and hurricane mitigation policies." § 163.08(1)(b), Fla. Stat. Contrary to Appellant's argument (Appellant Br. at 23), these benefits are substantial and accrue to the general public by adding clean, safe power to Florida's electric system.

The Florida PACE Act is consistent with other Florida Statutes designed to reduce Florida's energy consumption through enhanced conservation and efficiency measures in all end-use sectors and reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources. For example, the Florida Energy Efficiency and Conservation Act ("FEECA") (last amended in 2008), re-iterates the public policy goals and benefits of conservation, efficiency, and renewable energy for Florida: "The Legislature finds and declares that it is critical to utilize the most efficient and cost-effective demand-side renewable energy systems and conservation systems in order to protect the health, prosperity,

and general welfare of the state and its citizens." § 366.81, Fla. Stat. The Legislature went on to state that the provisions of FEECA should be "liberally construed" in order to reduce and control the growth rates of electric consumption and to conserve expensive resources, particularly petroleum fuels. *Id.* The Florida PACE Act provides another tool to accomplish these goals.

PACE programs allow local governments to finance the initial costs of installing solar panels and retrofitting homes with energy efficiency measures such as weatherization by providing upfront funding to homeowners to pay for these improvements. Local governments then recoup these costs by adding special assessments to participating properties.

By providing upfront funding for renewable energy and energy efficiency improvement costs, PACE programs benefit participants by enabling them to make investments that save energy, save money on their electric bills, and decrease the pollution from the electric sector, including the climate disrupting pollution emphasized in the Act.

PACE programs also benefit the general public by reducing the detrimental impacts from climate change and other air pollutants that result from the reliance on fossil fuel energy sources that produce carbon emissions and other harmful air pollutants. These reductions in turn result in improved human health, aesthetics, property value, recreational opportunities, and the environment.

PACE programs further benefit the public by creating thousands of local clean energy and energy efficiency construction jobs, which will develop a workforce in the building trades and other occupations necessary to deliver a new generation of higher-performing, smarter, greener buildings.[1] These efforts will have a substantial beneficial impact on Floridians by reducing carbon emissions from the use of fossil fuel generated power and thereby decreasing the threat of harm from global climate change.

B. Appellant Improperly Relies on Facts that are not in the Record and are Incorrect

Appellant does not support with actual data its conclusion that PACE will decrease the value of mortgages or materially increase risks to existing mortgage-holders. Indeed, the weight of the evidence available on this topic supports the opposite finding. PACE programs reduce risk to the existing mortgage holders by increasing home value and homeowner cash flow.

Further, Appellant's factual challenge is procedurally improper at this stage of review. While this Court reviews the trial court's conclusions of law *de novo*, the standard of review of the trial court's findings of fact is limited to whether the record included substantial competent evidence to support the trial court's findings.

[1] A recent study estimated that Florida will add an estimated 12,000 new clean energy jobs by 2015, a growth rate of 9.2%. *Clean Jobs Florida Report*, *available at* http://cleanjobsflorida.com/wp-content/uploads/2014/10/FINAL.FloridaJobsReport_101014_LR.pdf.

City of Gainesville v. State, 863 So. 2d 138, 143 (Fla. 2003). In this case, the trial court expressly found:

> This provision of the Florida PACE Act does not result in a contractual impairment of the mortgage or similar lien as the value of the prior contract (e.g. mortgagee's interest) is not impaired by the Financing Agreement nor is the prior contract impaired by recognition of the priority of a lien for a subsequent non-ad valorem assessment.

Amended Final Order (July 18, 2014) at 12-13. This finding of fact by the trial court cannot be overturned based merely on Appellant's unsupported – and incorrect – assertion that existing mortgages will be at greater risk because of PACE.

Even if Appellant's attempt to introduce new factual evidence into the record at this stage were proper, which it is not, the alleged facts are either incorrect or misconstrued.

1. <u>FHFA Has Never Made a Formal Finding that PACE Programs Present Risk to Lenders</u>

Appellant cites to a short statement made by the Federal Housing Finance Administration ("FHFA") on July 6, 2010 ("July 2010 Statement") to support its assertion that FHFA determined that PACE programs create special risks for lenders. (Appellant Br. at 29-32.) However, Appellant fails to explain that FHFA was acting in that instance as a quasi-private corporation rather than a government agency. The statements made by FHFA and cited by Appellant are not – and

cannot be construed as – any type of formal federal agency finding related to PACE because FHFA's issuance of the July 2010 Statement did not constitute a formal agency rule. FHFA specifically declined to conduct a rulemaking to consider the benefits and risks of PACE and instead relied on an obscure and unique provision in its originating statute related to its temporary role as the conservator of Fannie Mae and Freddie Mac.

Congress created FHFA with the Housing and Economic Recovery Act of 2008 ("HERA"). PL 110–289; 122 Stat 2645; as codified at 12 U.S.C. 4511 *et seq.* FHFA is an independent agency charged with supervising Fannie Mae and Freddie Mac and the Federal Home Loan Banks. In addition to providing regulatory powers, HERA empowered the FHFA to act, under certain circumstances, as a conservator or receiver of Freddie Mac or Fannie Mae for purposes of "reorganizing, rehabilitating, or winding up the affairs" of either entity. 12 U.S.C. § 4617(a)(1)(2). However, the statements, decisions, and judgments made by FHFA in its role as conservator do not carry the weight of federal agency rulemaking.

When acting in the role of conservator of Fannie Mae and Freddie Mac, FHFA "steps into the shoes" of the managers and directors of those private entities and essentially ceases its role as a government actor. *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 96 (D.D.C. 2012)("a conservator or receiver steps into the

shoes of the private entity—it assumes the private status of the entity"); *see, also, Cnty. of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 994 (9th Cir. 2013)("As FHFA acknowledges, HERA distinguishes between FHFA's authority as regulator and as conservator"). The July 2010 Statement relied on by Appellant is therefore not an expression of any federal policy; it is a private business decision made on behalf of two specific corporations.

Both FHFA and the courts rejected the notion that FHFA's July 2010 Statement constituted a federal regulatory agency action. Sierra Club was a party to one of several lawsuits brought against FHFA related to the PACE-related statements cited by Appellant. *California ex rel. Harris v. Fed. Hous. Fin. Agency,* 894 F. Supp. 2d 1205, 1208 (N.D. Cal. 2012) *vacated sub nom. Cnty. of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987 (9th Cir. 2013); *see, also, Leon Cnty., Fla. v. Fed. Hous. Fin. Agency*, 700 F.3d 1273, 1275-76 (11th Cir. 2012); *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 224 (2d Cir. 2012). Each of those cases expressly challenged the July 2010 Statement made by FHFA as an improper use of the agency's federal regulatory power. Sierra Club and other parties raised concerns that FHFA's actions might be construed as an expression of federal policy, which is exactly how Appellant presents the facts in this proceeding.

It was undisputed in those cases that at the time FHFA released the July 2010 statement, it had not followed the notice-and-comment rulemaking procedures required by the Administrative Procedures Act for federal rulemaking.

> [FHFA's General Counsel] did not attest that the FHFA had considered alternatives to its blanket prohibition against the purchase of PACE-encumbered mortgages or that it had considered the impact on the public interest of blocking the PACE programs, other than minimizing risks for [Fannie Mae and Freddie Mac]. Nor have Defendants presented evidence that the FHFA weighed the costs associated with the risk exposure produced by PACE programs against the economic benefits of allowing PACE programs to continue to expand and build a market for residential energy conservation projects.

California ex rel. Harris, 894 F. Supp. 2d at 1215.

FHFA's PACE-related actions were never subjected to the required notice-and-comment and substantial evidence standards required to support an agency's findings. Instead, FHFA issued the July 2010 Statement by fiat without the benefit of public input or the support of substantial evidence. FHFA responded that its July 2010 Statement did not constitute rulemaking because it was simply an exercise of FHFA's business judgment as a "conservator" of Fannie Mae and Freddie Mac and that, pursuant to HERA, "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f); *see, e.g., Leon Cnty., Fla.*, 700 F.3d at 1275-76.

Ultimately the courts expressly declined to address the substantive merits of FHFA's claims related to whether or not PACE created any risk for lenders. Instead, the courts determined that FHFA was immune to any form of judicial review when it acted in its unique role as conservator. *Cnty. of Sonoma*, 710 F.3d at 994 ("Because we conclude that FHFA acted within its powers as conservator, neither we nor the district court have jurisdiction over Plaintiffs'–Appellees' claims"); *Leon Cnty., Fla.*, 700 F.3d at 1279 ("Accordingly, because § 4617(f) provides that 'no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator or receiver,' *see* 12 U.S.C. § 4617(b), the district court correctly held that § 4617(f) bars Leon County's claims"); *Town of Babylon*, 699 F.3d at 227 ("Nothing in Section 4617 authorizes judicial review in the present circumstances").

Appellant's assertion in this case that FHFA ultimately "has found that PACE programs allowing for superiority of PACE loans present risk to lenders and secondary market entities" incorrectly implies that FHFA made a considered policy judgment on behalf of the public interest. (Appellant Br. at 29-30.) That is not the case. FHFA was acting only in its role as conservator of Fannie Mae and Freddie Mac during a particularly tumultuous time for those specific entities. By its own admission, FHFA expressly did not consider the public interest benefits of PACE programs, nor did it develop any substantive evidence to support the claim

that PACE programs create risks for lenders. *See, California ex rel. Harris*, 894 F. Supp. at 1215.

2. A Partial Rulemaking On PACE Addressed the Public Value of PACE Programs

The courts reviewing FHFA's actions never considered any factual evidence related to the substantive merits of the assertion that PACE programs created risks for mortgage holders. However, a partial rulemaking process did begin the process to develop those facts on the record. Prior to the Ninth Circuit ruling dismissing the FHFA litigation, the Northern District of California issued a preliminary injunction requiring FHFA to initiate a formal rulemaking process. *California ex rel. Harris*, 894 F. Supp. 2d at 1224. On January 26, 2012, FHFA issued an Advance Notice of Proposed Rulemaking seeking comment on whether the anti-PACE restriction set forth in the July 6, 2010 Statement should be maintained. 77 Fed. Reg. 3,958 (Jan. 26, 2010). The FHFA received 33,000 comments in response to the notice, with the vast majority expressing support for PACE programs. 77 Fed. Reg. 36,086, 36,089 (June 15, 2012).

Several local governments also expressed their support for PACE programs. The County of Sonoma, California commented, "There is no demonstrable risk to [Fannie Mae and Freddie Mac] from the existing PACE programs; instead, it appears that [Fannie Mae and Freddie Mac] are enjoying increased security on loans they own because of the added value of the improvements (over $45 million

in Sonoma County); with de minimus exposure to risk on any individual project." *Id.* at 36,089.

The New York City Mayor's Office commented, "PACE liens do provide community benefits such as improved air quality and aiding in the fight against climate change." The Mayor further noted that PACE default rates are "vanishingly small." *Id.* at 36,090.

The City of Palm Desert, California asserted, "The lien-priming feature of first-lien PACE obligations does not adversely affect the financial risks borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities if appropriate underwriting standards and program designs are implemented. Indeed, given proper PACE program design, the financial risks borne by such mortgage holders may actually be decreased." *Id.*

Other organizations, including Fannie Mae and Freddie Mac, asserted that PACE programs may increase risk. *Id.* Unfortunately, FHFA never resolved these differences because it never concluded the rulemaking. The substantial evidence that poured into partial rulemaking in favor of PACE nevertheless demonstrates that it is incorrect to simply assume, as Appellant does, that PACE programs automatically impair existing mortgages.

3. PACE Assessments Do Not Impair Existing Mortgages

Appellant does not provide sufficient evidence to support its factual contention that the super-priority lien status of PACE assessments impairs the value of existing mortgages. (Appellant Br.at 14-17.) Appellant relies primarily on the court's finding in *Sarasota County v. Andrews*, 573 So. 2d 113 (Fla. 2d DCA 1991), to support its assertion that PACE assessments will impair existing mortgages because "the earlier-recorded mortgagee is automatically at a greater risk of losing its investment if it no longer has a first priority lien." (Appellant Br. at 15.) This assertion is simply not true, and in any case is not supported by the facts on the record in this proceeding.

The facts in *Andrews* are distinguishable from the PACE assessments at issue here. *Andrews* considered a lien imposed by the County of Sarasota related to "administrative fines and other noncriminal penalties." *Andrews*, 573 So. 2d at 114. The fine at issue in that case was the result of a violation of a county ordinance, and the super-priority lien imposed by the County was an attempt to collect the outstanding amount due. *Id.* The payment of the fine did not work to improve the underlying property in any manner. In stark contrast, PACE assessments are directly tied to improvements of the property. It is improper to assume, as Appellant does, that a property with improved value will "automatically" put existing mortgages at greater risk. To the contrary, hard data

suggests that energy efficiency and renewable energy improvements increase the home value.

A recent study published at the University of California and Maastricht University in the Netherlands found that homes that achieved energy performance ratings (Energy Star, LEED for Homes or GreenPoint Rated) sell for 9% more (±4%) than comparable homes.[2] The study examined data from 4,321 actual homes in California against a control group of 1.6 million homes, controlling for outside variables such as location, size, vintage and desirable features such as swimming pools, views, and air conditioning. According to the California Energy Commission, a study published in the *Appraisal Journal* showed that "a $1 reduction in annual energy bills resulted in more than [a] $10 increase in resale value."[3] This is consistent with a 2011 Lawrence Berkeley National Laboratory study that examined sales of 2000 homes across California with photovoltaic ("PV") installations against a comparable set of 70,000 homes without PV from 2000 to 2009 and found that, on average, the net installed cost of PV installations

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[2] Nils Kok, Maastricht University & University of California, Berkeley and Matthew E. Kahn, University of California, Los Angeles, *The Value of Green Labels in the California Housing Market | An Economic Analysis of the Impact of Green Labeling on the Sales Price of a Home* (July 2012) at 1, *available at* http://www.pacenow.org/wp-content/uploads/2012/08/KK_Green_Homes_0719121.pdf.

[3] California Energy Commission, What is Your Home Energy Rating? (2011) at 12, *available at* http://www.energy.ca.gov/2009publications/CEC-400-2009-008/CEC-400-2009-008-BR-REV1.PDF.

was $5.00/watt and the average sales price premium for homes with PV was $5.50/watt, which translates to a premium of over $17,000 for an average 3.1 kW solar system.[4]

These studies show that Appellant's bald assertion that PACE programs automatically impair existing mortgages is at best unsupported, and at worst are simply untrue.

IV. CONCLUSION

The Florida PACE Act is a proper exercise of legislative and government authority that will benefit the public by reducing energy consumption and its related negative impacts to the environment and public health. For all of the reasons discussed above, Sierra Club respectfully recommends that this Honorable

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[4] Brian Hoen, Ryan Wiser, Peter Cappers, and Mark Thayer, *An Analysis of the Effects of Residential Photovoltaic Energy Systems on Home Sales Prices in California*, Lawrence Berkeley National Laboratory (April 2011) at iii, 4, 46, *available at* http://emp.lbl.gov/sites/all/files/lbnl-4476e.pdf. In addition, the study noted that homeowners with PV also benefit from electricity cost savings prior to the sale.

Court **deny** the appeal of the Florida Bankers Association and affirm the Amended Final Judgment.

Respectfully submitted on December 10, 2014,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served *via* the Florida Courts E-Filing Portal upon the following attorneys, as well as all Electronic Service Recipients listed on the Electronic Service List of the Florida Courts E-Filing Portal on this 10th day of December, 2014:

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