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IN THE SUPREME COURT
STATE OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: LIMITED CASINOS

CASE No. 83,886

On a request by the Attorney General for an advisory opinion on the validity of an initiative petition circulated under Art. XI, sec. 3

REPLY BRIEF OF NO CASINOS, INC., OPPOSING THE LIMITED CASINOS INITIATIVE

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The Limited Casinos ballot title is misleading--even more so than the ballot title in the "Save Our Everglades petition. By arguing that the title and summary must be considered together the proponents seek to expand their title to 90 words. This flies in the face of the spirit and intent of the law. The title itself must not mislead voters, and must give them fair notice of the amendment's main purpose. This title fails to do so

The limited casinos ballot summary is also misleading. It fails to specify the changes it would make, gives the false appearance of creating new protections when it would eliminate protections already in existence, and it improperly leaves out material facts.

The proponents' reliance on Weber v. Smathers 338 So.2d 819 (Fla. 1976) and Floridians Against Casino Gambling v. Let's Help Florida 363 So.2d 337 (Fla. 1978) is misplaced. While those decisions have some remaining vitality, the broad method of initiative analysis they applied has long since been abandoned.

This initiative is a logrolling measure. As exemplified by some briefs filed in this case, voters who desire casino gambling in Florida would be compelled to vote for measures they oppose in order to achieve their desired end.

The measure also violates the single subject rule, by affecting or performing a host of different governmental functions. It also has substantial unstated collateral effects and should be denied a place on the ballot.

ARGUMENT

I. THE BALLOT TITLE "LIMITED CASINOS" IS MISLEADING

It is not inappropriate to use the word "limited" in a ballot title. However, the title must accurately convey the chief purpose of the amendment. Advisory Opinion To The Attorney General--Limited Political Terms In Certain Elective Offices, 592 So.2d 225, 228 (Fla. 1991), quoting, Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982). When the words "limited casinos" are the only words in the title, the word "limited" is too ambiguous to accurately convey any purpose at all.

Notwithstanding the proponent's assertions to the contrary, the ballot title "Limited Casinos" is misleading. The proponents suggest that the title is not as rhetorical or hyperbolic as "Save Our Everglades." Proposition For Limited Casinos'("PLC") Brief at 18. Suffice to say in response, that because "Limited Casinos" carries more subtle implications, it has a greater potential to mislead than the phrase "Save Our Everglades." Save Our Everglades is at least clear in its deception. Only those who want to "save the everglades" would vote for the initiative. Conversely, the phrase "limited casinos" appeals to a wide range of personal proclivities. People who want one or more different limits on casinos might vote for this initiative, when in fact it imposes no realistic limits and authorizes casinos on a large scale.

The proponents also suggest that the ballot title cannot be examined alone or "in the abstract." PLC Brief at 17. If the

proponents intend to say that the initiative could not be removed from the ballot solely because of a defective title or summary that simply is not correct. Section 101.161, Florida Statutes, imposes separate requirements for the title and summary. Where the title fails to meet its requirements, the summary cannot be held up to the Court as a cure. Section 101.161 authorizes a 15 word title and a 75 word summary. By combining the two, the proponents would in effect create a 90 word title.

Furthermore, considering the initiative as a whole, cannot magically create "unity of purpose", see PLC Brief at 6, where none exists. Examining the initiative as a whole only makes clear the extent to which violations in title, summary, and text combine to create additional defects. See Initial Brief of No Casinos at 15. Whether the parts of an initiative are examined separately or together "[a] voter should not be misled" and must be given "fair notice" by the ballot. Askew, 421 So.2d 152, 155. "Fair notice in terms of a ballot summary is actual notice." Id. at 156. The title must not mislead voters regarding the content of the proposed amendment. Advisory Opinion--Limited Political Terms, 592 So.2d at 228.

The central issue with regard to the title in this case, as in all cases arising under section 101.161, is whether the title is misleading. Stated differently, the ultimate question in this case is: "can an initiative that authorizes casino gambling for the first time, and on a massive scale, claim to have "limited

casinos"[1] in Florida?

Under this initiative, riverboat casinos twenty-five percent larger than those currently in use are considered "limited in size", and authorizing casinos in virtually every corner of the State is considered "limited." This amendment would authorize four times the amount of casino square footage as now exists in Atlantic City, and almost as much floor space as in Las Vegas, Nevada. This cannot be described as "limited."

II. THE BALLOT SUMMARY IS MISLEADING AND COMPOUNDS THE CONFUSION CREATED BY THE BALLOT TITLE

Like the title, the ballot summary relies heavily on the word "limited" thereby misleading voters into believing that casinos are being limited in some way. Nowhere does the summary specify the number of casinos it would authorize. Instead, it uses the phrase "limited number" to convey the false impression that only a few casinos would be allowed. Similarly, by claiming that casino sizes are limited, the summary misleads voters into believing that any casinos created would be small. In fact, the amendment authorizes casinos that are quite large. The summary would also mislead voters into believing that the "limit" it imposes is simply to specify location, as has been the case with some other initiatives. However, this initiative while purporting to locate casinos, offers none of the explicit

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[1] Notwithstanding the proponents' assertions to the contrary, PLC brief at 19, the word "limited" is not always an adjective when used to modify the word casinos in the phrase "limited casinos."

description that should be included so as to advise voters of location. See, e.g., Advisory Opinion To The Attorney General--Limited Marine Net Fishing, 620 So.2d 997 (Fla. 1993)(specifying location with great particularity). By intimating that it would "locate," without giving voters specific and accurate locational information, the Limited Casinos initiative deprives voters of the ability to make an informed decision. While a summary need not include a full statement of current law, it must advise voters of what new circumstance will exist if the initiative passes. In re: Advisory Opinion--Restricts laws Related to Discrimination, 632 So.2d 1018, 1021 (Fla. 1994); Smith v. American Airlines, 606 So.2d 618, 621 (Fla. 1992). This summary does not meet that requirement.

The summary also creates the false impression that riverboat casinos could not be authorized in counties that have pari-mutuel facilities, and fails to define "riverboat casinos", a term that can have widely different meanings--the casinos created may not be boats at all. These failures to accurately describe the changes that would take place are all clear violations of section 101.161, Florida Statutes. See Florida League of Cities v. Smith, 607 So.2d 397, 399 (Fla. 1992)(requiring specificity in the ballot summary).

"While the Court is wary of interfering with the public's right to vote on an initiative proposal . . . [it] is equally cautious of approving the validity of a ballot summary that is not clearly understandable." Advisory Opinion--Restricts Laws

Related to Discrimination, 632 So.2d 1018, 1021 (Fla. 1994)(citing Smith v. American Airlines, 606 So.2d 618). The limited casinos ballot summary is misleading. It improperly fails to specify the changes being made. Florida League of Cities v. Smith, 607 So.2d 397, 399 (Fla. 1992). It gives the false appearance of creating new protections when it would eliminate protections already in existence, id, and it improperly leaves out material facts. Advisory Opinion--Limited Political Terms, 592 So.2d 225, 228 (Fla. 1991). This failure to fully advise voters of what they are voting on cannot be permitted. "Fair notice in terms of a ballot summary is actual notice." Askew, 421 So.2d 152, 156.

As the proponents suggest, voters are assumed to have some walking-around common sense, PLC Brief at 23, and it may be assumed that they will obtain readily available information. However, as this Court has said, "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, 621.

III. THE WEBER AND FLORIDIANS DECISIONS HAVE LITTLE OR NO APPLICATION TO THIS CASE

Throughout their analysis the initiative proponents place heavy emphasis on the reasoning, and interpretation of the single subject rule, found in Weber v. Smathers 338 So.2d 819 (Fla. 1976) and Floridians, 363 So.2d 337 (Fla. 1978). Their reliance is misplaced.

Weber was the Court's first attempt to interpret Article XI, section 3 after it was amended in 1972. Because that was the case, the majority opinion appears to have been deliberately restrained. It cautiously avoids sweeping discussion that could be misapplied in later cases, or misunderstood by those who must rely on the Court's decisions. See Weber, 338 So.2d 819.

Justice England's concurring opinion moved the Court towards allowing the amendment on the ballot. Joined by two other justices, he argued that "the power of initiative was consciously extended to multi-section and multi-article revisions short of a complete reworking of the entire document." Weber, 338 So.2d 819, 823 (England J. concurring).

He went on to argue for an extremely broad interpretation of the single subject rule that governs initiatives, based on Article III, section 6, the single subject rule that applies to legislative acts. Weber, 338 So.2d 819, 823.

In Floridians, a majority of the Court adopted Justice England's views from Weber. Floridians is the only case in which an initiative petition was judged under the relaxed single subject standard that applies to legislative acts.[2] Soon after the Weber and Floridians decisions, the Court retreated to its current, narrower, standard of review. See Fine v. Firestone, 488 So.2d 984 (Fla. 1984)(retreating from Floridians Article III,

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[2] The majority in Weber might have reached a different conclusion without the support of the concurring justices, but Article III, section 6 is not directly mentioned in the more restrained majority opinion.

section 6 analysis in connection with initiative petitions).

Under Article III, section 6, the Court applies a comparatively lax standard of review to legislative acts.[3] As the only case to apply that standard to a citizen's initiative, Floridians represents the high water mark of populist single subject analysis.[4] While a few elements of Weber and Floridians have continuing vitality[5] the reasoning that supported them has virtually no application and the Court has long since followed a different course.[6]

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[3] See Fine 488 So.2d 984 at 988-989(stating with regard to Article III, sec. 6, "we find that we should take a broader view of the legislative restriction because any proposed law must proceed through legislative debate and public hearings").

[4] In Fine the court expressly receded from three key elements of the Floridians holding. First, the conclusion that the single subject rule of Article XI should be applied in the same manner as Article III, section 6. Fine, 488 So.2d at 988. Second, Floridians ruling that allowed initiative amendments to go forward without identifying all constitutional provisions substantially affected. Id. at 989. Third, Floridians conclusion that the Court should not consider a proposal's affects on other articles or sections. Id. at 990.

[5] The "functionality" test was born in Weber, and is now a mainstay of the Court's single subject analysis.

[6] Justices have commented on these cases with varying degrees of disfavor. See, e.g., Evans v. Firestone, 457 So.2d 1351, 1357 (Fla. 1984)(Overton J. Concurring)(harmonizing the cases, but stating "I recognize that our Floridians decision has caused confusion"); Carroll v. Firestone, 497 So.2d 1204, 1208 (Fla. 1986)(Ehrlich J. concurring in result only)("I lamented in Fine that this court's semblance of continued adherence to Floridians and Weber...sent a garbled message to the public"); Fine, 448 So.2d at 997(Shaw J. concurring)("In announcing that we would view the one-subject limitation broadly rather than narrowly, we failed to appreciate the impreciseness of the words "one-subject" and thus invited initiative petitions which would sweep so broadly as to nullify the limitation."); Fine, 448 So.2d 984, 994(McDonald J. concurring)(noting that "[a]s Justice England recognized and Justice Roberts prophesied this Court's

The Floridians Court recognized that it would have been compelled to find that "at least five subjects" in Weber, if the Court had applied the narrow view. Floridians, 363 So.2d 337 at 340. Thus, that case would not survive under today's narrow standard of review. Since Floridians followed and applied the Weber standard, the casinos amendment in Floridians probably would not survive today either.

IV. THE LIMITED CASINOS INITIATIVE IS A LOGROLLING MEASURE

As the Court recently explained, a major purpose of the single subject rule in Article XI, section 3, is to prevent logrolling. In re: Advisory Opinion To The Attorney General--Save Our Everglades, 19 Fla. L. Weekly S276, S277 (May 26, 1994). Logrolling is "a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." Id.

The initiative proponents assert that this case does not involve logrolling because:

> the Petition does not carry 'dissimilar provisions designed to attract support of diverse groups to assure its passage. Any voter desirous of authorizing casino gaming into the state can vote to do so without having to accept some undesired change in the constitution, injected as a sweetener for some special constituency, and vice versa.

PLC Brief at 7 (citation omitted).

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discussion and holding...in Floridians has made the constitution 'subject to potentially devastating effects from...initiative petitions having subjects framed as broadly as the mind can devise.'").

Indeed, some voters who are desirous of casino gaming in this state are so concerned about having to accept undesired changes in the constitution--placed there to sweeten the pot for special constituencies--that they have filed briefs in this case attacking the Limited Casinos Initiative. See, e.g., Initial Brief of Florida Locally Approved Gaming, Inc., and Bally Manufacturing Corporation ("Bally Brief") and Brief of Amicus Proposition For County Choice Gaming, Inc.

The litany of special interests joined in the limited casinos initiative, the number of differing issues raised (including issues not stated in the initiative), and the number of separate subjects joined in this initiative is so broad that it will not bear repeating in a reply brief. See generally, Initial Brief of No Casinos, Inc., at 17-25.

If the single subject rule is to be a rule of restraint, Fine, 488 So.2d 984, 989, then this Court must require that amendments strictly comply with the single subject rule of Article XI, Section 3. Id. If the single subject rule is to act as a safeguard against logrolling then the Court cannot allow this amendment on the ballot.

V. THE LIMITED CASINOS INITIATIVE EMBRACES MULTIPLE SUBJECTS AND FAILS THE COURT'S FUNCTIONALITY TEST

The proponents assert that "[t]he Petition contains one subject and only one subject: an authorization for a limited number of gaming casinos in the State of Florida." PLC Brief at 6. This statement from the proponent's Brief conveys two

subjects "authorization" and "limitation of number", but it fails to mention other subjects included in the amendment such as privatization of casinos[7], location of casinos, maximum sizes for some casinos, creation of different but not clearly defined types of casinos, creation of taxes[8], preemption of zoning and land use authority[9], etc.

While it is true as the proponents suggest that an initiative may contain matters directly connected to the main purpose of the initiative, PLC Brief at 8, this does not mean that an initiative's proponents may themselves "directly connect" any matters they choose and thereby satisfy the single subject requirement. There must be a preexisting connection. The material connected must be "necessary to effectuate the main object and purpose of the amendment." Floridians, 363 So.2d 337, 339. The relation between the component parts must be one that arises naturally, not one that is artificially created so as to

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[7] The legislature has the power now to create publicly owned or privately owned casinos. Thus, the initiative misleads voters on this point. Indeed, the legislature chose to create a publicly owned lottery, it might prefer public ownership of casinos. This amendment performs that legislative function.

[8] Elsewhere, the PLC brief acknowledges that this Court has previously concluded that imposing taxes is a discreet legislative function. PLC Brief at 7 (describing "the government's ability to tax" as one of "three highly unconnected subjects" in Fine).

[9] On this point the proponents state that the Attorney General "fails to mention any source for the notion that local zoning and land use regulations are disregarded. The Court will find none in the petition" PLC Brief at 15. The failure to put voters on notice of these changes, is a major flaw in the initiative. That flaw cannot serve as a defense to the initiative's multiple violations of the single subject rule.

give the appearance of a single subject. In short, there must be a natural and logical oneness of purpose. Advisory Opinion--Save Our Everglades, 19 Fla. L. Weekly S277. "Enfolding disparate subjects within the cloak of a broad generality does not satisfy the single subject requirement." Advisory Opinion--Restricts Laws Related To Discrimination, 632 So.2d 1018, 1020.

In this case, the broad generality of casinos cloaks a host of subjects. These subjects are, at best, "reasonably related"--as Article III section 6 would require. See Fine, 448 So.2d 984, 988. They are certainly not "directly connected"--as Article XI, section 3 requires. Id. at 989.

The Proponents describe most of what they call "details" in the initiative as "locational" and suggest that the Court has already determined that this is an appropriate subject for an initiative petition. PLC Brief at 9 citing, Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (Fla. 1978).[10] Again, the proponents misapprehend the issue. The question is not whether locating casinos is an appropriate subject for an initiative. The question is whether that is the sole governmental function affected by the initiative, or whether

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[10] The proponents note that in Floridans, the Court approved "a petition authorizing casinos which contained in the text of the amendment very detailed boundary lines within two counties of the state as the geographical confines for the placement of casinos." PLC Brief at 8. However, there is no reasonable comparison between those provisions and the ones at issue here. This case and Floridians share only one common factor--they both involve casino gambling. Since the court will not examine the wisdom or merit of casino gambling, that basis for comparison is meaningless. Floridians, 363 So.2d 337, (Fla. 1978).

the initiative is misleading in that respect. For example, this initiative obviously "implements a policy decision of statewide significance." Advisory Opinion--Save Our Everglades, 19 Fla. L. Weekly S276, S277. "It also imposes a levy." Id. This Court has consistently treated the imposition of taxes as a separate governmental function.[11] See id.

To give but one additional example, this initiative purports to allow the legislature to authorize five riverboat casinos. This is clearly "a subject", and it is misleading since the legislature could authorize riverboat casinos now if it chose to do so. The initiative specifies the minimum size for casinos, and very ambiguously implies that there are some places where riverboat casinos could not be located. This is not simply "locating casinos" as in Floridians. While it is doubtful that the Floridians initiative would survive single subject challenge today[12], that initiative was much more precise, much more detailed, and hence, much less misleading than the Limited

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[11] Floridians allowed the allocation of revenue, but did not directly impose a tax. The Court has always been careful to distinguish Floridians on that basis. See e.g., Carroll v. Firestone, 497 So.2d 1204, 1206 (Fla. 1986)(Explaining "that in Floridians the taxes on casinos, assuming casinos were authorized and taxed, were committed to a specific purpose").

[12] As previously discussed, Floridians was decided under the much broader standard of review the court applies to legislative acts under article III, section 6. In Fine, The court retreated from and disapproved that standard for single subject cases arising under Article XI, section 3, and the Court has since applied a much narrower and more stringent standard.

Casinos initiative.[13]

This amendment also has substantial collateral effects including the disruption of state policies with regard to indian lands, and disruption of state and local planning, land use, and environmental functions. There is nothing in the initiative to put voters on notice of the initiative's significant domino effect on other constitutional provisions and other governmental functions. Advisory Opinion--Restricts laws Related to Discrimination, 632 So.2d 1018, 1022(Kogan J. concurring)(citing Florida League of Cities, 607 So.2d 397.

The proponents do not deny the breadth of the Limited Casinos petition. They merely suggest that its "locational provisions provide a contour for the subject matter of the petition, to shape its breadth." PLC Brief at 12. As previously noted, to describe this amendment's provisions as "locational" is as misleading as to suggest that the amendment imposes "limits." The substantial unstated collateral impact of this amendment cannot be ignored.

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[13] The Floridians amendment contained language carefully and precisely confining casinos to a particular area of the state. While it arguably contained other subjects--the authorization of casinos and allocation of taxes--it did not contain multiple, inaccurate, ambiguous and misleading locational provisions.

CONCLUSION

WHEREFORE, No Casinos, Inc., requests that the Court deny the Limited Casinos initiative a place on the ballot.

No Casinos, Inc., also respectfully suggests that oral argument is not necessary in this case. In the interest of efficiency, No Casinos, Inc., would gladly acquiesce to a decision by the Court to dispense with oral argument, and decide this case based on the briefs and other materials filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the persons identified below by hand delivery, or by United States mail, this 15th day of July, 1994.

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