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IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
ATTORNEY GENERAL

RE: FLORIDA LOCALLY APPROVED
GAMING

CASE NO. 84,165

______________________________/

On a Request by the Attorney General
for an Advisory Opinion on the Validity of an
Initiative Petition Circulated Under Art. XI, § 3

REPLY BRIEF OF GOVERNOR LAWTON CHILES AND THE FLORIDA CABINET

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SUMMARY OF ARGUMENT

The ballot title and summary for the proposed amendment violate the "fair notice" requirements of Section 101.161, Florida Statutes (1993). The ballot summary states that the proposed amendment requires local government approval of all gaming. However, Subsection (a)(3) of the proposal appears to mandate the placement, regardless of local government action, of hotel-based casinos in counties with over 500,000 residents.

In response, the initiative's sponsors argue that Subsection (a)(3) must be read in pari materia with the local approval provisions of Subsection (b), and that when read in this way, Subsection (a)(3) means only that where gaming is approved in counties having in excess of 500,000 residents, such gaming must be located in hotel based casinos. In other words, there can be no riverboat-based gaming in the state's most populous counties.

Assuming that this is the correct interpretation of the initiative, the summary still fails to disclose the initiative's key features and effects. According to its sponsors, the initiative actually controls the number and type of casinos that will be permitted in each county. The sponsors admit that this allocation scheme is a key feature of the proposal. The summary, however, states only that the initiative "determines the number of casinos in individual counties based on the resident population of

such counties . . . ." The failure to reference limits on the types of casinos that may be located in each county will mislead voters as to the proposal's primary effect and renders the summary defective. Specifically, it will mislead voters into thinking that both riverboat and hotel-based casinos will be permitted in each county, with only their numbers limited by population.

Subsection (d) requires that the Legislature implement the FLAG initiative by July 1, 1995. Since the next general election does not occur until 1996, it is clear that compliance with this implementation deadline is impossible. The impossibility of compliance with this implementation provision raises a question as to the exact scope of the Legislature's remaining power to implement the initiative if and when it meets with voter approval. This is certainly an issue about which the voters should be informed prior to casting their ballots. By failing to reference the implementation deadline, the summary fails to provide the voters with this information, and makes a truly informed decision impossible.

ARGUMENT

I.

THE BALLOT TITLE AND SUMMARY MISREPRESENT THE EFFECT OF SUBSECTIONS (a)(3) AND (b), RELATING RESPECTIVELY TO THE LOCATION OF CASINOS AND LOCAL AUTHORIZATION OF CASINOS.

Section 101.161(1), Florida Statutes, requires that the ballot title and summary for a proposed constitutional amendment "state in clear and unambiguous language the chief purpose of the measure." Askew v. Firestone, 421 So.2d 151, 154-55 (Fla. 1982). The critical issue is "fair notice." In re Advisory Opinion of the Attorney General - Restricts Laws Related to Discrimination, 632 So.2d 1018, 1021 (Fla. 1994). "What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." Askew, 421 So.2d 151, 155 (quoting Hill v. Milander, 72 So.2d 796, 798 (Fla. 1954).

If a ballot summary is determined to be defective, it is usually because it omits material facts necessary to make the summary not misleading. Askew, 421 So.2d at 158 (Ehrlich, J., concurring. In Askew, for instance, this Court held defective a ballot summary that described an amendment as granting citizens greater protection against conflicts of interest in government without revealing that it also removed an established constitutional protection. 421 So.2d at 155-56. As the Court noted, the problem lay not with what the summary said, but with what it didn't say. Id. at 156. See also, e.g., Smith v. American

Airlines, 606 So.2d 618, 620-21 (Fla. 1992). The problem with this ballot summary is that it both overstates and understates the effect of the proposed amendment.

For example, this summary states that the proposed amendment requires local government approval of all gaming. However, Subsection (a)(3) of the amendment appears to require the placement, regardless of local government action, of hotel-based casinos in counties having in excess of 500,000 residents. The proponents of this initiative devote over five pages of their initial brief to explaining the "correct" interpretation of the proposal. Essentially, FLAG argues that Subsection (a)(3) must be read in pari materia with the local approval provisions of Subsection (b), and that when this is done, it becomes clear that Subsection (a)(3) merely requires that casinos approved for larger counties be located in hotels. See FLAG brief, pp. 13-18.

As FLAG states in its brief, it is true that the Court must uphold a proposal unless it is "clearly and conclusively defective." Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337, 339 (Fla. 1978). However, the Court has no duty to abandon a common sense approach to the rules of statutory interpretation. Nor can the Court rewrite or stretch the language of the initiative beyond its plain meaning in order to eliminate a patent defect. See, e.g., State v. Globe Communications Corporation, 19 F.L.W. S645, 647 (Fla. Sup. Ct., Dec. 8, 1994)

(Court declined to rewrite statute given its plain unambiguous language). The sponsors chose the wording of the initiative--carefully and with purpose, it may be presumed--now they must live with it.

Even assuming that FLAG's interpretation of Section (a)(3) is correct, the summary is still misleading. According to FLAG, both the number and type of casinos permitted in any given county will be determined by population. Specifically, casinos authorized in counties having in excess of 500,000 residents must be hotel-based. In other words, riverboat casinos will exist, if at all, only in counties with between 200,000 and 499,999 residents. See FLAG brief, pp. 15-16. The ballot summary does not put the voter on notice of these facts. Instead, it provides only that "[t]his amendment . . . authorizes casinos aboard riverboats and in hotels of one thousand rooms or more; [and] determines the number of casinos in individual counties based on the resident population of such counties . . . ."

While the ballot summary need not include reference to incidental matters, nor explain in detail everything the initiative sponsors hope to accomplish, In re Advisory Opinion to the Attorney General - English the Official Language of Florida, 520 So.2d 11, 13 (Fla. 1988), the allocation scheme FLAG proposes is not merely incidental to the main purpose of the proposed amendment. To the contrary, the allocation scheme is a key feature of the proposed

amendment, and is so integral to its purpose and effect that FLAG refused to entrust its development to the discretion of the Legislature. (FLAG brief, p. 15)

The so-called "directive" embodied in Section (a)(3) giving "priority" to hotel-based casinos is, along with limitations on the number of casinos, the preeminent feature of this allocation scheme. By referencing the numerical limitation without putting voters on notice that the type of casinos permitted in each county also is a function of population, the ballot summary presents an inaccurate and misleading picture of the initiative's primary effect. Specifically, it will mislead voters into believing that both riverboat and hotel-based casinos will be permitted in each county, with only their numbers limited by county population. The summary, therefore, is defective.

II.

THE BALLOT TITLE AND SUMMARY ARE MISLEADING IN THAT THEY FAIL TO INFORM VOTERS THAT THE IMPLEMENTATION DEADLINE SET OUT IN THE PROPOSAL HAS EXPIRED.

The provision in Subsection (d) requiring implementation of the initiative by July 1, 1995, is a direct limitation on the Legislature's power. FLAG characterizes this provision as "incidental" to the chief purpose of the initiative, and therefore, implies that the Court need not consider its proper interpretation when assessing the initiative's compliance with statutory and

constitutional requirements. This requirement is far more stringent than the directive set out in the now repudiated "Limited Casinos" proposal. In re Advisory Opinion to the Attorney General - Limited Casinos, 644 So.2d 71 (Fla. 1994). There the Legislature was merely directed to act at some future point to implement the Amendment,with no gambling to occur prior to July 1, 1995. Id. at 73.

Such a callous treatment of the people's right to be informed of a material change in a proposed amendment to our constitution should not be countenanced by this Court. As discussed in our Initial Brief, the July 1995 deadline for Legislative action was a keystone to this proposal. When signing the petition to place this matter on the November ballot a voter was signing with the confidence that if this proposal was enacted, the incoming Legislature would have to act; not leaving the matter to some future assembly's whim.

Since this matter cannot be put before the voters until the next general election in 1996, it is clear that compliance with the implementation deadline is virtually impossible. Since the implementation clause imposes a direct limit on the Legislature's power, the near-impossibility of compliance raises a serious question as to the exact scope of the Legislature's remaining power to implement the initiative if and when it meets with voter approval. This is certainly an issue about which the voters should

be informed prior to casting their ballots. Many voters, including those who signed on to the initiative petition, might not vote for an initiative that could not be fully implemented or that might result in further litigation. The failure to reference the defective implementation deadline in the summary deprives the voters of this information. As a result, voters are deprived of the ability to make a truly informed decision as required by American Airlines, supra.

Contrary to the position taken by FLAG, the implementation clause is not incidental to the central purpose of the proposal. Once approved, this argument will be the law of this state. As such, the Legislature may not ignore it or disregard it until the Court has determined it to be invalid. As established in the case of Pope v. Gray, 104 So.2d 841, 842 (Fla. 1958), cited by FLAG, a constitutional provision is not "invalid" merely because it is impossible of implementation. Rather, a provision of a state constitution is "invalid" only where it conflicts with some higher authority, i.e., the United States Constitution.

There is no such conflict here. Hence, the mandated implementation clause, is not invalid, and may not be severed from the remainder of the initiative.[1] In short, FLAG is stuck with

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[1] It also should be noted that, if the Court finds that the failure to reference the implementation deadline renders the ballot summary misleading, the severance clause could not be invoked to "save" the initiative. A severance clause, even if part of the

both the limitation it chose for its initiative, and the uncertainty it generates now that compliance with the limitation is impossible. Such dilemma is of FLAG'S own making as it could have drafted a less demanding, more open-ended time clause ("within one year of voter approval . . ."). The Governor and Cabinet urge this Court not to excuse this poor draftsmanship. As a member of this Court once wrote, it ought to be hard to amend a Constitution; this Court should avoid the temptation to affirmatively "cut some slack" to a mistake as grave as this.

III.

THE TEST OF THE PROPOSED AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT OF ART. XI, § 3, FLORIDA CONSTITUTION.

We rely upon the arguments presented in our Initial Brief on this point.

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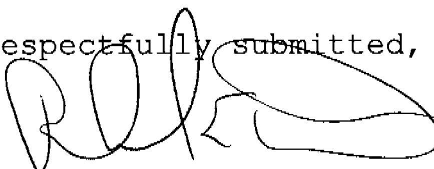
proposed amendment itself, cannot operate to "cure" a single subject or ballot summary defect. **Fine v. Firestone**, 488 So. 2d 984, 992 (Fla. 1984). Any change to the text of the initiative petition would necessitate a new filing with the Division of Elections. All signatures previously gathered would be invalid, and FLAG would be required to start a new campaign. **Florida Department of State, Division of Elections, Advisory Opinion DE94-06** (March 24, 1994) (Changes to the text of the proposed amendment require separate approval by the Division).

CONCLUSION

Based on the above arguments and citations of authority, the Governor and Cabinet urge this Honorable Court to prohibit the placement of this proposed constitutional amendment on any future ballot.

Respectfully submitted,



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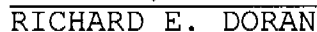
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY BRIEF OF GOVERNOR LAWTON CHILES AND THE FLORIDA CABINET** has been furnished to **ARTHUR J. ENGLAND, JR., ESQ.**, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131, Counsel for Proposition for Limited Casinos, Inc.; **M. STEPHEN TURNER, P.A.** and **MICHAEL MANTHEI, ESQ.**, Broad and Cassel, 215 South Monroe Street, Suite 400, Post Office Box 11300, Tallahassee, Florida 32301, Counsel for Proposition for County Choice Gaming, Inc.; **JULIAN CLARKSON, ESQ.** and **SUSAN TURNER, ESQ.**, Holland & Knight, 315 South Calhoun Street, Suite 600, Post Office Drawer 810, Tallahassee, Florida 32302, and **CHESTERFIELD SMITH, ESQ.** and **MIKKI CANTON, ESQ.**, Holland & Knight, 701 Brickell Avenue, Suite 3000, Post Office Box 015441, Miami, Florida 33131, Counsel for Florida Locally Approved Gaming, Inc. and Bally Manufacturing Corporation; **ROBERT T. MANN, ESQ.**, 1326 Riverside Avenue, Post Office Box 907, Tarpon Springs, Florida 34688-0907; **STEPHEN R. MACNAMARA, ESQ.**, General Counsel, No Casinos, Inc., 217 South Adams Street, Tallahassee, Florida 32301, and **DONALD L. BELL, P.A.**, Kerrigan, Estes, Ranking & McCloud, 217 South Adams Street, Tallahassee, Florida 32301, Counsel for No Casinos, Inc.; **RANDAL H. DREW, ESQ.**, 909 Haines Street, Post Office Box 270, Jacksonville, Florida 32206-6027, Counsel for Bill Sims; by U.S. Mail this 13TH day of February, 1995.



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