IN THE SUPREME COURT
STATE OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: CASINO AUTHORIZATION, TAXATION AND REGULATION	)	CASE No. 84,064

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., IN OPPOSITION TO THE PROPOSITION FOR COUNTY CHOICE INITIATIVE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

CONSTITUTIONAL PROVISIONS

STATUTES

SUMMARY OF ARGUMENT

The Proposition For County Choice initiative violates the single subject rule of Article XI, section 3, Florida Constitution.

The proponents concede that the amendment provides for the "licensing and taxation" of casinos, and they argue that the chief purpose of the initiative is to create a "local option." It is abundantly clear that the amendment would also perform the legislative function of authorizing casinos. Thus, without further consideration the amendment would perform four governmental functions, thereby failing the Court's functionality test.

The initiative would regulate casinos, and creates a broad trust to be funded with new taxes and fees. The initiative also contains mandatory provisions for distributing the trust income. These are all separate subjects and none is necessary or directly connected to the initiative's chief purpose.

The proponents' preemptive argument that the initiative can be saved by its severability clause is in error. The severability clause goes well beyond the mere implementation provisions this court has allowed in the past and it cannot be given effect. Even if severance were allowed the initiative still contains multiple subjects--including taxation provisions--and severance would not cure its defects

The initiative is also a logrolling measure. It attempts to logroll different special interests with its licensing, taxation

and trust fund provisions into supporting the initiative. It also attempts to logroll voter support through its multifarious taxation, licensing and trust provisions.

The County Choice Initiative also fails to meet the requirements of section 101.161, Florida Statutes. The ballot title refers to multiple subjects--not the "chief purpose" of the initiative. The ballot summary deviates in important ways from the language of the initiative in order to stay within the 75 word limit of section 101.161, Florida Statutes. In doing so, the summary impermissibly "recasts" the language of the text.

For all of these reasons the County Choice Amendment must be denied a place on the ballot.

I. ARGUMENT

A. THE COUNTY CHOICE INITIATIVE VIOLATES THE SINGLE SUBJECT RULE OF ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION

1. The Initiative Contains Multiple Subjects And Performs Multiple Governmental Functions.

The Court applies a "functionality test" to determine whether the single subject standard is met. If an amendment would "change" or "affect" more than one governmental function it fails the test. Evans v. Firestone, 457 So.2d 1351, 1354 (Fla. 1984). Furthermore, no single proposal can "alter" or "perform" multiple governmental functions without violating the single subject rule. See In re Advisory Opinion To The Attorney General--Save Our Everglades Trust Fund, 19 Fla. L. Weekly S276, S277 (May 26, 1994).

The proponents concede that this initiative provides "for the licensing and taxation of any casino that may be authorized." (County Choice at 8).[1] In doing so the initiative obviously

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[1] The proponents rely on Carroll v. Firestone, 497 So.2d 1204 (Fla. 1986), for the notion that "where an initiative will generate revenue, the initiative may direct the disposal of those funds without running afoul of the single subject rule's prohibition against logrolling." (County Choice at 8). Carroll merely expressed the drafters' intent that revenue generated by a government program serve a single objective--education. However, unlike this case, the determination of whether to actually provide funds for education was left to the legislature. Carroll. 497 So.2d at 1207 (explaining that "[t]he clause if adopted . . . leave[s] the ultimate disposition of proceeds . . . to the discretion of the legislature.") Carroll does not even mention logrolling; nor does it apply the Court's functionality test. Moreover, Carroll does not authorize imposition of taxes and fees, and does not include the other multiple subjects in this initiative.

performs two separate governmental functions. Fine v. Firestone, 448 So.2d 984 (Fla. 1984)(treating taxation as a separate function of government); National Cable Television Association, Inc. v. United States, 415 U.S. 336, 340 (1974)(distinguishing taxes from licensing type fees). In addition the proponents argue that the initiative creates a "local option." If so, the initiative performs still a third governmental function. Finally, the proponents cannot deny that this initiative would set aside the legislature's determination that casinos should not be allowed in this state, and would authorize casino gambling for the first time.[2]

Without considering the provisions that relate to pari-mutuel wagering, riverboats, or the initiative's other multifarious provisions, it is clear that the initiative performs at least four governmental functions. The determination of whether casinos should be allowed in the State of Florida is a legislative function. The legislature has exercised its authority in this area by prohibiting casinos. This initiative would usurp that authority and "perform a legislative function of statewide significance" by lifting the ban on casinos. See Save Our Everglades Trust Fund, 19 Fla. L. Weekly S276, S277. The initiative would also create a trust--not as a mere passive tool

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[2] The proponents may argue that since the actual opening of casinos would be subject to a local vote, the initiative does not authorize casinos. However, casinos are now prohibited. The initiative puts procedural mechanisms in place whereby they can be opened. Even if never opened, casinos would be authorized under this initiative.

to aid in implementing the main purpose of the initiative--but to receive and disperse newly created tax and fee revenues. The creation of this constitutional level trust with multiple purposes must be considered a separate governmental function that is part of a comprehensive legislative scheme to be created by this initiative. See Id.

Where an initiative performs multiple functions of government it fails the court's functionality test. Advisory Opinion--Save Our Everglades, 19 Fla. L. Weekly S276, S277.

While it is true that an amendment may contain matters directly connected to its main purpose, the material connected must be "necessary to the main purpose of the amendment." Floridians Against Casino Gambling v. Lets Help Florida, 363 So.2d 337 (Fla. 1978)(emphasis added). If one seeks to authorize casino gambling, it is not necessary to include mandatory regulation, taxation, and appropriations provisions. It is not necessary to include riverboats, parimutuel facilities or any of the other peripheral matters in this initiative. Nor, is it necessary to perform and affect multiple governmental functions as is the case here.

2. The Severability Clause Cannot Be Given Effect And Would Not Save The Initiative

Not unexpectedly, the initiative proponents have argued that Section 2 of the initiative petition, the severability clause, cures its defects. (County Choice at 9). The Court has allowed severability clauses in some cases on the theory that they were mere passive implementation provisions. See, e.g., Carroll v. Firestone, 497 So.2d 1204 (Fla. 1986); Advisory Opinion To The Attorney General--Limited Marine Net Fishing, 620 So.2d 997 (Fla. 1993). However, No Casinos has not found a case in which the court has actually applied a severability clause. See Fine, 448 So.2d 984, 992(removing amendment from ballot that contained severability clause).

Furthermore, severance cannot cure this amendment. If applied literally the severability clause would itself be removed from the ballot by severance. The Court has already determined that where an initiative includes a severance clause, the clause must appear on the ballot. Fine, 448 So.2d 984, 992.

This clause does more than passively aid the implementation of the chief purpose of the initiative. The severance clause would remove provisions that create a constitutional level trust, the purpose of which is to support the imposition of new taxes and fees, and arrange the distribution of those revenues. The trust would distribute funds for a multitude of diverse and unrelated purposes.

After using these provisions to attract supporters for their petition, the initiative proponents now callously suggest that

defects in the initiative can be cured by severing them. (Brief of Proposition For County Choice Gaming, Inc., at 9)("County Choice"). If the initiative is allowed on the ballot without subsection (d.), then as noted in No Casinos Initial Brief, it will have flown there under false colors. See Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1984).

It is clear from the proponents' preemptive severance argument that they do not care whether the taxation, licensing, and trust fund provisions survive single subject review. As noted in No Casinos Initial Brief, including taxation and fee provisions in the initiative was against the proponents' economic interest. It seems unlikely they would be displeased if the court severed those provisions. The only purpose for including these provisions, which are not necessary to the main purpose of the amendment, was to attract diverse voters.

The initiative cannot be cured by severing subsection (d.) The initiative is defective because it contains multiple subjects throughout, and performs multiple functions. For example Subsection 16(a.) of the amendment still imposes a tax, still authorizes casinos, and still determines where casinos can be located and in what kinds of facilities. In addition the title and summary still refer to taxes and regulation, in addition to casino authorization.

The single subject rule of Article XI, section 3, requires that initiatives to amend the constitution "embrace but one subject and matter directly connected therewith." Art. XI, § 3,

Fla. Const. This initiative fails that test.

3. The County Choice Initiative Is A Logrolling Measure

The Initiative's proponents baldly assert without any elaboration that the amendment encompasses the requisite "oneness of purpose." (County Choice at 6). They go on to make the anticipatory argument that:

> [t]he County Choice Initiative does not attempt to implement a complex legislative style scheme that affects the multiple branches of state and local government. Rather it has as its sole purpose and effect the creation of a 'local option' that would permit local voters to authorize casino gambling. Decisions concerning the location, type, size and regulation of the gaming to be permitted in any particular county, are left to local legislative and judicial processes. Id.

These statements raise serious unanswered questions about what motivates this amendment. If the sole purpose of the amendment is to create a local option then why do the words "local option" not appear in the title, or in the summary? Why do those words appear only once, in a different context, in the entire text of the initiative? If the initiative is not concerned with location or types of facilities, then why does it contain provisions relating to pari-mutuel facilities, riverboats, commercial vessels, and transient lodging establishments.[3]

If the initiative is not concerned with regulation, why does it contain so many regulatory provisions, and why is the word

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[3] If these provisions are intended require, or restrict, casinos to certain locations and types of facilities, then what do they do?

"regulate" in the title. Why does it contain licensing, taxation, and trust provisions? Why do the trust provisions extend to so many diverse purposes? See Advisory Opinion--Save Our Everglades, 119 Fla. L. Weekly S276, S277 (discussing broad trust provisions as part of comprehensive legislative scheme that violates single subject rule). If the sole purpose of the initiative is to create a local option then why does the initiative provide for voting by Tourist Development Council Districts, when most local areas do not have such districts?

The proponent's assertion that the sole purpose of this initiative is to create a local option highlights the initiative's other provisions in such a way as to demonstrate that they could only have been included to mislead and logroll voters who would not otherwise support the initiative.

A major purpose of the single subject rule in Article XI, section 3, is to prevent logrolling. Advisory Opinion--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.

Because it tries to appeal to so many diverse constituencies, this initiative requires voters who may support one or more of its provisions to vote for provisions they may oppose. "When voters are asked to consider a modification to the constitution, they should not be forced to 'accept part of an initiative proposal which they oppose in order to obtain a change

in the constitution which they support.'" In re: Advisory Opinion To The Attorney General--Restricts Laws Relating To Discrimination, 632 So.2d 1018, 1019-1020 (Fla. 1994)(quoting Fine, 448 So.2d 984, 988). Voters here are asked to "cast an all or nothing vote." Id. This forced acceptance of diverse and opposing interests violates the single subject rule.

B. THE BALLOT TITLE AND SUMMARY ARE CLEARLY AND CONCLUSIVELY DEFECTIVE

Section 101.161, Florida Statutes, requires that a ballot title and summary state "in clear and unambiguous language the chief purpose of the measure." Advisory Opinion To The Attorney General--Limited Political Terms In Certain Elective Offices, 592 So.2d 225 (Fla. 1991) quoting, Askew, 421 So.2d 151, 155 (Fla. 1982).

The initiative proponents argue that the amendment "has as its sole purpose and effect the creation of a 'local option.'" (County Choice at 6). If this is accurate, the proponents have conceded that the initiative title is clearly and conclusively defective. The title for this initiative is "Casino Authorization, Taxation, and Regulation." There is no mention of the "local option", which the proponents have described as the sole purpose of the initiative.[4] Thus, the title fails to state the "chief purpose" of the initiative in violation of section

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[4] Indeed, the text of the amendment uses the words "local option" only one time, as a part of the noun phrase "local option Tourist Development Council Districts" Nowhere is the term "local option" used to convey the message that a local option is the chief or sole purpose of the initiative.

101.161, Florida Statutes. Similarly the words "local option" do not appear anywhere in the ballot summary. If that is the chief purpose of the initiative, the summary fails to describe the contents of the amendment.

If the chief purpose of the initiative is not to create a local option, the title is still clearly and conclusively defective. It describes three purposes and three different functions of government, not one. See Askew, 421 So.2d 151, 155 (requiring that title state "the chief purpose" of the measure)(emphasis added) A defective amendment cannot be cured by an overly broad title. Evans, 457 So.2d 1351, 1354.

In addition to its title defects, the initiative's ballot summary is clearly and conclusively defective. In an effort to meet the 75 word limit for ballot summaries, the drafters of the ballot summary deviated from the language of the amendment text in important ways. The proponents note, for example, that the word "hotel" was substituted in the ballot summary for the phrase "transient lodging establishment" in the text. This was done because the word hotel was more "economic." (Brief of Proposition For County Choice Gaming, Inc. at 6)(noting that "hotel" is a more economic term).

The proponents argue that hotel is a synonym for "transient lodging establishment" and is not a more restrictive phrase. This causes one to wonder, if these two terms are synonyms as the initiative proponents assert, why was the more economic term

"hotel" not used in the text of the amendment?[5]

Notwithstanding the proponents protestations to the contrary, the summary's statement that "[t]his amendment prohibits casinos" is unquestionably false and misleading.

Amendments with similar, but less blatant, defects in the ballot summary have consistently been denied a place on the ballot. See e.g., Askew, 421 So.2d 151; Evans 457 So.2d 1351.

The summary claims that the amendment prohibits casino gaming, while the text merely notes that casino gaming is already prohibited. This "recasting" of language in the summary to say something strikingly different than the amendment text cannot be allowed. Evans, 457 So.2d 1351, 1355. A summary must accurately specify what is being changed. Florida League of Cities v. Smith, 607 So.2d 397, 399 (Fla. 1992). This summary fails to satisfy that requirement.

The proponents ignore other defects in the summary altogether. For example, the text of the amendment goes on to allow Taxing Districts and Counties to establish casinos only

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[5] The proponents concede that the section 509.013(11), Florida Statutes, defines transient establishment to mean "any public lodging establishment that is rented or leased to guests by an operator whose intention is that such guests' occupancy will be temporary." Yet they somehow translate this to mean that Transient lodging facility means hotel. They also ignore section 83.43(10), Florida Statutes, which defines "transient occupancy" as "occupancy when it is the intention of the parties that the occupancy be temporary", and section 83.42(3), Florida Statutes, which defines the places where transient occupancy could take place to include "[t]ransient occupancy in a hotel, condominium, motel, roominghouse, or similar public lodging, or transient occupancy in a mobile home park." Obviously, "hotels" is a subset of "transient lodging establishments."

within their own boundaries. However, the summary leads voters to believe that upon a favorable vote by any County or District, casinos could be established across the entire state. A voter should not be misled by the ballot. Askew, 421 So.2d 151, 155.

Similarly, the text of the amendment would allow Counties and Districts to establish casino gambling at a variety of different alternative facilities. However, the summary gives the impression that if a County or District votes to approve gambling, then gambling would automatically be allowed at all of the kinds of facilities identified. The summary and text also fail to define the term "riverboats" so as to let voters know what will be authorized. Many will erroneously believe the initiative authorizes casinos only on boats.

The ballot summary fails to specify what the state of the law will be if the amendment passes, and it omits material facts. Some voters will be misled by the statement that "this amendment prohibits casinos" into believing that a new protection is being created, when in fact an existing protection is being removed. Florida League of Cities v. Smith, 607 So.2d 397, 399 (Fla. 1992).

The initiative must be denied a place on the ballot.

II. CONCLUSION

WHEREFORE, No Casinos, Inc., respectfully requests that the Court enter an order finding that for all of the foregoing reasons the County Choice Casinos initiative violates the single subject rule of Article XI, section 3, Florida Constitution, and that the ballot title and summary are in violation of section 101.161, Florida Statutes.

Respectfully submitted this 17th day of August, 1994.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the persons identified on the attached service list this 17th day of August, 1994, by United States Mail.

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