IN THE SUPREME COURT OF FLORIDA

Case No. 83,886

Upon Request From The Attorney General
For An Advisory Opinion As To The
Validity Of An Initiative Petition

**IN RE: ADVISORY OPINION
TO THE ATTORNEY GENERAL -**

LIMITED CASINOS

REPLY BRIEF OF FLORIDA LOCALLY APPROVED GAMING, INC. and BALLY MANUFACTURING CORPORATION

OPPOSING THE LIMITED CASINOS PETITION

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REPLY ARGUMENT

FLORIDA LOCALLY APPROVED GAMING, INC. ("FLAG") and BALLY MANUFACTURING CORPORATION ("Bally") were among the interested parties filing five initial briefs opposing the proposed constitutional amendment of Proposition for Limited Casinos, Inc. ("PLC"). The other four briefs opposing the Limited Casinos petition were filed by No Casinos, Inc.; Proposition for County Choice Gaming, Inc.; former judge Robert T. Mann; and Bill Sims. PLC filed the sole brief in support of its Limited Casinos petition.

The title and ballot summary of the Limited Casinos petition[1] violate Florida law because they are ambiguous, misleading, and omit facts that are material and not readily available to the voter. The defects are summarized below:

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[1] The ballot title and summary of the Limited Casinos petition provide as follows:

Title: Limited Casinos

Summary:

> Authorizing a limited number of gaming casinos in Broward, Dade, Duval, Escambia, Hillsborough, Lee, Orange, Palm Beach and Pinellas Counties, with two in Miami Beach; and limited-size casinos with existing and operating pari-mutuel facilities; and if authorized by the legislature up to five limited-size riverboat casinos in the remaining counties, but only one per county. Mandating implementation by the legislature. Effective upon adoption, but prohibiting casino gaming until July 1, 1995.

1. "Limit" and "limited" in the title and summary are ambiguous and misleading because, contrary to the popular understanding of "limit" as restrictive, the Limited Casinos petition authorizes casino gaming for the first time, and authorizes a large, undisclosed total number of casinos having a large, undisclosed total area of gaming space.

2. The ballot summary fails to accurately track the language of the proposed amendment and therefore omits material facts in the following respects:

   a. The summary fails to disclose that one casino must be placed in the so-called "South Pointe Redevelopment Area";

   b. The summary fails to disclose the number of casinos that would be authorized; and

   c. The summary fails to disclose the size limitations for the gaming area of casinos with pari-mutuel facilities and on riverboats.

3. The ballot summary is confusing and misleading because it references an unquantified limit on the number of one type of casino, and an unquantified limit on the size of two other types, without explaining that the petition fails to limit the size of the first type and the number of another.

4. The title, summary, and petition as a whole are misleading for failing to disclose that one of the chief purposes of the proposed amendment is to ensure that Thomas Kramer and Mirage Resorts will own and operate a large hotel casino in south Miami Beach. This is an unprecedented attempt to bestow special constitutional benefits on a single private commercial endeavor.

This Court has made it clear in developing the standards applicable to ballot titles and summaries that omissions of this materiality and language this misleading are fatal defects in proposed constitutional amendments, requiring that such defective proposed amendments be stricken from the ballot. Florida League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992); Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991); Wadhams v. Board of

County Comm'rs, 567 So. 2d 414-416-17 (Fla. 1990); Askew v. Firestone, 421 So. 2d 151, 155-56 (Fla. 1982).

A. The Title And Summary Are Misleading In Purporting To "Limit" Casinos, And The Summary Omits Material Facts.

In its initial brief, PLC says the "most important" response to the petition's misleading use of "limit" is that the Court has approved other initiatives using the terms "limited" or "limitation." [PLC In. Br. 21.] By this PLC apparently means to assert that once a word has been used in the title of an initiative that this Court approves, the word is henceforth beyond attack no matter what its subsequent use and context. Such an assertion is, of course, utterly unsupported by this Court's prior decisions or any other authority.

Although the word "limited" was indeed used in the title of a previous initiative petition case, Limited Terms, that prior use cannot and does not establish a precedent for the use of the same word in the Limited Casinos petition.[2] Whether the term is misleading or not depends on the context in which it is used. The proposed constitutional amendment at issue in Limited Terms put a clearly-defined eight-consecutive-year limit on terms of political office. 592 So. 2d at 225. The eight-year limit was stated in the summary as well as in the text of the amendment. Id. at 227. The terms of political office are set forth in the Florida Constitution at article III, section 15 and article IV, section 5, and are well

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[2] There is no indication in Limited Terms that any party contested the accuracy of the title's use of the word "limited."

known to voters, who are regularly inundated with elections and taught these basics of political terms in civics classes.

Unlike the ballot summary in Limited Terms, the Limited Casinos ballot summary does not quantify the "limits" that the proposed amendment purports to impose. In contrast to the Limited Terms proposal and its context, the Limited Casinos petition requires voters to make an important decision about a topic that is not already part of Florida law, not taught in our schools, and not a matter of common knowledge. Therefore, although the Court approved the title in Limited Terms, that decision by no means determines or even suggests that the title of the Limited Casinos petition is accurate and not misleading.

The same principles apply to undermine PLC's reliance on two other cases in which proposed constitutional amendments used the word "limitation" in their titles. The accuracy and clarity of the word as used in those titles was not raised as an issue before the Court. In In re Advisory Opinion to the Attorney General -- Homestead Valuation Limitation, 581 So. 2d 586 (Fla. 1991), the Court relied in part on the fact that "[t]he summary does make it clear that the valuation will be limited to a maximum of three percent." 581 So. 2d at 588. In contrast, the summary of the Limited Casinos petition fails to quantify any of its promised "limits."

In In re Advisory Opinion to the Attorney General, Limitation of Non-Economic Damages in Civil Actions, 520 So. 2d 284 (Fla. 1988), the ballot summary specifically quantified at $100,000 the proposed limit on recoveries for non-economic losses. 520 So.

2d at 286. The Court found that the ballot summary was legally sufficient because it "accurately tracks and describes the proposed amendment." Id. at 287. But the Limited Casinos ballot summary fails to quantify its "limits," and fails to accurately track the proposed amendment because it omits those limits as well as other material portions of the amendment such as the requirement of a casino in the "South Pointe Redevelopment Area."

PLC further defends its petition's misleading title and summary on the grounds that (1) taken together, they are sufficiently clear to avoid confusion about the promised "limits"; (2) the Limited Casinos petition does in fact "limit" casinos when compared to the possibility of unlimited casinos and when placed in the context of the size and population of Florida; and (3) the use of "limit" is a point of draftsmanship as to which the public must inform itself and the Court should not be concerned [PLC In. Br. 18-20].

All of PLC's defensive arguments rely on the premise that there is a point beyond which the title and ballot summary need not inform the voter, after which the voter must assume all responsibility for becoming informed or must accept the information available from the press and opponents of the measure. PLC necessarily believes, then, that the facts omitted from the title and summary are not so material as to require affirmative disclosure to the voter, and that the availability of the underlying information from public sources is sufficient. Such a position is inconsistent with this Court's standards for ballot summaries.

This Court ruled in Askew that the burden of informing voters falls on the ballot title and summary, not the press or opponents:

> The purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment. A proposed amendment cannot fly under false colors; this one does. The burden of informing the public should not fall only on the press and opponents of the measure -- the ballot title and summary must do this.

Askew, 421 So. 2d at 156.[3] Although voters must "do their homework and educate themselves about the details of a proposal and about the pros and cons of adopting" it, "the availability of public information about a proposed amendment cannot be a substitute for an accurate and informative ballot summary." Smith v. American Airlines, Inc., 606 So. 2d 618, 620 (Fla. 1992) (emphasis added).

This Court has approved ballot summaries over the objections of opponents who asserted that the summaries omitted material information, but not when the omissions were like the omissions from the Limited Casinos ballot summary. Significantly, the omissions here are matters of fact contained in the proposed amendment but not in the summary, and are not merely elaboration or advocacy as to the wisdom of the proposal. The facts omitted from the ballot summary of the Limited Casinos petition are much more

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[3] PLC quotes part of this same statement [PLC In. Br. 18], but only in the context of arguing that the title and summary must be considered together in determining whether the title is accurate, informative, and not misleading. PLC does not mention Askew in connection with its analysis of whether the ballot summary is sufficient [PLC In. Br. 21-25].

significant to the chief purposes of the petition, and more important to fully inform the voters as to facts embodied in the amendment, when compared to information allegedly omitted from other summaries. Limited Terms, 592 So. 2d at 228-29 (summary sufficient although it failed to mention severability clause and failed to advise voters that no term limits previously existed); Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986) (summary sufficient although it failed to warn voters that "legislature may choose not to authorize lotteries, not appropriate the proceeds to educational uses, and even to divert the proceeds to other uses"); Grose v. Firestone, 422 So. 2d 303, 305 (Fla. 1982) (summary not required to explain and analyze Fourth Amendment law and exclusionary rule where it accurately disclosed that proposal would force linkage between state and federal search and seizure law); In re Advisory Opinion to the Attorney General, English -- The Official Language of Florida, 520 So. 2d 11, 13 (Fla. 1988) (summary said legislature would "implement" this "article," whereas text said legislature would "enforce" this "section").

The omissions from the Limited Casinos ballot summary are omissions of very material facts, necessary to fully inform the voter of the chief purposes and significant ramifications of the proposed amendment. This is not a case of harmless semantic differences between the summary and text, or of opponents demanding that the summary analyze the wisdom of the proposal or furnish extraneous explanatory material. The Limited Casinos ballot summary omits facts contained in the proposal that the voter must know in order to make an intelligent and informed choice. See,

e.g., In Re: Advisory Opinion to the Attorney General -- Save Our Everglades Trust Fund, 19 Fla. L. Weekly S276, S278 (Fla. May 26, 1994). These omissions, together with the confusing and misleading use of the terms "limit" and "limited" in the title and summary, render the Limited Casinos summary clearly and conclusively defective, mandating its removal from the ballot.

B. The Omission Of South Pointe From The Summary Is Material And Misleading.

PLC could say only so much in the 75 words allotted for its ballot summary, but that is no excuse for omitting material factual information about a very significant part of the proposed amendment:

> [T]he word limit does not give drafters of proposed amendments leave to ignore the importance of the ballot summary and to provide an abbreviated, ambiguous statement in the hope that this Court's reluctance to remove issues from the ballot will prevent us from insisting on clarity and meaningful information.

Smith, 606 So. 2d at 621. The ballot summary is fatally defective for failing to accurately track the proposed amendment by including the special requirement that a hotel casino be placed on South Pointe land. No other private commercial interests currrently hold the special constitutional status that the Limited Casinos petition would bestow on Thomas Kramer and Mirage Resorts; if such a thing is to be accomplished for the first time through this amendment, the voters must be placed on notice in the ballot summary that a special requirement is included.

PLC readily admits the indisputable fact that the ballot summary fails to mention that one hotel casino must be located in

the "South Pointe Redevelopment Area." [PLC In. Br. 22.] PLC defends this deficiency on the grounds that it is a "purest form of 'detail'" that is not by any "stretch of prior case law, relevant to the 'chief purpose' of the proposed amendment." [PLC In. Br. 23.][4]

One is left to wonder why, if the mandatory placement of a hotel casino on land in South Pointe is so totally irrelevant, PLC revised the proposed amendment to include it at all. Certainly if the voters of Florida are being asked to constitutionalize a site-specific casino provision with the concealed effect of virtually guaranteeing its ownership by one individual and its control by one casino company, the voters are <u>at least</u> entitled to fair warning from the ballot summary that they should investigate further. Even then, a serious question remains as to the ready availability of this information to the public. The omission of any reference to South Pointe in the ballot summary is unfair and misleading.

Although PLC argues that information about pari-mutuel locations is readily available from state officials [PLC In. Br. 25], PLC conspicuously fails to address the availability of information about the "South Pointe Redevelopment Area." PLC says

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[4] PLC also asserts that the summary's omission of South Pointe is irrelevant because South Pointe is mentioned in PLC's Statement of Intent [PLC In. Br. App. 3], which PLC says was released "at the same time the Petition was unveiled." [PLC In. Br. 23 n.12.] However, the Statement of Intent is undated, and it is unclear whether or how widely it was distributed. There is no indication that it accompanied each petition form distributed for signatures. In any event, it, too, fails to explain precisely where the "South Pointe Redevelopment Area" is or why it is singled out for special treatment.

only that most voters know where Miami Beach is, and asserts that the South Pointe Redevelopment Area is "a discrete, 246-acre zone designated by that municipality as a redevelopment area." [PLC In. Br. 24.][5] Nothing in PLC's initial brief or appendix supports PLC's assertion as to the acreage of the area, or otherwise proves its existence. If the voters are to place a supposedly "defined" term in the Florida Constitution, it should have some definite and official meaning; the term "South Pointe Redevelopment Area" does not.

Information about the "South Pointe Redevelopment Area" is not readily available to the public. South Pointe is not named on readily available maps, nor, of course, is a "redevelopment area" depicted on such maps. Over a period of several weeks, FLAG, Bally, and their undersigned counsel undertook countless phone calls, several trips to the Miami Beach city clerk's office, review of public records, and legal research, and were unable to find anything defining a "South Pointe Redevelopment Area." It defies logic to suggest that every voter concerned or merely curious about the potential constitutional requirement that a casino be placed in this location should be expected to undertake similar time and expense in the search.

The South Pointe requirement is one of the chief purposes and important ramifications of the Limited Casinos petition. It

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[5] PLC's Statement of Intent says only that one of the two Dade County hotel casinos "should be" in Miami Beach, "with one of these located, as expressly provided in the amendment, in the South Pointe Redevelopment Area (as designated by the Miami Beach Redevelopment Agency)." [PLC In. Br. App. 3 at 3.]

should have been disclosed in the ballot summary (and it should have been defined in the text). Its omission from the summary renders the Limited Casinos petition clearly and conclusively defective.

CONCLUSION

Because the Limited Casinos petition relies upon ambiguous and misleading language, and because its ballot summary omits material facts and is misleading, the proposal violates Florida's title and ballot substance requirements. Accordingly, the Court should render its opinion invalidating the Limited Casinos petition and prohibiting its submission to the voters.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished to the following by United States mail this 15th day of July, 1994.

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