

IN THE SUPREME COURT OF FLORIDA

Case Nos.: SC16-778; SC16-871

**ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: VOTER CONTROL OF GAMBLING**

**INITIAL BRIEF OF OPPONENTS
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ENTERTAINMENT, LLC, INVESTMENT CORPORATION OF PALM
BEACH, WEST FLAGLER ASSOCIATES, LTD., BONITA-FORT MYERS
CORPORATION, AND MELBOURNE GREYHOUND PARK, LLC**

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IDENTITIES AND INTERESTS OF THE OPPONENTS

Jacksonville Kennel Club, Inc. (“Jacksonville”), Dania Entertainment, LLC (“Dania”), Investment Corporation of Palm Beach (“Palm Beach”), West Flagler Associates, Ltd. (“West Flagler”), Bonita-Fort Myers Corporation (“Bonita”), and Melbourne Greyhound Park, LLC (collectively the “Opponents”) are registered Florida businesses that own and operate separate entertainment complexes offering intertrack wagering and cardroom games in Florida. The Department of Business and Professional Regulation (the “Department”) has authorized all the Opponents to conduct intertrack wagering and cardroom game activities at their facilities pursuant to chapter 550 and 849, Florida Statutes. The Department has approved licenses to conduct slot machine operations at Dania and West Flagler’s facilities pursuant to section 551.102(4), Florida Statutes, and article X, section 23 of the Florida Constitution. Palm Beach and Bonita conducted local referenda to authorize slot machines at their facilities pursuant to section 551.102(4), Florida Statutes.

The Opponents oppose the Voter Control of Gambling Amendment (the “Gambling Amendment”) because the proposed amendment, if approved, could have a damaging financial impact on all of the Opponents’ businesses. Specifically, each of the Opponents’ facilities offer various authorized card games that, under the provisions of the Gambling Amendment, could be rendered illegal

immediately. These card games are an integral part of the Opponents' business as customers have shown great interest in the games and in turn, the games generate a substantial income for the facilities. To stop these card games immediately would disrupt the Opponents' economic viability for years to come.

What is more troublesome is that the blanket prohibition of these card games – or any other type of “casino gambling” currently authorized under Florida law – is not at all articulated in the text of Gambling Amendment. The voters, many of whom are customers at the Opponents' facilities, should be put on notice of the Gambling Amendment's ramifications on the current law and the gaming industry. Failure to fully inform the voters of these ramifications is not only unfair to the voters, it is unfair to the gaming industry which employs thousands of Floridians. It is for these reasons, the Opponents submit this brief in opposition of the Gambling Amendment.

SUMMARY OF ARGUMENT

This Court should direct the Gambling Amendment not be placed on Florida's ballot because the ballot summary and title violate section 101.161(1), Florida Statutes, and the text of the Gambling Amendment contemplates more than one subject in violation of article XI, section 3 of the Florida Constitution.

First, the ballot summary fails to fully and accurately explain the ramifications of the Gambling Amendment on certain gaming activities – including

card games, charitable bingo, lotteries, and sweepstakes – that are currently authorized under Florida law. For example, the ballot summary and the supporting text of the Gambling Amendment do not indicate whether the law intends to be prospective or retrospective, causing an unfair and misleading presentation to the voters on the status of existing law. As current laws are potentially implicated in this constitutional change, the need for clarity and accuracy is necessary for the voter to cast a fully informed vote.

Second, the ballot summary and title mislead the voters to believe they will “control” casino gambling, when in practice voters may only “authorize” casino gambling. Instead, the text of the Gambling Amendment expressly entrusts “control” to the Legislature. The inconsistencies found between the words “control” and “authorize” in the ballot summary and title unfairly deceive the voters on the scope of the voters’ influence in policy-making. As such, the Gambling Amendment violates section 101.161(1), Florida Statutes, and should be barred from Florida’s ballot.

Finally, the Gambling Amendment encompasses two competing subjects in violation of the single-subject requirement in the Florida Constitution. The first subject deals with casino gambling authorization by citizens’ initiative. This authorization is expressly provided in the text of the amendment. A voter can understand that by passing the Gambling Amendment, only voters would be able to

approve any form of casino gambling (that is, as long as the activity it is approved via a citizens' initiative). However, the second subject – the potential repeal of existing gambling activities not approved by citizens' initiative – is not readily clear in the text of the Gambling Amendment. To recognize this change, a voter must be in tune with the nuisances of Florida's current gaming laws to understand whether the passage of this Gambling Amendment would render current laws invalid. By combining these two subject together, the Gambling Amendment has forced the voter to consider voting for a favorable action – to control casino gambling – at the costs of a potentially unfavorable action – possible nullification of existing gaming statutes. This scenario is textbook logrolling and for this reason and the reasons stated above, the Gambling Amendment should be barred from Florida's ballot.

ARGUMENT

I. THIS COURT SHOULD DIRECT THE GAMBLING AMENDMENT NOT BE PLACED ON FLORIDA'S BALLOT BECAUSE THE GAMBLING AMENDMENT'S TITLE AND SUMMARY VIOLATE SECTION 101.161(1), FLORIDA STATUTES.

The title and summary of proposed constitutional amendments must comply with the requirements set forth in section 101.161(1), Florida Statutes, which states in part:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot [T]he substance of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

§ 101.161(1), Fla. Stat.

More specifically, a ballot title and summary are required to state in clear and unambiguous language the chief purpose of the measure. *Advisory Op. to the Att’y Gen. re Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991). The title and summary must be accurate and informative in order to ensure the “electorate is advised of the true meaning, and ramifications, of an amendment.” *Advisory Op. to the Att’y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998). Of course, the title and summary do not have to explain every ramification. *Advisory Op. to the Att’y Gen. re Prohibiting Pub. Funding of Political Candidates’ Campaigns*, 639 So. 2d 971 (Fla. 1997); *see also* *Advisory Op. to the Att’y Gen. re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996) (stating “[t]he voter must be presumed to have a certain amount of common sense and knowledge.”). Still, courts emphasize that the language must be so clear to the voter that the language will provide “fair notice of the content of the proposed amendment . . . that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.” *Id.* at 803. To this end, courts have consistently

held that “[a] proposed amendment cannot fly under false colors” *Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982). As discussed herein, the ballot summary and title do not satisfy the requirements found in section 101.161(1), Florida Statutes.

A. The Ballot Summary Violates Section 101.161(1), Florida Statutes, Because the Summary Does Not Advise Voters on Whether the Gambling Amendment is Intended to Have a Retroactive or Prospective Impact on Florida’s Current Gambling Laws.

The purpose and effect of a proposed amendment on current law must be abundantly clear to voters. *Askew*, 421 So. 2d at 155. One such purpose is whether the proposed amendment intends to be applied prospectively or retrospectively to current Florida law. *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983); *see also Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 489 (Fla. 2008) (stating the intent of the ballot summary and text of the amendment was to be retrospective because the amendment “clearly expressed an intent to do away with then current Florida law restricting access to this information and would lead voters to the conclusion that all records, including existing records, would henceforth be subject to patient review.”).

Generally, it is the duty of the courts to harmonize or reconcile new constitutional provisions with existing statutes. *See In re Advisory Opinion to the Governor*, 132 So. 2d 163, 169 (Fla. 1961). In *In re Advisory Opinion to the Governor*, this Court found that a statute will continue in effect unless found to be

“completely inconsistent with the plain terms of the Constitution.” *Id.* at 169. If a new amendment is irreconcilable with a statute in force, the conflicting statute will be regarded as repealed via implication. 16 Am. Jur. 2d, *Constitutional Law* § 50.

The law, however, does not favor the implied repeal of statutes and requires a high standard of clarity to effect a repeal by implication. Courts faced with a repeal of statute via implication will abide by the following standard:

The inconsistency between existing legislation and a new constitutional provision must be irreconcilable, that is, the inconsistency must be obvious, clear, and strong In making the determination whether there is a conflict between a preexisting statute and a new constitutional provision so that the statute is repealed by implication, a court will presume in favor of the constitutionality of the statute until the contrary clearly appears and will, if possible, construe a statute so as to render it valid-The repeal must be plain and unambiguous.

16 Am. Jur. 2d, *Constitutional Law* § 51.

1. The Ballot Summary is Unclear on the Gambling Amendment’s Impact on Existing and Approved Card Games Played in Florida, as Well as Other Currently Authorized “Casino Gambling” in the State.

The language in the ballot summary and full text of the Amendment do not advise voters on whether the true meaning and ramifications of the Amendment are intended to have a retroactive or prospective relationship with current Florida’s gambling laws. This absence of clarity leaves the voter guessing as to which forms of gambling will remain in effect.

“Gambling” is defined under Florida law as:

[A]ny game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value[.]

§ 849.08, Fla. Stat. (2015).

While gambling is generally prohibited under Florida law, the Legislature has authorized certain forms of card games for cardroom facilities because these games are “considered to be pari-mutuel style games and not casino gaming because the participants play against each other instead of against the house.” *See* § 849.086(1), Fla. Stat. (2015).

It is unclear, however, if the Gambling Amendment contemplates a similar distinction. In fact, the full language of the Gambling Amendment is completely silent about pari-mutuel style card games. This is not for lack of consideration of pari-mutuels. The text expressly exempts pari-mutuel wagering on horse racing, dog racing, or jai alai exhibitions from the definition of “casino gambling.” The text’s specific exception for pari-mutuels coupled with its silence on pari-mutuel style card games may mislead the voters to draw a number of conflicting conclusions regarding Gambling Amendment’s impact on existing card games: Could cardroom operators continue to offer games pursuant to section 849.086, Florida Statutes, because the Amendment only intends to be applied prospectively? Or does the language of the Amendment render section 849.086, Florida Statutes, repealed and operators must immediately stop offering approved games until

authorization via a citizens' initiative? The voter does not know and cannot tell from the ballot summary.

Card games are not the only approved form of gambling activity that would be impacted by the ambiguous language of the Gambling Amendment. In section 849.0931, Florida Statutes, bingo is authorized for charitable and nonprofit organization. Section 551.101, Florida Statutes, authorizes certain facilities to conduct slot machine operations. Section 849.094, Florida Statutes, authorizes sweepstakes, such as the Monopoly sweepstakes run by McDonalds' franchises. Section 849.0935, Florida Statutes, allows charitable and nonprofit organizations to conduct drawings by chance in order to fund raise for their respective organizations. All of these activities are defined as gambling because they satisfy the following conditions: (1) consideration, (2) chance, and (3) prize. *See Little River Theater Corp. v. State ex rel. Hodge*, 185 So. 855 (1939). However, the Gambling Amendment fails to mention how the statutory authorization of any these activities will be impacted and only informs the voters that the provisions of this Amendment will not conflict with federal law.

This is particularly problematic because some types of gambling activities currently exempted under Florida law are not readily considered gambling in the public eye. A voter may only think casino gambling includes activities found in Las Vegas casinos, but if the activity includes chance, consideration, or a prize, it

is considered gambling regardless of where it is played. For instance, under section 546.10, Florida Statutes, activities like pinball or claw/crane machines fall under the definition of gaming because they involve chance, consideration, and a prize. *See* Op. Att’y Gen. Fla. 89-05 (stating a coin operated crane game having “an unpredictable outcome or chance which is inherent in the machine” qualifies as a “slot machine”). Under current Florida law, however, these games are exempted from the gambling prohibitions found in chapter 849, Florida Statutes, because they are defined as “amusement games.” A voter wishing to authorize gambling activities via citizens’ initiative may not be informed of the wide-spread definition of gambling to understand pinball and claw/crane machines may also be impacted. A voter therefore cannot cast an intelligent and informed ballot if the voter does not know what impact the Gambling Amendment may have on existing and authorized gambling activities in the state without more direction from the ballot summary.

2. The Ballot Summary is Unclear on the Gambling Amendment’s Impact on Current and Pending Slot Machine Licenses in Florida.

The Opponents are not the only entities to recognize the uncertainty of the Gambling Amendment’s prospective or retrospective application. Recently, the Office of Economic and Demographic Research held a Financial Impact Estimating Conference and submitted a financial impact statement for

Amendment. The report found “a probable financial impact cannot be determined because whether certain casino gambling activities are currently authorized is not clear.” *Financial Information Statement for the Initiative Petition Titled Voter Control of Gambling in Florida*, Office of Economic and Demographic Research, Serial Number 15-22 (May 19, 2016). The report highlighted four activities that would be affected by the proposed Amendment if the language were to be applied retrospectively. Notably, the report states the Gambling Amendment’s proponents have indicated there would be a retrospective application due to negative impact upon Hialeah Park’s slot machine license. *Id.* at 9.

The Legislature granted Hialeah Park authorization to operate slot machines pursuant to section 551.102(4), Florida Statutes. This means Hialeah Park did not obtain slot machine authorization via a citizens’ initiative. Under a retrospective application of the new Amendment, the Legislature’s authorization would be repealed and Hialeah Park would immediately suspend slot machine operations because, pursuant to the Gambling Amendment, the only way to operate casino gambling is via a citizens’ initiative. Of course, Hialeah Park could obtain authorization pursuant to the Gambling Amendment, but this extra step on Hialeah Park is contemplated nowhere in the Gambling Amendment’s language. Thus, voters are not put on notice of this discrepancy with the statutes anywhere in the Gambling Amendment’s text.

Other facilities may be affected by the retrospective application of the Gambling Amendment. The validity of section 551.102(4), Florida Statutes, to allow counties to run referenda authorizing slot machines is currently on appeal before this Court. If this Court finds Gretna Racing, LLC (“Gretna”) is entitled to a slot machine license, a retrospective application of the Gambling Amendment would prevent Gretna from obtaining that license because the slot machines have not been authorized by a citizens’ initiative. As of the date of this Brief, a total of six counties have conducted local referenda for slot machine operations – such as Palm Beach and Bonita – pursuant to section 551.102(4), Florida Statutes.

This technicality is both confusing and misleading to voters. For instance, a voter could conceivably vote via a county-wide referendum for slot machines in the voter’s county but at the same time vote in favor of the Gambling Amendment to only approve all forms of casino gambling through citizens’ initiative. This discrepancy in voting would essentially nullify the voter’s previous vote for slot machines. The text of this Amendment and the ballot summary should indicate that such a discrepancy exists in order for the voter to cast an informed vote. Because the ballot summary fails to do so, it should not be placed on Florida’s ballot.

B. The Ballot Title and Summary Violate Section 101.161, Florida Statutes, Because Voters Can Only “Authorize” Casino Gambling in Florida, Not “Control.”

Language used in ballot titles and summaries must be consistent with each other so that voters can readily understand the meaning and force of the text. *Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982). The selection of words used in titles and summaries are important to ensure that language in a proposed amendment does not “fly under false colors.” *Id.* at 156 (Fla. 1982). In *In re Advisory Op. to the Att’y Gen. - Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994), this Court directed a constitutional amendment not be placed on the upcoming ballot because the ballot title, “Save Our Everglades,” was misleading to voters. The Court stated that the title implied “that the Everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be ‘saved’ via the proposed amendment. Yet, nothing in the text of the proposed amendment hints at this peril.” *Id.* at 1341. In fact, the actual text of the amendment did not indicate pollution or other threats to the Everglades to warrant saving, and never actually used the word “save” in describing the amendment’s purpose in its full text. The Court ultimately found that the text of the amendment stated that the purpose of the amendment was to “restore” the Everglades to its original condition, not to “save” it from peril. As the words “restore” and “save” invoke very different reactions

from voters, “the title could well be misled as to the contents and purpose of the proposed amendment.” *Id.*

The word “control” of gambling is only used in the Gambling Amendment’s ballot title, whereas voters may “authorize” casino gambling throughout the ballot’s summary and text. The verbs “control” and “authorize” have two very different meanings and the distinction between these words is important to the voters’ understanding of their role in casino gambling in Florida. “Control” means “the power to influence or direct people’s behavior or the course of events.” *Control, Oxford English Dictionary* (3d ed. 2010). “Authorize” means to “give official permission for or approval to.” *Authorize, Oxford English Dictionary* (3d ed. 2010). Based on the text of the Gambling Amendment, a voter can give permission to allow certain forms of gambling, but cannot necessarily control how that gambling will function in the state. *See Financial Information Statement*, at 11.

The difference between a word in the ballot title and a different word in the ballot summary can mislead a voter as to the contents and purpose of the proposed amendment. *See Save Our Everglades*. Here, the text of the Gambling Amendment indicates the voter is merely voting on whether to permit or “authorize” certain forms of casino gambling. The voter does not get to choose how the activity is restricted, regulated, or taxed. Thus, in practice the voter does not actually

“control” casino gambling in Florida. In fact, pursuant to the actual text of the Amendment, the actual control of the activity is reserved for the Legislature. Through the use of these two very distinct words, the ballot title and ballot summary are wholly misleading as to the actual power of the voter. The voter may vote to authorize a particular activity but have no meaningful idea of the true scope of the authorizations due to the Florida Legislature’s reserved powers to actually regulate the conduct. This could result in an activity greater in scope, or lesser in scope, than what was originally intended by the authorization. It is for these reasons, the ballot title and summary violate section 101.161(1), Florida Statutes, and should not be placed on Florida’s ballot.

II. This Court Should Direct the Gambling Amendment Not Be Placed on Florida’s Ballot Because the Amendment Encompasses More Than One Subject in Violation of Article XI, Section 3 of the Florida Constitution.

Article XI, section 3 of the Florida Constitution states any proposed amendment to the Florida Constitution “shall embrace but one subject and matter directly connected therewith.” This Court has interpreted this to mean a proposed amendment must manifest a “logical and natural oneness of purpose.” *Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d at 227. The ultimate goal for the single-subject restriction is to prevent “logrolling,” the act of combining multiple propositions into one proposal so that “the electorate cannot know what it is voting on-the amendment's proponents' simplistic explanation reveals only the

tip of the iceberg.” *Fine v. Firestone*, 448 So. 2d 984, 994. (Fla. 1984). A single-subject requirement prevents a voter from having to decide whether to vote for a provisions of an amendment it wishes to support, while also having to vote for unrelated provision that the voter does not wish to support. *Advisory Op. to the Att’y Gen. – Ltd. Marine Net Fishing*, 620 So. 2d 997 (Fla. 1993). Finally, no single proposal can substantially alter or perform the functions of multiple aspects of government. *Save Our Everglades*, 636 So. 2d at 1340.

The Gambling Amendment includes two competing subjects which may appeal to voters with different and conflicting preferences. This is textbook logrolling and is in clear violation of the single-subject requirement of the Florida Constitution. The first subject deals with authorization of casino gambling by citizens’ initiative. It is clear from the express language of the Gambling Amendment that voting for this amendment, voters will be able to authorize any form of casino gambling so long as it is approved via a citizens’ initiative.

However, the second subject – the potential repeal of existing gambling activities not approved by citizens’ initiative – is not readily clear in the text of the Gambling Amendment. A voter must be in tune with the nuisances of Florida’s current gaming laws to understand the passage of this Gambling Amendment may render current laws invalid. By combining these two subject together, a voter who favors approving casino gambling for new types of activities but may not be

supportive of the repeal of current gaming activity may be forced to choose between these two competing interests. What's more troublesome, is that the voter in this scenario may not even realize there are these competing subjects in the text of the Gambling Amendment. Essentially, the Gambling Amendment's text provides a "simplistic explanation" that only provides "the tip of the iceberg" to the voter. *Ltd. Marine Net Fishing*, 620 So. 2d 997 (Fla. 1993). Because the Gambling Amendment involve two competing subjects and attempts to hide one of the subjects from the text, the Gambling Amendment should be barred from Florida's ballot.

CONCLUSION

This Court should direct the Gambling Amendment not be placed on Florida's ballot because the ballot summary and title violate section 101.161(1), Florida Statutes, and the text of the Gambling Amendment contemplates more than one subject in violation of article XI, section 3 of the Florida Constitution. The title and ballot summary are misleading, as they fail to inform voters of the potential retrospective nature and impact the Gambling Amendment may have on existing gaming activity. The discrepancies between the words "control" and "authorize" fail to inform the voters of the role they play in policy-making for casino gambling. For all these reasons, this Court should direct the Gambling Amendment fails to meet the essential requirements to be placed on Florida's ballot.

Respectfully submitted this 9th day of June, 2016.

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I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email delivery this 9th day of June, 2016, to the following:

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