IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 83,886

IN RE: ADVISORY OPINION
TO THE
ATTORNEY GENERAL -- LIMITED CASINOS

REPLY BRIEF
of
PROPOSITION FOR LIMITED CASINOS, INC.

(Filed in Support of the Initiative Petition)

ORIGINAL PROCEEDING

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Introduction

This brief is filed by Proposition for Limited Casinos, Inc. ("PLC") in response to briefs in opposition filed by Florida Locally Approved Gaming, Inc. and Bally Manufacturing Corporation ("**Bally**"), Proposition for County Choice Gaming, Inc. ("**County Choice**"), No Casinos, Inc. ("**No Casinos**"), Bill Sims, and Robert T. Mann.[1/]

Summary of Argument

The Limited Casinos petition ("the Petition") conforms to established precedent in the three areas of law which are scrutinized in an advisory opinion proceeding commenced by the Attorney General under section 16.061, Florida Statutes (1993). The arguments presented by the opponents of the Petition cannot be reconciled with the Court's prior decisions. The alleged omissions and ambiguities they have implied are interpretations of verbiage inappropriate for the Court's review.

The Petition contains one subject -- an authorization for a limited number of casinos in the state -- and important matters directly connected with that subject such as the number, location, size and types of casinos that are being authorized. The ballot title for the Petition is a non-political, accurate caption which reflects the name by which the measure is commonly referred to or spoken of, as prescribed by section 101.161(1), Florida Statutes (1993). The ballot summary for the Petition provides fair notice of the content of the proposed amendment in a manner which states the chief purpose of the measure, as section 101.161(1) directs.

1/ Bally and County Choice have proposed competing initiative petitions for voter approval. (See Appendices 1 and 2).

Since 1976, the Court has taken a broad view of the right of citizens to initiate changes in their Constitution, based on its interpretation of the language change in Article XI, section 3 of the Constitution made in 1972. The Court's decisions have provided guidance to those who would draft initiative petitions, consistent with that broad view of the citizens' amendatory right.

Opponents of the Petition have presented arguments which, if adopted, would restrict the standards for initiative review and curtail the right of citizens to amend their constitution. Seizing on the impetus provided by the Attorney General's transmittal letter to the Court, they infer that the Court has already done just that in its three most recent initiative petition decisions. PLC submits that the Court has not clamped down on initiatives with a heightened level of scrutiny, and that it should not do so now.

Argument

I. Overview of the Issues.

The briefs in opposition to the Petition largely piggyback the concerns raised by the Attorney General in his transmittal letter to the Court, to which PLC responded with specificity in its initial brief. This reply brief will not repeat in detail the responses already made. The Court will find that the arguments of those in opposition, like the Attorney General's comments, either are inconsistent with the Court's decisional law on the relevant issues, or invite a new approach to the advisory opinion process which draws the Court into the merits and wisdom of the proposal, or a review of the quality of draftsmanship.

A few common features of the opponents' briefs specifically commend the Court's threshold attention, as an overview of what follows.

First, none of the opponents have mentioned, let alone attempted to distinguish, the two prior initiative decisions which *upheld* casino gambling initiatives having features identical to those in this Petition.[2/]

Second, none of the opponents have shown an awareness of the "guideline" role of precedent in the jurisprudence of initiative petition review,[3/] or given more than lip service to the Court's responsibility to exercise "extreme care, caution and restraint" when being asked to abort the constitutional prerogative of citizens to amend their Constitution through the initiative process.[4/]

Third, the Court will note that there is absolutely no disagreement among the several parties who have briefed this case as to the "tests" to be applied for the Court's one subject analysis, and for its title and summary review. All of the opponents have stated the standards in precisely the same terms that PLC brought to the Court's attention in its initial brief. The fundamental difference between PLC and the opponents is their approach to the Court's task of *applying* the terminology. That difference is the most critical feature of this proceeding, as it bears on both the validity of the arguments in opposition and the philosophical approach which the Court will use to evaluate the Petition. This brief will respond first to the validity of the opponents' arguments.

2/ *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337 (Fla. 1978) ("***Floridians Against Casinos***"), and *Watt v. Firestone*, 491 So. 2d 592 (Fla. 1st DCA 1986), *review denied*, 494 So. 2d 1153 (Fla. 1986).

3/ See PLC's initial brief at pp. 5-6.

4/ *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

II. The Petition embraces only one subject and matters directly connected.

The Attorney General had suggested to the Court that the Petition was defective under the one subject requirement of Article XI, section 3 of the Constitution because the Petition specified that casinos would be sited in some but not all counties in the state. He expressed concern that the forced choice of locations might be a form of geographic logrolling, or might interfere with the powers of local governments in the areas of zoning and land use. His concerns were misplaced, as PLC has explained in its initial brief.[5] The variations on those themes which permeate some of the opponents' briefs are equally misplaced.[6]

All of the one-subject arguments presented by the opponents basically key off the formulations which the Court has used to express the functional test for one-subject analysis since *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). Those arguments pigeonhole the Court's inquiries as to whether the proposed amendment affects more than one function of government, affects other provisions of the Constitution, and alters or performs the functions of different branches of government.[7] The opponents present detailed examples which, it is claimed, display the prohibited effects in these categories. Of necessity, PLC will present a point-by-point refutation of those arguments in the sections of this brief which follow. That

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[5] PLC's initial brief at pp. 9-12.

[6] See County Choice brief at pp. 9-10; No Casinos brief at pp. 19-20, 21-22, 26; Mann brief at pp. 2-3; Sims brief at pp. 15-17.

Not all of the opponents believe the Petition suffers from a single subject defect. Bally makes no argument on the point at all. Bally apparently was not persuaded by the Attorney General's concerns, and was unable on its own to detect any one-subject defect in the Petition.

[7] These subjects for consideration were identified by PLC in its initial brief at p. 4.

discussion should not, however, mask the far more important issue which inheres in this case, and which is discussed afterward -- the philosophy of initiative petition review.

Uniformly, the opponents have given no more than passing reference and perfunctory attention to the more thematic standards which undergird the functional approach to the one-subject requirement: that an initiative petition must display a "logical and natural oneness of purpose," and that due consideration must be given to the right conferred by the Constitution to include "matter directly connected." PLC would emphasize for the Court that it has *never* used its functional tests in the manner which the opponents propose -- microscopically, rather than as an adjunct to the macroscopic standard of "oneness of purpose."

That broad principle of unified purpose is totally ignored by those who oppose the Petition. The opponents of the Petition cannot, and do not, assert that the authorization for a limited number of casinos in the state is other than a unified theme in the Petition. Rather, they quibble with the type and extent of the limitations selected by the framers of the Petition, under the guise of applying the functional tests of one-subject analysis.[8/]

A. The proposed amendment has no effect on multiple branches of the government.

The Court has said that it is relevant to consider a proposal's effect on the multiple branches of government when evaluating the one-subject requirement. The Attorney General did not suggest that the Petition affected different branches of state government, but the

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[8/] The Court will note that one of the two opponents with a competing initiative petition has itself provided for a limited number of casinos in the state -- twenty -- but specified only the *type* of facilities at which the casinos shall be sited -- pari-mutuel facilities, riverboats and hotels -- rather than *where* they shall be located. (Appendix 1). The other has opted for an *unlimited* number of casinos. (Appendix 2).

opponents have devised arguments that it does. The usefulness of any "branch of government" evaluation is limited, of course.

> Although the proposed amendment affects three different branches of government, that fact alone is not sufficient to invalidate the proposed amendment.

Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991) ("***Limited Terms***").

In that case the amendment had a direct and express effect on different branches of government (the legislative and executive branches) *as well as* an impact on two distinct governments (federal and state). The opponents of the proposal argued that those variants presented wholly separate subjects for voters, and that those who might want limited terms for state officeholders in one branch (such as the executive) were being forced to accept limited terms in another branch of state government (the legislative) *and* limited terms for federal officeholders where seniority considerations are indispensable to effective representation. The Court nonetheless rejected those concerns.

The lesson of *Limited Terms* is that an initiative's effect on different branches of government can be direct and consequential without being disabling. It follows, then, that effects which are remote, conjectural and inconsequential cannot possibly be invalidating. The arguments of the opponents here offer remote, conjectural and inconsequential effects on the different branches of government. They discuss concerns based on imagined and implied possibilities, rather than on direct and genuine impacts.

Mr. Sims, for example, argues that the Petition has an effect on the functions of all three branches of government.[9] Some of his arguments are based on a misreading of the proposed amendment,[10] and some are contrary to precedent directly on point.[11] All of his arguments, however, are derived from implementation concerns that may or may not occur, rather than overt and direct consequences which force voters to accept an undesired alternate if they vote to approve the Petition.

No Casinos argues that the Petition usurps executive branch functions by stripping the governor and Cabinet of some of their legislatively-conferred powers in the area of land use and planning.[12] Part of this argument is based on the same misreading of the proposed amendment as Mr. Sims',[13] and the balance is based on a non-existent premise. Nothing in the Petition usurps, interferes with or affects the powers and authority of the executive branch to integrate casinos into existing governmental policies for land use, environmental considerations or the like.[14] There is in the Petition no directive for an "override" of local

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9/ Sims brief at pp. 16-20.

10/ Mr. Sims asserts that the size limit on pari-mutuel facilities encroaches on an executive branch function. (Sims brief at p. 17). He misreads the "cap" on size as a "required" size for casinos with the pari-mutuel facilities.

11/ Mr. Sims finds encroachments into the taxation, regulation and licensing powers in the Petition's "legislature shall implement" language. (Sims brief at pp. 19-20). As noted in PLC's initial brief at p. 9, the Court has already addressed and rejected the argument that a direction for implementation constitutes a separate subject.

12/ No Casinos brief at p. 28.

13/ See No Casinos brief at p. 29.

14/ The inferential interference described by No Casinos would apply equally to any constitutional authorization for a new subject which requires implementation responsibilities, such as the authorization for a state-run lottery.

or state environmental, land use or regulatory policies now entrusted to various agencies. The proposed amendment is silent on the subject, and it no more interferes with local or state governmental authority than did the locational specificity in *Floridians Against Casinos* or in *Watt v. Firestone*.

The arguments made by No Casinos on this topic are exposed as pure hypothesis by its recognition that the executive branch functions it asserts are usurped involve future unknown effects,[15] and by its acknowledgement that the impact of the initiative on the functions of government

> will not be fully known or understood until after it is a part of the constitution.[16]

These indirect and futuristic effects on government are far more attenuated than the immediate and direct effects of voting for limited terms of officeholders from different branches of government and different governmental systems. The same types of speculative, futuristic arguments could have been made with respect to the authorization for lotteries, or for ethics in government, or for English language only (to mention a few).[17]

Naturally, the effects of a constitutional amendment are far-reaching, and are not fully known with particularity upon adoption. The Constitution is not an AAA triptik for governance, with all the roads and detours precisely identified. It is, rather, a global plan for

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15/ "The potential questions that might arise . . . are potentially limitless in number." No Casinos brief at p. 30.

16/ No Casinos brief at p. 26.

17/ See also County Choice brief at pp. 18-19, where a range of "could be's" and "might be's" are paraded.

the governance trip, with an established point of departure, a destination, and the general rules of the road for undertaking the journey.[18/]

The one-subject question for the Court in this proceeding is not how many and in what ways the branches of government can conceivably be affected, but rather whether the proposed amendment has an overall oneness of purpose when considered with any allowable, connected matters. The Petition here has that unifying harmony, with no more effect on the branches of government than any change in the organic law would entail.

B. The proposed amendment has no effect on other provisions of the Constitution.

The Court has said that another consideration in evaluating the one-subject requirement is whether other provisions of the Constitution, unidentified, are affected by the proposal. This too is not a litmus test, but simply another consideration in the search for oneness of purpose. None of the opponents have identified any provision of the Constitution which is impacted by the Petition other than very tangentially, as happens with every constitutional amendment.

County Choice asserts that the Petition's authorization for up to five riverboat casinos in five counties creates an exception to the constitutional provision for referenda on special

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[18/] Four Justices recently observed that an initiative petition which is **too** detailed may be more suited to placement elsewhere than a constitution.

> I am concerned, however, that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution.

Advisory Opinion to the Attorney General -- Limited Marine Net Fishing, 620 So. 2d 997, 1000 (Fla. 1993) ("***Net Fishing***") (McDonald, J., concurring, as joined by Barkett, C.J. and Overton and Kogan, JJ.).

laws.[19] This argument absurdly presupposes either that the legislature will choose to implement the proposed constitutional amendment through the defective passage of a "special law" rather than with general legislation, or that every initiative which contemplates capital improvements will create a conflict with the "special law" provision of the Constitution because the legislature must site them somewhere.[20]

This argument also overlooks the fact that the Petition *authorizes*, but nowhere requires up to five riverboats. The legislature may approve from one to five riverboat casinos, or none. The Court has previously held in a like situation that the mere "possibility" of legislative action absolutely precludes invalidation:

> The difficulty with these arguments is that there has been no such legislation, and the proposed amendment does not mandate any legislation.

In re Advisory Opinion to the Attorney General English -- the Official Language of Florida, 520 So. 2d 11, 12 (Fla. 1988) ("***Official English***").[21] Likewise in *Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986), the Court held:

> The clause, if adopted, reflects a decision by the voters to leave the ultimate disposition of the proceeds received from lotteries, if established, to the discretion of the legislature. Such delegations of authority to the legislative, executive, or judicial branches of government is not unusual or constitutionally infirm.

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[19] County Choice brief at p. 12.

[20] Under this theory, the initiative presently circulating to raise funds to build prisons would be defective because the prisons to be built with the funds generated will necessarily be sited in *some* unnamed counties.

[21] There exists the same chasm between reality and the argument of County Choice that the Petition benefits "a few well connected private interests." (County Choice brief at p. 13). The directive for a location in the 246-acre South Pointe Redevelopment Area of Miami Beach does not assure anyone a casino, despite the entrepreneurial anticipation of persons or entities who have a 12-acre tract (*Id.* at 13) in that zone.

Id. at 1207.

Mr. Sims argues that the Petition is invalid because it fails to identify the Taxation and Finance provision of the Constitution, yet directs the legislature to tax casinos.[22/] The argument, too, overlooks direct precedent holding that it is not a violation of the one subject requirement to authorize implementation. See *Official English*, 520 So. 2d at 13; *Carroll v. Firestone*, 497 So. 2d at 1207.[23/]

No Casinos asserts a failure to mention the provision of the Constitution which creates the Cabinet because, it argues, the proposed amendment interferes with land use and environmental responsibilities assigned to that body.[24/] This is nothing but a variation of the argument regarding an effect on multiple branches of government. It, too, pays no heed to the *Carroll* and *Official English* decisions.

C. The proposed amendment does not alter or perform multiple governmental functions.

The Court will take into account, as one of its considerations in determining oneness of purpose, whether a proposal alters or performs multiple governmental functions. Mr. Sims argues that the Petition does that because it leaves issues for each branch to decide when

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22/ Sims brief at p. 20. The same argument is dropped into the potpourri of arguments presented by No Casinos. See No Casinos brief at pp. 32-33.

23/ The principle which Mr. Sims overlooks is that a directive for using another provision of the Constitution, in this case a legislative implementation of the Finance and Taxation article, no more requires the mention of that other provision than it would require a mention of Article III (which creates the legislature) or Article IV (which creates the departments of the executive branch to carry out the authorization for regulation of the subject matter of the proposal).

24/ No Casinos brief at p. 32.

implementing the proposal.[25] In addition to ignoring precedent, his point is self-contradictory. The proposed amendment does not *perform* a function when it authorizes governmental bodies to perform their inherent responsibilities. That's exactly, and appropriately, what constitutions do!

> Our Constitution consists in large part of a delegation of discretionary authority to the three branches of government and numerous provisions of the Constitution are contingent on general law.

Carroll v. Firestone, 497 So. 2d at 1207.

County Choice suggests, without elaboration, that a specification of the location of casinos interferes with the power of the Administration Commission to conduct its review of developments of regional impact.[26] The Petition patently does not. There is no discernible effect on any land use regulation or power, either at the state or the local level. This contention is just a variant of the Attorney General's unfounded concern the Petition might interfere with the powers of local governments.[27]

County Choice further suggests that the designation of sites for casinos in the Petition "makes an essentially judicial determination" about local property owners and nuisances, and cuts "off a judicial remedy."[28] This argument is meritless. If this imagined hypothesis had validity, there could be *no* initiatives to amend the Constitution, and the Court would be hard-pressed to reconcile its prior decisions. Three examples make the point. The petition in *Floridians Against Casinos* had a locational directive. It was not perceived as being defective

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[25] Sims brief at p. 16.

[26] County Choice brief at pp. 10-11.

[27] PLC responded to the Attorney General's suggestion in its initial brief at pp. 16-17.

[28] County Choice brief at p. 11.

although it had the same effects on governmental functions which County Choice finds in the Petition here. The proposal in *In re Advisory Opinion to the Attorney General -- Homestead Valuation Limitation*, 581 So. 2d 586 (Fla. 1991) ("***Homestead Valuation***"), directed the level of assessments. That, too, would necessarily have precluded any judicial review of real property tax assessments. In *In re Advisory Opinion to the Attorney General -- Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d 284 (Fla. 1988) ("***Non-Economic Damages***"), the proposal flatly took away the judicial function of setting non-economic damages in civil proceedings, by setting a cap.

The effect of the features of this proposed amendment which concern the opponents do not impair its oneness of purpose. If one were to ignore for the moment those features, there would be a simple authorization for casinos in the state. By adding the number, size, location and type of casinos which are being authorized, no independent impact on the functions of government is created, and no branch of the government is affected differently. The unity of the proposal remains unchanged.

D. The proposed amendment does not constitute logrolling.

Some of the briefs in opposition argue that the Petition is a form of prohibited "logrolling," inasmuch as it has gathered under one umbrella a diverse group of parties financially interested in its passage -- pari-mutuel owners and operators, and casino operators.[29/] This argument completely misperceives the evil for which the logrolling formulation is applied -- diverse "subjects" which are gathered together to force the acceptance of unwanted additions to the Constitution as the price of approval for those which

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29/ Sims brief at p. 21; No Casinos brief at pp. 17-25.

are desired. The alignment of financial or moral interests behind an initiative petition is of no legal consequence to the Court.[30/]

If this argument by the opponents had any merit whatsoever, *no* initiative would survive the Court's scrutiny of the backers, financiers and diversity of supporters for a proposal. Consider, for example, who might have been the supporters of a state-run lotteries: high-income opponents of a personal income tax; lottery operating companies; persons with an interest in gambling, including the poor who could envision quick riches. Or consider who might have supported and backed a limitation on homestead valuations: home owners; realtors; residential developers; elected public officials. Obviously, an inquiry about the supporters or financial beneficiaries of any constitutional amendment is *not* an appropriate consideration with which to evaluate the initiative provision of the Constitution.

> I must stress that this Court has an absolute obligation to be entirely blind to the particular political agenda of those who have proposed this or any other initiative.

In re Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1021 (Fla. 1994) ("***Restricts Discrimination***") (Kogan, J., concurring).

30/ *Cf. Carroll v. Firestone*, in which the Court refused to consider a behind-the-petition concern of opponents that the sponsors of the amendment had promised that a lottery would produce over $300 million annually.

> We decline to embroil this Court in the accuracy or inaccuracy of political advertisements. . . .

Id. at 1206-07.

E. The proposed amendment does not invite an inquiry into collateral consequences.

In his concurring opinion in *Restricts Discrimination*, Justice Kogan discussed the "collateral" impact of the proposal under review. The opponents of the Petition have seized on that theme to imagine far-reaching collateral impacts of this proposal. They misunderstand the extent to which Justice Kogan's analysis applies in the one-subject context, and they carry their impact analyses to far-fetched extremes.

No Casinos, Mr. Mann and Mr. Sims, for example, present a catalogue of options that they describe as distinct "issues" or "proposals" within the Petition.[31/] These listings are not "subjects," however. They are all details connected with the authorization for a limited number of casinos in the state. The framers of the Petition were unquestionably free to present to the electorate an amendment for casinos which circumscribes the number, size, location and type of those facilities.[32/] Facets of a proposal such as these are precisely what the Constitution contemplates when it authorizes "matters directly connected."[33/]

No Casinos also asserts as a collateral consequence that the authorization for casinos with pari-mutuel facilities will "overwhelm" voters who previously approved pari-mutuel facilities in their communities without knowing that casinos would some day come along.[34/]

31/ No Casinos brief at pp. 17, 20-21; Mann brief at pp. 2-3; Sims brief at pp. 22-23. No Casinos presents a variation of its point with a discussion of how voters' "views" might change if the proposal were worded differently. (No Casinos brief at pp. 22-24). The argument is far afield from the Court's evaluation of *this* initiative petition.

32/ These features are found in variations in the competing petitions sponsored by two of the opponents. See Appendices 1 and 2.

33/ See PLC's initial brief at pp. 8-9.

34/ No Casinos brief at pp. 24-25.

This type of collateral consequence -- disrupting a citizen's belief that constitutions are immutable -- is hardly what Justice Kogan was describing. That consequence is *always* the result of constitutional change.[35/] No Casinos even foresees as a collateral effect that Indian tribes will be authorized to offer casino gaming on their reservations if the Petition is adopted by the electorate.[36/] That is hardly the type of collateral impact that Justice Kogan was discussing.

The collateral impact of an initiative petition may indeed be relevant to examine in connection with the one-subject requirement of the Constitution, so long as the examination is tempered by the knowledge that *all* initiative petitions have some collateral consequences. After all, a change in the fundamental doctrine of governance will necessarily bring "fundamental" change. When the simple and straight-forward initiative petition for lotteries was adopted there were collateral effects on the legislative branch, which had to decide whether to place regulatory authority in an agency controlled by the Governor or one controlled by the Governor and the Cabinet jointly, and subsequently on the executive branch. When voters adopted the "Ethics in Government" provision of the Constitution, there were enormous collateral effects, not the least of which were forcing the creation of the Ethics Commission and obligating the legislature to adopt a financial disclosure law.

In other words, any constitutional amendment requires implementation, and that process necessarily affects, collaterally, functions and branches of government not listed in

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35/ The Court need only consider the business entities that lodged their headquarters in Florida before 1972, when the state had no corporate income tax, or the civil libertarians who thought, before 1982, that search and seizure protections under the Florida Constitution were broader than those under the United States Constitution.

36/ No Casinos brief at p. 9.

detail in the summary or text of the proposal. Justice Kogan's concern with collateral effects was not abstractly applied in derogation of that immutable fact. It was undertaken with respect to a proposal that, *on its face*, purported to effect a change in the laws of "'the state, political subdivisions of the state, municipalities or any other governmental entity,'" *Restricts Discrimination*, 632 So. 2d at 1019, none of which were identified. The framers of that proposal said in their proposed amendment, in effect: "we intend to change and impact the entire range of existing powers and laws that touch on discrimination, in all levels of government in Florida, but we're not going to tell the voters how, what laws, or with what consequences." Justice Kogan's concern for collateral impact was the result of the drafters' direct attempt to *cause* consequences which they declined to describe.

The petition for Limited Casinos neither purports to cut with such a broad swath, nor does it in fact do so. Justice Kogan's "collateral effect" analysis was appropriate in *Restricts Discrimination*, but it not an appropriate analysis here.

In sum, none of the opponents have really suggested what possible "subject" other than a casino authorization inheres in the Petition. None suggests that "Limited Casinos" is a broad generality which cloaks two or more diverse subjects, in the manner that "general revenue" blanketed taxation, user-fee operations and capital funding through bonds,[37/] in the manner that "civil rights" cloaked limits on defendants' liability and a rule of procedure being placed in the Constitution,[38/] and in the manner that "Save the Everglades" embraced the creation of a fourth branch of government, the imposition of a new tax, and the pronouncement of a judgment of wrongdoing.

37/ *Fine v. Firestone*, 448 So. 2d 984.

38/ *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984).

III. The ballot title and summary accurately describe the content of the proposal, and the summary fairly reflects the chief purpose of the proposed amendment.

Not unexpectedly, the opponents of the Petition raise some of the same ballot title and summary concerns expressed in the Attorney General's transmittal letter to the Court. They suggest that the title "Limited Casinos," read in the abstract, is misleading for those who might not know that casinos are not currently authorized, and therefore might think that the petition actually *limits* rather than *authorizes* casinos in Florida.[39/] This argument was fully met in PLC's initial brief.[40/] In fact, it is the same argument that was raised and rejected in *Limited Terms*:

> Opponents of the proposed amendment argue that the ballot summary is invalid because it does not advise voters that there are presently no limits on the terms of the affected offices. . . . However, we do not find the failure to indicate the current lack of term limits to be misleading. *This is not a situation in which the ballot summary conceals a conflict with an existing provision. There is no existing constitutional provision imposing a different limitation on terms of office. In effect, this proposed amendment writes on a clean slate.*

Limited Terms, 592 So. 2d at 228 (emphasis supplied, citation omitted).

The Attorney General's concern with the summary's failure to identify all casino locations, or to state that a casino would be sited in the South Pointe Redevelopment Area of Miami Beach, are also reiterated by the opponents.[41/] PLC's initial brief adequately

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39/ County Choice brief at pp. 18-23; No Casinos brief at pp. 3-6; Sims brief at pp. 8-10.

40/ PLC initial brief at pp. 18-21.

41/ County Choice brief at pp. 17-18; Bally brief at pp. 13-18. Bally suggests that there is no "South Pointe Redevelopment Area" (Bally brief at p. 14); a point not relevant to the Court's responsibilities in this proceeding, of course. There is indeed an area bearing that name, however.

On February 1, 1984, the Miami Beach Redevelopment Agency, composed of the

(continued...)

addressed these concerns as well.[42/]

A. The opponents' criticisms of the ballot title and summary are inconsistent with the requirements of section 101.161.

On a more fundamental note, none of the opponents seem to fully appreciate the limits which surround the Court's evaluation of title and summary. The requirements for those voter protections derive from a statute; not from a constitution. The difference between statutory and constitutional analysis is significant.[43/] In the plainest of terms, that statute

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[41/](...continued)
mayor and members of the City Commission, approved a motion to rename "South Shore" to "South Pointe." From that point forward, the City described that area as the "South Pointe Redevelopment Area." See, *e.g.*, Commission Memorandum No. 122-94, dated February 16, 1994, the subject of which is stated to be: "Amendment to zoning ordinance No. 89-2665 relative to amending the development regulations for the South Point Redevelopment Area - Second Reading," and the title of which for section 3 of the proposed amendment -- Ordinance No. 94-2908 -- is: "That Subsection 13-5, entitled 'Destruction or Renovation of Nonconforming Buildings and Uses' of Zoning Ordinance No. 89-2665, is hereby amended as follows for the properties in the South Pointe Redevelopment Area." (Consolidated Appendix 3).

[42/] PLC initial brief at pp. 22-25.

[43/] Bally argues for a close scrutiny of the title and summary because, unlike legislation which is developed through the committee and hearing process of the legislature, an initiative petition has no safeguards other than Court scrutiny. (See Bally brief at pp. 17-18). Bally relies for its argument on a quotation from *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984), but the test it has quoted relates to the constitutional single-subject requirement. The scrutiny for which Bally argues is not applicable to a review of ballot title and summary. In fact, just the opposite is true. The Court provides *less* scrutiny to the "fair notice" principle embodied in the statutory, 15- and 75-word requirements for a ballot title and summary. *Cf., e.g., Restricts Discrimination*, 632 So. 2d at 1020 ("The critical issue concerning the language of the ballot summary is whether the public has fair notice of the meaning and effect of the proposed amendment."); *Net Fishing*, 620 So. 2d at 999; *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981, 987 (Fla. 1981) (ballot not misleading and gave fair notice where it "contained a brief description of the tax plan, i.e., the rate, the group on whom it would be imposed, the expected revenues, and the planned expenditure of those revenues").

severely restricts the number of words that can be used in a title and a summary, and it precisely states that only one requirement need be met by each of those ballot features.

According to section 101.161(1), the title is to be a "caption . . . by which the measure is commonly referred to or spoken of." Not one of the opponents has suggested that the Petition is not commonly referred to or spoken of as "Limited Casinos." The summary is to be "an explanatory statement . . . of the chief purpose of the measure." Not one of the opponents has suggested that the Petition's summary fails to state the measure's "chief purpose."[44/] Indeed, not one of the opponents has seen relevance in the express legislative limitation of 15 and 75 words -- restrictions designed to *prevent* the ballot from becoming a restatement of the full text of the amendment and all its ramifications.

> We cannot accept the contention that the seventy-five word ballot summary required by the statute must explain in detail what the proponents hope to accomplish by the passage of the amendment.

Official English, 520 So. 2d at 13.[45/] The Court is well aware that a ballot summary is not the sole source of election information. In *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954), the Court observed:

> It is a matter of common knowledge that many weeks are consumed, in advance of elections, apprising the electorate of the issues to be determined and that in this day and age of radio, television, newspaper and many other means of communicating and disseminating information, it is idle to argue that every proposition on a ballot must appear at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting.

44/ Some of the opponents actually misread the statute to import the "chief purpose" requirement for a summary into the title requirement. See No Casinos brief at pp. 3 and 6; Sims brief at p. 8.

45/ And see further discussion on the point in PLC's initial brief at pp. 21-22.

The opponents' fundamental misappreciation of the notice-giving requirements of section 101.161 is vividly displayed in the argument, made by every one of the opponents, that the summary is misleading because it fails to define various terms it uses, such as "riverboat casinos," "pari-mutuel facilities," "the remaining counties," "limited," and even the word "with."[46/] Their microscopic search for precise definitions is not at all appropriate for determining whether a ballot title and summary meets the "chief purpose" requirement.

Twelve years ago, in *Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982), the Court considered a proposed constitutional amendment directing that Fourth Amendment rights under the Florida Constitution would be controlled by interpretations of the counterpart federal rights which are announced by the United States Supreme Court, and required the courts of Florida to conform their determinations of admissibility to the standards for admissibility in federal proceedings as determined by that Court. This proposal was challenged under section 101.161 as being misleading and under-descriptive. Applying long-standing prescriptions for evaluating that statute, the Court rejected the challenge. It held that the ballot summary "clearly states the amendment's *chief purpose*,"[47/] and went on to explain its rationale in language which could have been written for this case:

> Appellants effectually seek an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects. . . . *Inclusion of all possible effects, however, is not required in the ballot summary.*

46/ No Casinos brief at pp. 8, 12-16; Bally brief at pp. 9-12; County Choice brief at pp. 24-25; Mann brief at pp. 4-5; Sims brief at pp. 11-14.

47/ 422 So. 2d at 305 (emphasis added).

That rationale was reiterated in *Non-Economic Damages*, which held that drafters of an initiative petition need not include in the summary an "inclusive list" of everything the proposal contains. 520 So. 2d at 287.

Consistent with its practical application of the statute, the Court has rejected invitations to evaluate possible alternative consequences that are not explained in the summary, and confined itself to the clarity of a summary's recitation of chief purpose:

> It is true, as appellants . . . urge, that the legislature may choose not to authorize lotteries, not appropriate the proceeds to educational uses, and even to divert the proceeds to other uses. *However, those questions go to the wisdom of adopting the amendment and it is for the proponents and opponents to make the case for adopting or rejecting the amendment in the public forum.*

Carroll v. Firestone, 497 So. 2d at 1206 (emphasis supplied). The opponents have lost sight of these fundamentals.

Further illustrative of the inappropriate inquiry into minutiae which the opponents urge on the Court is their extension of the Attorney General's theme to suggest that the word "limited" in the title and summary does not convey to voters the magnitude of casino intrusion into the state. They argue that the summary fails to specify the exact number of casino locations that will be established in Florida if the proposed amendment is adopted,[48/] and that the gross gaming area authorized is unavailable so that voters can compare Florida with Las Vegas and Atlantic City.[49/] Neither of these omissions provide a basis to conclude that the summary is misleading.

48/ No Casinos brief at p. 11; County Choice brief at pp. 18-23; Bally brief at p. 11.

49/ County Choice brief at p. 20 (the term limited casinos "invites a comparison . . . with the situation in other states"); Bally brief at p. 12 ("The proposal's failure to give the voter a basis for comparison to other gaming centers and facilities . . . is misleading.").

The criticism that the summary fails to state the exact number of casinos has two fundamental flaws. First, it is not consistent with prior case law. The specification of the exact number of facilities being authorized is not an indispensable feature of the summary of an initiative petition. The lottery initiative did not tell voters that dispensing facilities would be located in every fast-food store and gas station in the state, and the two earlier casino initiatives were not invalidated because the summary failed to enumerate the number of facilities being authorized.

Second, the Petition *could not* specify the number of locations being authorized because the exact number cannot possibly be known until the amendment is adopted and implemented. The legislature can vary the number of facilities by five, depending on its decision to authorize all, some or none of the riverboat casinos. Then, too, the exact number of pari-mutuel facilities that will have casinos cannot be known until the election takes place, since the proposed amendment allows casinos only at pari-mutuel facilities which have been in active operation for two years prior to the date of the general election at which the proposal is adopted. Since the signatures gathered for an initiative petition are valid for 4 years,[50/] the Petition could be placed on the ballot for a general election in either 1994 or in 1996. The summary of the Petition could not, therefore, specify the number of *eligible* pari-mutuel facilities in advance of either general election.[51/]

[50/] Section 100.371(2), Florida Statutes (1993).

[51/] Had the summary stated the precise number of pari-mutuel facilities at which casinos were being authorized in 1994, the drafters of the petition would have been speculating that they would be successful in obtaining the requisite number of valid signatures to place the Petition on the 1994 ballot. If their petition drive then failed to meet that goal, all of the signatures collected for the 1994 election might become useless in 1996, with the possibility that the ballot summary would then indeed be misleading.

The criticism that gross gaming area is not provided in the summary is equally invalid. For one thing, the size limitations for riverboats and pari-mutuel facilities in the Petition are "caps," and cannot validly be used to ground an estimate of what will actually be authorized by the legislature once the amendment is implemented. Nor can anyone predict how far below those caps various facilities will be erected in light of demographic, economic and other practical considerations.

The gaming area statistics provided by Bally and County Choice[52/] are no more useful than comparing apples with oranges. Those opponents calculate that the Petition would bring to Florida a gross gaming area equal to all of the gaming area in Las Vegas and four times the gaming area available in Atlantic City.[53/] From those raw numbers, they argue that the term "limited casinos" is a misleading turn of phrase. PLC suggests, rather, that the information which those opponents assert is missing may be suitable for a political campaign, but it is more likely than not to be misleading on a ballot summary.

The City of Las Vegas has a permanent population (according to the 1990 census) of 258,295, which is housed in an area of 86 square miles. Atlantic City has a permanent population (according to the 1990 census) of 37,986, which is housed in a geographic area under 12 square miles (with all of its casino facilities crammed along an oceanfront strip of land that is a fraction of that area). A true comparison of the saturation levels of those cities with the dispersion of casinos in the Florida under the Petition would go to prove, rather than disprove, the accuracy of the title and summary representation that Florida will have a "limited" number of casinos.

[52/] Bally brief at pp. 10-11; County Choice brief at pp. 20-22.

[53/] Bally brief at pp. 9-12; County Choice brief at p. 22.

Using Bally's computations for the square footage of gaming area in each place (Bally brief at p. 10), Las Vegas has 12.4 square feet of gaming area per person, Atlantic City has 22.5 square feet of gaming area per person, and Florida would have 0.25 square feet of gaming area per person. In terms of territorial coverage, Las Vegas and Atlantic City have 37,328 and 71,314 square feet of casino gaming area per square mile, respectively, whereas Florida would have 67.4 square feet of casino gaming area per square mile.

Any comparison with the gaming area in those two cities might be a campaign curiosity, PLC suggests, but it would not be informative for voters if it appeared on the ballot in a statewide election. Voters in the panhandle of the state will have very few casino facilities accessible to them, as compared to voters in the more compact, tri-county area encompassing Dade, Broward and Palm Beach Counties. Comparisons with Las Vegas and Atlantic City would actually mislead voters, since it would not reflect conditions that will be replicated in their immediate vicinity.

The Court will recognize, of course, that the opponents have invited the Court to apply the wrong standard to determine whether a summary is "misleading." Deceptiveness in a ballot title and summary is measured by what is objectively conveyed by the words expressed; not by a psychoanalysis of what some readers may subjectively or statistically perceive the language to mean. It is quite beside the point to this advisory opinion proceeding that some voters in a state having over 12 million people might *think* that the word "limited" means "few,"[54/] or might believe that 47 casinos is not limited enough.

The comparisons which the opponents make with the Court's two most recent decisions illustrates why subjective views of the word "limited" do not make the term

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[54/] No Casinos brief at p. 8.

misleading. The summary in *Save Our Everglades* was deceptive because it proclaimed that sugar interests would provide "help" for the Everglades pollution problem, while the text of the proposed amendment did far more.[55/] The promise of the summary in *Stop Early Release* was that the proposed amendment would "ensure" that criminals serve 85% of their sentences. That declaration was objectively false, since the proposed amendment specifically created an exception for pardons and clemency.[56/] There is no recitation in the summary of this Petition which is false vis-a-vis the text of the proposed amendment, and the opponents suggest none. The ballot summary here provides no "subjective evaluation of special impact," but simply tells the voter "the legal effect of the amendment, and no more."[57/]

B. The Court's recent invalidation of the "Stop Early Release" petition for a defective summary does not require an invalidation of the Petition.

After initial briefs were filed by the parties, the Court rendered its decision in *Stop Early Release*. In that case the Court invalidated yet another initiative petition brought to the

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55/ *In re Advisory Opinion to the Attorney General -- Save Our Everglades*, 19 Fla. L. Weekly S276 (Fla. May 26, 1994) ("***Save Our Everglades***").

56/ *Advisory Opinion to the Attorney General; Re: Stop Early Release of Prisoners*, Slip Opinion (Fla. Case No. 83,702, July 7, 1994) ("***Stop Early Release***").

57/ *Evans v. Firestone*, 457 So. 2d at 1355.

Court by the Attorney General this year.[58] A majority of the Court held that the proposal violated the ballot summary requirement of section 101.161(1).[59]

The Court's *decision*, PLC believes, is not inconsistent with prior law, although certain language in the majority opinion and in the concurring opinion of Justice Overton can be read to give concern that the Court has applied subjective standards for its review of initiative petitions.[60] PLC believes that the Court's decision is in the mainstream of decisional law which rejects ballot summaries that overtly and affirmatively represent as fact something which the text of the proposed amendment does not accomplish -- representations that invariably are tailored to carry a "political" message.

The summary in *Stop Early Release* promised, unequivocally, that 85% of criminal sentences would be served. It was designed as much as anything else as a form of political message declaring that the proposal would keep criminals in jail, obviously to sway voters in favor of the measure. The same type of false statements, also coupled with a political slant, doomed "Save Our Everglades." There the industry "which polluted the Everglades" was said

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[58] The Court noted in its decision that the Attorney General advised that the proposal met the requirements for placement on the ballot. (Slip opinion at p. 1). The Attorney General had similarly advised the Court that the requirements of law were met by the *Restricts Discrimination* and *Save Our Everglades* petitions. The Court has now found all three of these initiative proposals invalid.

[59] Because of the Court's disposition, the one-subject requirement was assumed to be met and was not reached. (Slip opinion at p. 4).

[60] The circumstances under which the case was processed will certainly excuse any language which goes beyond, and is unnecessary to the Court's decisional holding. First, to the Court's overt dismay no one briefed or argued the case for the Court -- not even the drafters of the proposed amendment. (Slip opinion at pp. 2-3). Additionally, the Court's decision "had to be expedited because of the nearness to the fall elections." (Slip opinion at p. 2).

to "help" pay for the cleanup, whereas the text of the proposed amendment "implies just the opposite."[61/]

In contrast to these inaccurate and politically tinged summaries, the summary of the Limited Casinos petition makes *no* representation whatsoever which the text does not support, and it contains *no* political rhetoric. Not one of the opponents has suggested otherwise.

IV. Opponents of the Petition have applied the Court's standards for review microscopically, in disregard of its more broad, historical foundation.

PLC and the opponents differ widely in asking the Court to apply its constitutional and statutory standards. On the one hand, PLC has presented a proposed constitutional amendment, and supporting argument, which apply the standards of review through the lens of history -- that is, in conformity with the guidelines developed and expressed by the Court *prior* to the drafting and circulation of its initiative petition. The opponents, on the other hand, have uniformly argued for an application of the Court's verbal formulations through a highly magnified lens which has not previously been used in initiative petition analysis -- that is, by means of a heightened and detailed *subjective* scrutiny which postulates that, to the extent that anyone *could* disagree with any aspect of the drafters' choices, there exists a defect warranting invalidation of the proposal.

The choice of approach which the Court makes here, on the issue of how to apply its articulated tests, will determine not only the outcome of the case but, as a matter of policy, whether the initiative method of amending the Constitution will continue to have

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61/ 19 Fla. L. Weekly at S278.

predictability.[62] To date, PLC believes, the Court's application of standards has been predictable, and consistent with the history of the evolution of Article XI, section 3 of the 1968 Constitution. As that history is being challenged in this proceeding, it is worth reviewing.

The initiative petition provision of the Constitution was changed in 1972. Conflicting points of view as to what that change meant were aired in *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976). There, a majority of the Court approved for ballot placement an initiative petition for "Ethics in Government" predicated on a revitalization of the "clearly and conclusively defective" test which had found its most profound expression in Justice Terrell's 1956 admonition that

> [W]e are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have the right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution.

338 So. 2d at 821.

The intent of the 1972 rewording of the initiative provision of the Constitution engaged the Court in *Weber*. At issue was whether the change affected a narrowing or an enlargement of the right of initiative. A concurring opinion acknowledged that the pivotal one-subject language "obviously means different things to different, reasonable people," and it postulated that the Court's responsibility was to select an interpretation "not only looking back on its development as best we can and with a view to its applicability in this case, *but as well*

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[62] One observer holds the view "[that] there is no real guiding principle . . . and the court can do pretty much whatever it wants." See comment of Tom Julin, Esq., in the *Daily Business Review* at p. A9 (July 11, 1994), a copy of which is attached as Appendix 4.

with a concern for future cases where the right of initiative may be exercised."[63/] Three concurring justices concluded that the "1972 change was designed to *enlarge* the right to amend the Constitution by initiative petition."[64/]

One justice, dissenting, held the opposite view. He asserted that the authors of the revised initiative provision intended that "it be more restrictive," and that it "should be more difficult" to amend the Constitution by initiative.[65/] That interpretation of the 1972 revision to Article XI, section 3 has not been revisited since the *Weber* case was decided in 1976, and there has been no announced retreat from a liberal application of the one-subject requirement to the people's right to amend *their* constitution.

If the Court now accepts the opponents' invitation to scrutinize draftsmanship, parse verbiage, search for alternate meanings in every phrase and term, inquire into the nature and motives of its proponents, and consider the merits and wisdom of each proposal, the Court will be redefining the one-subject requirement in Article XI, section 3 in contravention of the last 20 years of initiative jurisprudence. PLC submits that, inasmuch as the language of Article XI, section 3 has not changed since 1972, it is inappropriate to re-interpret the intent of the framers of that provision in line with the crimped construction offered by the *Weber* dissent. The tragedy in doing so would be that the Court will leave no tracks for petition

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[63/] 338 So. 2d at 822 (England, J., concurring, and joined by Adkins and Sundberg, JJ.) (emphasis added).

[64/] *Id.* at 823 (emphasis added).

[65/] 338 So. 2d at 824 (Roberts, J., dissenting).

drafters to follow. The practical precedential predictability that has marked the present form of Article XI, section 3 since 1976, will effectively be a dead letter.[66/]

Conclusion

Historically, the Court has allowed the adjective "limited" and the noun "limitation" to appear in the title and summary of initiative petitions, has been practical in construing the "chief purpose" requirement of Section 101.161 by allowing ballot summaries to omit a catalog of all matter directly connected with the proposal, has forborne from second-guessing the wisdom or draftsmanship of initiative petitions, and has centered its analysis of the one-subject requirement on the unity of the proposal and its oneness of purpose. The opponents of the Petition have expressed no appreciation for those broad principles, and no regard for the Court's stewardship over the right of citizens to amend their constitution.

The Petition meets the statutory requirements of Section 101.161, and the constitutional requirement of Article XI, section 3. Setting aside the passionate advocacy which the opponents have brought to the case, the Court will find that there are only three questions to answer, and if the answer to each is "yes" then the proposed amendment must be approved.

> 1. Is the title "Limited Casinos" the name by which the proposal is commonly referred to or known, as section 101.161(1) requires, and does it omit political rhetoric or any assurance which the text of the amendment does not contain? The answer to that question is "yes."

66/ Oddly, the two opponents of the Petition who have developed competing initiative petitions for casino gaming -- County Choice and Bally -- have argued for a narrowing approach to initiative review, in the face of the prospect that their interpretation will assuredly invalidate their own proposals. This proceeding is not the place to detail those self-induced defects, of course.

2. Does the ballot explanation describe the "chief purpose" of the proposed amendment, as section 101.161(1) requires, and does it give fair notice of the contents of the amendment's text? The answer to that question is "yes."

3. Does the proposed amendment have a "logical and natural oneness of purpose" to meet the one-subject requirement of Article XI, section 3 of the Constitution? The answer to that question is also "yes."

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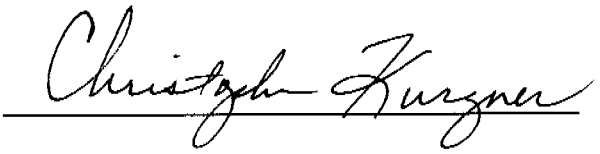

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APPENDICES

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