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IN THE SUPREME COURT OF FLORIDA
Case No. SC01-1000

ORIGINAL

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: AUTHORIZATION FOR COUNTY VOTERS TO APPROVE OR DISAPPROVE SLOT MACHINES WITHIN EXISTING PARI-MUTUEL FACILITIES

RESPONSE BRIEF OF THE FLORIDA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION

AND

THE SOUTH FLORIDA GREYHOUND ASSOCIATION, INC.

(SUPPORTING THE INITIATIVE PETITION)

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INTRODUCTION

This brief is filed by the Florida Horsemen's Benevolent and Protective Association ("FHBPA") and the South Florida Greyhound Association, Inc. ("SFGA"), supporters of the Initiative Petition, in accordance with this Court's order of June 4, 2001, directing the service of responsive briefs by July 16, 2001. The purpose of this Response Brief is to address issues raised in the initial briefs submitted in opposition to the Initiative Petition by: (i) No Casinos, Inc., Humane Society of the United States, The Fund for Animals, The Ark Trust, Inc., and American Society for the Prevention of Cruelty to Animals (collectively "No Casinos"); and (ii) Animal Protection Institute, Ark Trust, Inc., Friends of Animals, Grey2k USA, Greyhound Protection League, Last Chance of Animals, Michigan Retired Greyhound League, National Coalition Against Gambling Expansion, National Greyhound Adoption Program and World Society for the Protection of Animals (collectively "API").

SUMMARY OF ARGUMENT

The initiative petition authorizing county voters to approve or disapprove slot machines within existing pari-mutuel facilities ("Petition") conforms to established precedent in the areas of the law scrutinized in an advisory opinion proceeding commenced by the Attorney General under section 16.061, Florida Statutes (2000). The arguments set forth in the briefs of the opponents cannot be

reconciled with this Court's prior decisions. Further, the alleged flaws, omissions, and ambiguities suggested by the opponents are inappropriate subjects for the Court's review.

The Petition contains only one subject -- an authorization for county voters to approve or disapprove slot machines within existing pari-mutuel facilities. Approval of the proposed amendment will necessarily allow the Florida Legislature to license, tax and regulate slot machines in counties where the electorate has approved of slot machines within existing pari-mutuel facilities.

The ballot title for the Petition is a non-political, accurate caption that reflects the name by which the measure will be commonly referred to or spoken of, as prescribed by section 101.161(1), Florida Statutes (2000). The ballot summary for the Petition provides fair notice of the content of the proposed amendment in a manner that states the chief purpose of the measure, in accordance with section 101.161(1), Florida Statutes.

This Court has adopted a broad view of the right of citizens to initiate changes to their Constitution. The Florida Constitution expressly provides for and guarantees the right of the people to propose and vote upon revisions or amendments to any portion of the Florida Constitution. Art. XI, Sec. 3, Fla. Const. The opponents to the Petition seek to impose insurmountable obstacles to the right of the people to amend their constitution through an unfair and unsupportable

reading of the single-subject requirement found in Article XI, Section 3 of the Florida Constitution, and through an overly-expansive view of what language must be included in the ballot title and summary for a proposed initiative petition to comply with section 101.161, Florida Statutes.

This Court should approve the proposed initiative for placement on the ballot. The voters of Florida possess the common sense and reason necessary to discern when and whether their Constitution should be revised. Article XI, Section 3 of the Florida Constitution guarantees this right to the people. This Court should not, through an unwarranted expansion of its authority to review this initiative petition, deprive the people of this fundamental right.

ARGUMENT

I. OVERVIEW OF THE ISSUES.

The briefs filed in opposition to the Petition, for the most part, merely echo the concerns raised by the Attorney General in his letter to the Court, concerns that FHBPA and SFGA addressed in their Initial Brief. This Response Brief will not repeat in detail the response already set forth in the Initial Brief. The arguments raised in opposition and those raised by the Attorney General are either inconsistent with this Court's prior decisions on the relevant issues, or suggest an expansion of the scope of this Court's review in the advisory opinion process, drawing the Court into the merits and wisdom of the proposal.

A number of issues raised in the opponents' briefs merit this Court's attention at the outset, as an overview of what follows.

First, neither of the opponents have attempted to distinguish the two recent decisions of the Court approving initiative petitions authorizing gaming that contained many of the same features as those in the Petition. See Advisory Opinion to the Attorney General re: Florida Locally Approved Gaming, 656 So. 2d 1259 (Fla. 1995); Advisory Opinion to the Attorney General re: Limited Casinos, 644 So. 2d 71 (Fla. 1994).

Second, neither of the opponents have demonstrated a fundamental appreciation of this Court's duty to exercise "extreme care, caution, and restraint" when being asked to limit the right of the voters to amend their Constitution through the initiative process. Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982).

Third, No Casinos suggests that the ballot title and summary are defective in that they do not discuss the impact the amendment would have on the ability of Indian Tribes to conduct gaming activities in Florida. This argument is neither an appropriate consideration for this Court or in accordance with the decisional law of the Court. The argument that, by virtue of the operation of the federal "Indian Gaming Regulatory Act" ("IGRA"), 25 U.S.C. 2701, *et seq.*, passage of the proposed amendment would automatically permit the operation of all Class III

gaming devices on Indian lands in Florida, has no place in this Court's analysis of whether the ballot title and summary adequately express the chief purpose of the proposed amendment.

Finally, the Court will note that the among the parties who submitted briefs in this proceeding, there is virtually no disagreement as to the test to be employed by the Court in its analysis of whether the Petition complies with the single-subject requirement of Article XI, Section 3, Florida Constitution, and the ballot title and summary requirements of section 101.161, Florida Statutes. Instead, the disagreement lies in how this Court is to apply this test. This Response Brief will respond first to the validity of the arguments raised by the opponents.

II. THE PETITION COMPLIES WITH THE REQUIREMENTS OF ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION.

In his letter to the Court, the Attorney General suggested that the Petition may be violative of the single-subject requirement of Article XI, Section 3, Florida Constitution, because the petition may (1) substantially affect the functions of the Legislature and county governments and (2) improperly "logroll" disparate subjects by directing that tax revenue derived from slot machines be used to enhance programs benefiting senior citizens and education. His concerns are, however, misplaced, as FHBPA and SFGA addressed in their Initial Brief. Initial Br. at 19-23. The reiteration of these concerns, which appear in the opponents'

briefs, is equally misplaced. API Initial Br. at 13-14; No Casinos Initial Br. at 32-39.

In their effort to obstruct voter determination of this gaming initiative, the opponents urge the Court to employ an extremely restricted reading of Article XI, Section 3, Florida Constitution and an overly expansive interpretation of section 101.161, Florida Statutes, for the ballot title and summary. The restrictions on initiative petitions are, however, both constitutionally and statutorily mandated. Art. XI, Sec. 3, Fla. Const.; §101.161, Fla. Stat. (2000). The Court's authority in reviewing initiative petitions is limited to a determination of whether the ballot title and summary meet the requirements of section 101.161(1), Florida Statutes, and that the petition complies with the single-subject requirement set forth in Article XI, Section 3, Florida Constitution. Advisory Opinion to the Attorney General Re: Fish & Wildlife Conservation Comm'n, 705 So. 2d 1351, 1353 (Fla. 1998). The Court does not have the authority or responsibility to rule on the merits or the wisdom of proposed initiative amendments. Advisory Opinion to the Attorney General re: Amendment to Bar Government From Treating People Differently, 778 So. 2d 888, 891 (Fla. 2000).

The Petition complies with the single-subject requirement. Like the Limited Casinos amendment, this proposed amendment concerning approval or disapproval of slot machines within existing pari-mutuel facilities may have

certain ramifications for this State, but it only deals with one subject and it does not substantially alter or perform multiple functions of government.

A. The Petition Does Not Substantially Affect Any Other Provisions of the Florida Constitution.

This Court has stated that one consideration in evaluating the single-subject requirement is whether other provisions of the Constitution, not identified, are affected by the proposal. This is not a litmus test, but rather one of the factors the Court must consider in its determination of whether the proposal expresses a oneness of purpose. Neither of the opponents has identified any provisions of the Florida Constitution not identified in the Petition that is impacted, other than very tangentially, which occurs with every proposed constitutional amendment.

The opponents also suggest that the proposal is defective because it seeks to exempt itself from the constitutional provision requiring that any proposed amendment that imposes a new tax pass by a two-thirds majority vote. No Casinos Initial Br. at 39-41; API Initial Br. at 12-13. Such an interpretation and holding by this Court would mean that the people's expectation and belief that they had reserved unto themselves their authority to initiate change to the Constitution will have been judicially frustrated. Adams v. Gunter, 238 So. 2d 824, 833-835 (Fla. 1970)(Ervin, J., dissenting). The people's fundamental right to exercise their authority to amend the Constitution when all other avenues and sources for

organic change have been exhausted and failed, will have been effectively and totally eliminated. Id. at 835. This Court should not so hold.

No Casinos asserts that the Petition impacts "numerous other provisions of the Florida Constitution," but provides absolutely no explanation of *how* the Petition impacts those constitutional provisions. No Casinos Br. at 42. In order for the initiative to violate the single-subject requirement, there must be a substantial effect or alteration of another provision of the Florida Constitution. Advisory Opinion to the Attorney General re: Tax Limitation, 644 So. 2d 486 (Fla. 1994). This is not the case here.

B. The Petition Does Not Alter or Perform Multiple Governmental Functions.

The Court will consider, as one of the factors in determining oneness of purpose, whether a proposal alters or performs multiple governmental functions. The opponents of the Petition appear to suggest that any proposed amendment that, by interaction, affects or impacts any other existing constitutional provision must fail. This Court has rejected this argument on numerous occasions. Advisory Opinion to the Attorney General re: Term Limits Pledge, 718 So. 2d 798, 802 (Fla. 1998); Advisory Opinion to the Attorney General - Fee on Everglades Sugar Production, 681 So. 2d 1124, 1128-29 (Fla. 1996); Advisory Opinion to the Attorney General re: Limited Casinos, 644 So. 2d 71 (Fla. 1994).

API suggests that the Petition substantially alters or performs the function of the Legislature by "remov[ing] from the Legislature its ability to legalize slot machines" and "alter[ing] the lawmaking function of the Florida Legislature to regulate slot machines and to make appropriations." API Initial Br. at 15-17. No Casinos suggests that the Petition performs the function of the Legislature through "designation of purposes for which the taxes mandated by this initiative must be spent" and the function of the executive branch by limiting "the power of the Governor under Article III, Section 8 to veto appropriations" and impacting the "regulatory and administrative powers of the executive branch." No Casinos Initial Br. at 36-39.

In essence, what the opponents now seek to accomplish is a pronouncement or opinion that any proposal that "affects" multiple branches or levels of government must necessarily "alter" the functions of multiple branches or level of government and is, therefore, defective. Through this suggestion, the opponents ask the Court to reverse its numerous decisions which have expressly pronounced that simply because a proposal "affects" the functions of multiple branches or levels of government, the proposal is not rendered violative of the single-subject requirement. Advisory Opinion to the Attorney General Re: Florida Transportation Initiative for Statewide High Speed Monorail, 769 So. 2d 367 (Fla. 2000); Advisory Opinion to the Attorney General -- Fee On The Everglades Sugar

Production, 681 So. 2d 1124, 1128 (Fla. 1996). More importantly, the opponents wholly ignore this Court's decisional law relative to other initiative petitions authorizing gaming within Florida. Advisory Opinion to the Attorney General re: Florida Locally Approved Gaming, 656 So. 2d 1259 (Fla. 1995); Advisory Opinion to the Attorney General re: Limited Casinos, 644 So. 2d 71 (Fla. 1994).

In Florida Locally Approved Gaming, this Court upheld an initiative petition that authorized twenty state-regulated, privately owned casinos in counties with populations of at least 200,000; permitted each county, by a vote of its governing body, to "authorize gaming within its jurisdiction"; and provided for licensure, taxation, and regulation by the Legislature. 656 So. 2d at 1261-62; compare Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978)(provision requiring that the Legislature apply tax revenues to education and law enforcement properly served to implement the single-subject of casino gambling in Dade and Broward counties). This Court rejected a "legislative encroachment" argument similar to the one posed by the opponents here in Limited Casinos, where the proposed amendment permitted a limited number of casinos in a number of Florida counties and within existing and operating pari-mutuel facilities:

> Opponents further argue that the petition encroaches upon the taxation, regulation, and powers of the legislature because of the "legislature shall implement" language contained in the petition. We

> find that this language is incidental and reasonably necessary to effectuate the purpose of the proposed amendment and does not violate the single-subject requirement.

Limited Casinos, 644 So. 2d at 74.

Under the analysis suggested by the opponents, neither the Limited Casinos nor the Locally Approved Gaming initiative petitions would pass constitutional muster in a single-subject analysis by this Court. Despite the fact that both initiative petitions contained provisions that authorized gaming in Florida and authorized the Legislature to license, regulate and tax such gaming, this Court upheld the petitions. The impact of this Petition on other branches of government is no different than the impact of the prior initiative petitions authorizing gaming approved by this Court.

C. The Proposed Amendment Does Not Constitute Logrolling.

The opponents suggest that the Petition is a form of prohibited "logrolling." API argues that the Petition: (1) includes disparate taxing and spending provisions in a single initiative and (2) includes the disparate subjects of enhancing senior citizen services, classroom construction, education programs, and teachers' salaries and benefits. API Initial Br. at 13-14. No Casinos contends that the following aspects of the Petition constitute impermissible "logrolling": (1) questionable and ancillary impact on Indian gambling and the federal regulation thereof; (2) authorization of gambling; (3) authorization of a new tax;

(4) direction of the appropriation of tax revenues derived from gambling; and (5) exemption from the 2/3 voting requirement under Article XI, Section 7. No Casinos Initial Br. at 31-40. These arguments completely misapprehend the evil for which the logrolling analysis is applied – diverse "subjects" that are bundled together to force the acceptance of unwanted additions to the Constitution as the price of approval for those that the voters desire.

Once again, the opponents wholly ignore this Court's decisional law relative to other initiative petitions authorizing gaming within Florida. In the Limited Casinos and Florida Locally Approved Gaming decisions, this Court upheld the petitions, both of which combined the allegedly "disparate" subjects of taxing and spending. See Limited Casinos, 656 So. 2d at 1261, Florida Locally Approved Gaming, 644 So. 2d at 73. Further, in Floridians Against Casino Takeover, this Court approved a petition that enfolded the so-called "disparate" subjects of education and law enforcement through the appropriation of tax revenues derived from casino gaming to "counties, school districts and municipalities for the support and maintenance of the free public schools and local law enforcement." Floridians Against Casino Takeover, 363 So. 2d at 338. The petition scrutinized by the Court in Floridians Against Casino Takeover, as the Petition here, provided for the authorization of gambling, authorization of a new tax, and the direction of the appropriation of tax revenues derived from gambling. The Court declined to

reject that petition on single-subject grounds. It should similarly decline to do so in this proceeding.

III. THE PETITION SATISFIES THE REQUIREMENTS OF SECTION 101.161(1), FLORIDA STATUTES.

Not surprisingly, the opponents of the Petition raise many of the same title and ballot summary concerns expressed in the Attorney General's letter to the Court. The opponents reiterate the Attorney General's concern that the summary fails to fully inform voters of the extent of casino operations. API Initial Br. at 19-21. This argument was fully addressed in FHBPA and SFGA's Initial Brief. Initial Br. at 16-19.

In addition, API suggests that the ballot summary is misleading in that it fails to inform the voter that (1) there is no way to reverse the vote to permit the operation of slot machines at pari-mutuel facilities and (2) the effect of the amendment will be to limit the power of the Legislature to legalize slot machines. API Br. at 18-20. Further, No Casinos suggests that the ballot title and summary are misleading in that the ballot summary mentions "educational programs" as one of the beneficiaries of revenues derived from the taxation of slot machines, whereas the text mentions "classroom construction, educational programs and teachers' salaries and benefits." No Casinos Br. at 27. Finally, No Casinos argues that the ballot summary may mislead voters into believing that the exemption from

the 2/3 voting requirement applies to the vote over a local referenda governing slot machines rather than a voter over the constitutional amendment authorizing counties to approve or disapprove of slot machines within existing pari-mutuel facilities. No Casinos Br. at 28.

The opponents' criticisms of the ballot tile and summary are, however, inconsistent with the requirements of section 101.161, Florida Statutes. Neither of the opponents seems to fully understand the limits that surround the Court's analysis of the ballot title and summary. The opponents' fundamental misapprehension of the requirements of section 101.161 is evident in their microscopic search for precise definitions, which is not at all appropriate in the determination of whether the ballot title and summary meet the section 101.161 requirement of expressing the "chief purpose" of the proposed amendment.

The criticism by API that the ballot summary fails to disclose that "there is no way to reverse the vote to permit the operation of slot machines at pari-mutuel facilities" is both incorrect and inconsistent with prior case law. First, the voters can reverse the effects of the operation of the amendment through the same process by which the amendment was created, *i.e.*, the voters may propose an initiative petition to ban the operation of slot machines at pari-mutuel facilities. Second, numerous initiative petitions have been upheld that have produced, after placement on the ballot, positive law in the form of a constitutional amendment,

with no express explanation of how the effects of such law may be nullified. The constitutional amendment authorizing the operation of lotteries by the state, for example, contains no express provision for the abolition of the state lottery. See, e.g., Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986); Art. X, Sec. 15, Fla. Const. (adopted in 1986 and proposed by initiative petition upheld by the Court in Carroll v. Firestone). To suggest that this Petition is misleading for its failure to include a provision for its repeal upon adoption by the voters is simply illogical.

API's argument that the Petition would limit the power of the Legislature to legalize slot machines is both without merit and contrary to this Court's decisional law. The initiative petitions in Limited Casinos and Florida Locally Approved Gaming both provided for casino gaming in Florida, and in Florida Locally Approved Gaming, the initiative expressly provided for the operation of slot machines within those casinos. Limited Casinos, 644 So. 2d at 73; Florida Locally Approved Gaming, 656 So. 2d at 1261. Both petitions "limited" the authority of the Legislature to authorizing gaming or the operation of slot machines. This Court, however, found neither defective.

With regard to the suggestion by No Casinos that the ballot title and summary are misleading in that the ballot summary mentions "educational programs" as one of the beneficiaries of revenues derived from the taxation of slot machines, whereas the text mentions "classroom construction, educational

programs and teachers' salaries and benefits," the Court will recognize, of course, that the opponents have invited the Court to apply an erroneous standard to determine whether the summary is "misleading." Deceptiveness in a ballot title and summary is measured by what is objectively conveyed by the words expressed, not by a subjective prediction of what some readers may perceive the language to mean.

IV. THE PROPOSED AMENDMENT'S POTENTIAL IMPACT ON THE FEDERAL INDIAN GAMING REGULATORY ACT IS NOT BEFORE THE COURT, AND IN ANY EVENT DOES NOT RENDER THE PETITION INVALID.

A. Any Collateral Impact of the Proposed Amendment on the Operation of the Federal Indian Gaming Regulatory Act is Not Properly Before This Court.

The fundamental flaw with the Petition suggested by No Casinos is its potential impact on Class III gaming on Indian lands by operation of federal law under IGRA. No Casinos suggests that ballot title and summary of the proposed initiative are misleading in that they do not disclose that the "proposed initiative will, by automatic operation of federal law, permit Class III gambling devices throughout Florida." No Casinos Br. at 26. This suggestion, of course, is quite irrelevant to the purpose of the submission of this initiative petition to the Court, which is to obtain the Court's advice whether the initiative addresses the single-subject requirement and whether the ballot title and summary are appropriate. As

the Court noted in Limited Casinos, 644 So. 2d at 75, "[w]e do not pass judgment on the wisdom or merit of the proposed initiative amendment." 644 So. 2d at 75.

In evaluating an initiative petition, this Court has consistently recognized its limited role in determining whether the proposed amendment and the ballot title and summary comply with the requirements of Article XI, Section 3, Florida Constitution and section 101.161, Florida Statutes. See, e.g., Advisory Opinion to the Attorney General re: Term Limits Pledge, 718 So. 2d 798, 801 (Fla. 1998). Consistent with its reasoned and practical application of the statute, this Court has repeatedly rejected invitations to evaluate possible collateral effects that are not explained in the summary and confined itself to the clarity of a summary's recitation of chief purpose. Carroll v. Firestone, 497 So. 2d at 1206. While the Court will consider collateral impacts on other provisions of the Florida Constitution, the Court will not entertain the impact of an initiative petition on federal law. See, e.g., Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991); Advisory Opinion to the Attorney General re: Right to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998).

Significantly, two initiative petitions authorizing casino gaming, one to which No Casinos submitted a brief in opposition, have been upheld by the Court subsequent to the 1988 enactment of IGRA – Limited Casinos and Florida Locally

Approved Gaming. In Limited Casinos, the initiative petition authorized casino gaming in certain geographical locations in Florida. No Casinos suggested in its brief filed in opposition to the Limited Casinos petition that passage of the proposed amendment would have the effect of authorizing casino gambling on Indian lands. App. A at 34-35. No Casinos argued:

> The ballot summary also fails to put voters on notice, as does the entire initiative, that the amendment would fundamentally change the State's relationships with indian tribes and would have the collateral side effect of authorizing casino gambling on indian lands. This and the initiatives [sic] other side effects violate the single subject rule.

App. A at 9.

This Court specifically considered the No Casinos argument, stating in its opinion that the opponents to the Limited Casinos initiative petition had suggested that "the petition would impact the authority of the executive and legislative branches because it might authorize and compel negotiations for casinos on Indian reservations." 644 So. 2d at 74. Notwithstanding the arguments presented by No Casinos, this Court expressly and unambiguously rejected such arguments, finding instead that the initiative petition complied with both the single-subject requirement under Article XI, Section 3, Florida Constitution and the ballot title and summary requirements set forth in section 101.161, Florida Statutes.

The opponents make clear that they consider adoption of the proposal here unwise. This, however, is a matter for determination of the people at the ballot

box under the contemplation of Article XI, Section 3, Florida Constitution. It is for the people, not this Court, to address the merits and wisdom of the adoption of amendments to the Florida Constitution. The Court may only determine their legality for ballot placement and consideration by the people.

B. Any Collateral Impact of the Proposed Amendment on the Operation of the Federal Indian Gaming Regulatory Act is Both Speculative and Inappropriate in this Proceeding.

No Casinos proposes a myriad of speculative scenarios relating to the impact of the Petition on federal law governing the regulation of gaming on Indian reservations. As discussed supra, any prospective impact passage of the proposed amendment may have on the federal regulation of gaming on Indian lands is irrelevant to the Court's analysis in this proceeding.

No Casinos warns this Court of dire consequences that allegedly will follow if the Petition is permitted to be placed before the voters, suggesting that adoption of the proposed amendment would "permit [the operation of] slot machines by Indians tribes elsewhere in Florida." No Casinos Br. at 18. Such predictions, however, represent nothing more than premature speculation. Compare Limited Casinos, 644 So. 2d at 74 ("[T]he scenarios raised by the opponents [including the scenarios involving IGRA raised by No Casinos in opposition to the Limited Casinos initiative petition] relating to the possible impacts on other branches of government or on the constitution [are] premature speculation.").

Notwithstanding that such collateral issues are irrelevant to the Court's review of this Petition, the scenarios posed by No Casinos are both speculative and unsupported by any empirical evidence. Compare Advisory Opinion to the Attorney General re: Florida Transportation Initiative for Statewide High Speed Monorail, 769 So. 2d 367 (Fla. 2000). Although No Casinos admits that "the State's Indian tribes have [already] begun high-stakes gambling," No Casinos fails to acknowledge that Class III gaming is already being conducted on Indian lands in Florida, albeit without federal or state authorization. No Casinos Br. at 17.

Indeed, while No Casinos references the fact that the State of Florida has previously sued the Seminole Tribe on grounds that the Tribe was "illegally engaging in Class III gambling, " No Casinos fails to point to any empirical evidence that would suggest the government's allegations are incorrect or that Class III gaming is *not* already present in several of the Indian gaming facilities in Florida. No Casinos Br. at 17 (citing Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999)(suit dismissed on grounds of Tribal sovereign immunity)).

In addition to failing to acknowledge the operation of Class III gaming devices by Florida's Indian tribes, No Casinos has oversimplified the complex interaction between federal and state statutory and decisional law relative to gaming on Indian lands pursuant to IGRA. No Casinos suggests that the

inevitable result of the passage of the proposed amendment is that Class III gaming will be authorized on Indian lands in Florida. The subject of whether Class III gaming (including the operation of "slot machines" within the meaning of Florida law) may be conducted on tribal lands in Florida is the subject of on-going litigation between the State and federal governments and Indian tribes in Florida. See Amended Complaint filed in United States of America v. Seminole Tribe of Florida, Case No. 97-1481-CIV-T-17(A) (M.D. Fla. 1997), at App. B; see also Complaint and filed in State of Florida v. U.S., Case No. 4:99-CV137-RH (N.D. Fla. 1999), at App. C.

The litigation between the Seminole Tribe and the State of Florida and the federal government arises under IGRA. Congress enacted IGRA in 1988 for the purpose of providing clear standards and regulations for the conduct of gaming on tribal lands. See 25 U.S.C. § 2710(3). Section 2703 of Title 25, United States Code divides gaming into three classes – Class I, Class II, and Class III. Class III gaming consists of all gaming that is not Class I or Class II and includes bank card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. See 25 U.S.C. § 2703(6)-(8); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1255-56 (9th Cir. 1994), cert. denied, 117 S. Ct. 2508 (1997).

IGRA provides, in pertinent part, that Class III gaming activities are

authorized on Indian lands only where such activities are (1) authorized by an ordinance or resolution that is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (2) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (3) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State that is in effect. 25 U.S.C. 2710.

No Casinos erroneously suggests to this Court that passage of the proposed amendment will automatically permit the conduct of Class III gaming on Indian lands because "federal law dictates automatic granting of high-stakes gambling rights on Indian lands if a State provides similar rights to any person for any purpose." No Casinos Br. at 12. This argument, however, ignores the express terms of IGRA that provide that a number of conditions be met before Class III gaming may be conducted on Indian lands. In order to conduct Class III gaming devices on Indian lands, the interested tribe must first seek to enter into a tribal-state compact governing the Class III gaming with the state in which the Indian lands are located. 25 U.S. C. § 2710(d)(1)(C); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 543 (9th Cir. 1994), cert. denied, 116 U.S. 297 (1995).

There are currently six Indian gaming casinos in Florida – one operated by the Miccosukee tribe in Miami and five operated by the Seminole Tribe, in Coconut Creek, Hollywood, Immokalee, Okechobee, and Tampa. The Miccosukee

Indian Gaming casino in Miami offers "400 Video Pull Tab Machines" and is open twenty-four hours daily. App. D. The Seminole Tribe's Coconut Creek Casino offers "pull-tab gaming machines" twenty-four hours a day, seven days a week. App. E. The Hollywood Seminole Gaming casino operates a number of "pull-tab" machines. App. F. The Immokalee Seminole Indian Casino offers over 300 pull-tab machines and is open twenty-four hours daily. App. G. The Brighton Seminole Bingo and Gaming facility offers 55 "video slot" machines and a number of "pull-tabs." App. H.

The Seminole Indian Casino in Tampa is open twenty-four hours daily and offers both pull-tabs and "video gaming machines." App. I. The Tampa casino's brochure clearly depicts coin-operated "video-gaming machines," which appear to be "slot machines" within the meaning of Florida law and definition of Class III gaming devices under IGRA. App. I.

Although the tribes contend that the "video slot" and "pull-tab" machines are not "slot machines" or "Class III" gaming devices, the State of Florida and federal government have expressed their disagreement with the tribe's position. In United States v. Seminole Tribe of Florida, the United States sued the Seminole Tribe for conducting "unauthorized and therefore unlawful gaming activities on the Tribe's reservation properties [in Florida]." App. B at 1. United States v. Seminole Tribe of Florida, Case No. 97-1481 CIV-T-17A, pending in the United

States District Court for the Middle District of Florida; compare State of Florida v. U.S., Case No. 4:99-CV137-RH (N.D. Fla. 1999), at App. C. Specifically, the government argues that the Tribe is operating "Class III gaming activities . . . without a compact [with the State of Florida] in violation of the Indian Gaming Regulatory Act." App. B at 4.

The U.S. Attorney also alleges that the Tribe is operating "approximately 500 or more electronic facsimiles of games of chance defined [by federal law] as Class III gaming [devices]." App. B at 6. The U.S. Attorney states in its complaint that the "Pot of Gold Video pull tabs, World Touch video pull tab, Touch 6 Lotto, Super 6 Lotto and Super Pick Lotto" machines operated at the Tampa, Okeechobee and Immokalee Gaming Palaces, are Class III gaming devices unauthorized by federal and Florida law. App. B at 6. Given the government's allegations that unauthorized Class III gaming devices are currently being operated on Indian lands, it is questionable whether passage of the proposed amendment will have any impact whatsoever on the operation of Class III gaming devices on Indian lands in Florida.

In suggesting that the proposed amendment may have a direct impact on Class III gaming on Indian lands, No Casinos also cites to "rules promulgated"[1] by

[1] The proposed rule is referred by the Department as a "Proposed Rule Allowing Procedures to Permit Class III Gaming Procedures" ("Proposed Rule") under

the United States Department of the Interior "which permit a tribe confronted with a State's refusal to be sued on Eleventh Amendment grounds to ask for and receive federal approval for its Class III gambling activities." No Casinos Br. at 15. No Casinos fails to inform this Court that the Department of Interior has withdrawn the Proposed Rule in order to provide the Solicitor for the Department of Interior and the newly-confirmed Assistant Secretary of Indian Affairs, as well as the new administration, an opportunity to evaluate the issues raised in the lawsuits against the Seminole Tribe in Florida. See App. J.

Further, notwithstanding that the Proposed Rule has been withdrawn, the States of Florida and Alabama challenge the validity of the predecessor of the Proposed Rule, questioning the authority of the Secretary of Interior to promulgate regulations under IGRA for the operation of Class III gaming on Indian lands. State of Florida v. U.S., Case No. 4:99-CV137-RH (N.D. Fla. 1999), at App. C. The States contends that:

> [T]he Proposed Rule is predicated on a faulty legal understanding that the Secretary [of the United States Department of the Interior] has the authority to prescribe class III tribal gaming procedures when a state raises an Eleventh Amendment bar to a 'bad faith' lawsuit under IGRA...[A]bsent specific congressional authorization, the Secretary has no legal authority to prescribe class III gaming procedures for an Indian tribe other than as provide for in section 11(d)(7) of IGRA, which provides for a federal court to appoint a mediator only after the court has made a determination that the State has failed to negotiate in

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IGRA. App. J.

good faith."

Accordingly, not only is the operation of Class III gaming on tribal lands in Florida subject to the fluid and dynamic interaction between the United States Department of Interior and the State of Florida, it is also subject to the uncertainties of the judicial process and the vagaries of the political process by virtue of the new administration's reconsideration of proposed regulations under IGRA. Further, Class III gaming on tribal lands in the form of video slot machines appears to be offered to Floridians around the clock at six locations with the seeming acquiescence of state and federal authorities. Therefore, any impact that the proposed initiative (upon passage of the amendment) may have on Class III gaming on tribal lands is, at best, premature speculation and improperly addressed in this proceeding.

CONCLUSION

The Petition arrives at this Court entitled to great deference, and may only be barred from the ballot if "clearly and conclusively defective." The Petition and the title and ballot summary comply fully with the requirements of Article XI, section 3, Florida Constitution and § 101.161, Florida Statutes. The Court should approve the Petition for submission to the electorate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 16th day of July 2001 to the following:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the foregoing Brief has been prepared in Times New Roman 14 font in compliance with Rules 9.210(a)(2) and 9.100(1), Florida Rules of Appellate Procedure.

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