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SUMMARY OF ARGUMENT

The initial briefs supporting the proposed initiative show that the voters will be thoroughly confused about the purpose, terms and effect of their vote. The proposed initiative is so confused and confusing that even its proponent and supporters cannot accurately describe its effect and purpose.

In addition, contrary to the claims of the proponents and supporters of the amendment, the proposed initiative will have immediate and significant effects on and will perform the functions of several branches and levels of government. One egregious example is the judicial function performed by both the text and ballot summary of the proposed initiative, which is in addition to, and not logically a part of, the ostensible legislative purpose of the initiative.

Moreover, the proposed ballot summary does not even meet the simple “truth” standard posited by the proponents. Far from being just “superfluous,” as suggested by the proponents of the initiative, the ballot summary is simply wrong, and will mislead the voters. This proposed initiative is fatally flawed and should be struck down.

ARGUMENT

- I. VOTERS WILL BE CONFUSED BECAUSE THE PROPOSED INITIATIVE WILL NOT DO WHAT ITS PROPONENTS SUGGEST.
- A. **The Proposed Initiative will not “level” a “Playing Field,” but will exacerbate the very problem Proponents seek to address by shifting enforcement and regulatory power to the federal government.**

“Floridians for a Level Playing Field” (“Floridians”), Proponents of the proposed initiative, describe its purpose for this initiative: “. . . adoption of the Petition by the electorate and subsequent approval by county electorates will permit a ‘level playing field’ in these counties.” Initial Brief of Floridians for a Level Playing Field (“Floridians’ Br.”), 1-2.¹ By “level playing field,” Floridians means that it wants the pari-mutuel industry to compete with illegal gambling offered by Indian tribes and “cruises to nowhere” by offering the same types of gambling as it claims Indian tribes and “cruises to nowhere” now provide illegally. *Id.*

As Proponents of this initiative, Floridians must know that both Indian

¹ “Floridians believe the pari-mutuel industry, which is fully licensed, regulated, and taxed by the State, has been severely damaged economically by gaming activities which are slot machines or their equivalent by Indian Tribes and so-called ‘cruises to nowhere’ – illegal but nevertheless occurring openly and in an unregulated and untaxed manner – and that adoption of the Petition by the electorate and subsequent approval by county electorates will permit a ‘level playing field’ in these counties.” Floridians’ Br., 1-2.

gambling and “cruises to nowhere” are controlled by federal law. They no longer write on “a clean slate,” as in *Advisory Op. to the Att’y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998). They cannot ignore the requirements and effects of federal law. *See Ray v. Mortham*, 742 So.2d 1276 (Fla. 1999).

The effect of federal law here is clear and immediate. As amply shown in No Casino’s initial brief, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2702 *et seq.* (“IGRA”), provides for a limited State role in regulating gambling on Indian lands. *See* Initial Br. of No Casinos, *et al.*, (“No Casinos Br.”), 13-22. Florida has tried to regulate gambling on Indian lands and been rebuffed under the Eleventh Amendment. *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237 (11th Cir. 1999).²

“Cruises to nowhere” are similarly governed by federal law, under an

²This 1999 decision and other cases have clarified the state of the law regarding state regulatory power over Indian gambling since the last time this Court considered a gambling initiative. These recent cases demonstrate the shift of power from state to federal authorities as soon as IGRA is triggered. This initiative proposal – to “level the playing field” – is an outgrowth of the recent tremendous expansion of Indian gambling efforts and the failure of state regulatory efforts. *Floridians’ Br.*, 1-2; *Seminole Indian Tribe*, 181 F.3d at 1139. This is a far different situation from that in *Advisory Op. to the Att’y Gen. re Ltd. Casinos*, 644 So. 2d 71, 75 (Fla. 1994) (“We are confident that the public . . . will understand that the effect of the amendment would be to permit casino gambling **subject to the limitations contained therein.**” *Emphasis added.*). The effects of permitting casino gambling anywhere in Florida are no longer “contained” within the language of the proposed initiative. The proposed initiative, therefore, no longer “writes on a clean slate,” *Term Limits Pledge*, 718 So. 2d at 803, it now writes on a full and growing “slate.”

exception to the Johnson Act (which generally prohibits gambling), 15 U.S.C. § 1175, and under the Gambling Ship Act. 18 U.S.C. §§ 1081-1084 (1994). In 1992, Congress amended the Johnson Act to create a federal right to operate a gambling “cruise to nowhere.” Pub. L. 102-251, §§202, 106 Stat. 60, 61-62 (1992), amending 15 U.S.C. § 1175(b)(1). Federal authority over “cruises to nowhere” similarly pre-empts state anti-gambling laws. *See Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999); *United States v. One Big Six Wheel*, 166 F.3d 498 (2d Cir. 1999)(expansion of off-shore territorial limit does not limit gambling on “cruises to nowhere”).

Obviously frustrated by its inability to obtain a “level playing field” under federal law, Proponents chose to invoke state law, through the initiative process. They could not outlaw Indian or cruise gambling, so they chose to make gambling legal in similar circumstances for themselves. While one or more initiatives might be crafted, in certain circumstances and with full disclosure to the voters, to achieve such a goal, the proposed initiative here goes much further than just “leveling” a playing field by making gambling lawful at pari-mutuel facilities. As shown in No Casinos’ initial brief, even if no county in Florida votes to legalize gambling, enactment of the proposed initiative alone will trigger rights on Indian lands and shift enforcement power from state to federal governments.

Proponents contend that illegal gambling is allegedly taking place on Indian lands. *Seminole Indian Tribe*, 181 F.3d at 1139. But their solution will not only expand gambling at pari-mutuel facilities, it will also permit Indian tribes to expand gambling at other facilities not identified in the proposed initiative. These are major changes in law, not mentioned in the text, the ballot summary or ballot title. The proposed initiative is fatally flawed because it does not inform the voters about inevitable and significant effects of passage.

B. Voters cannot understand the Proposed Initiative because the text and summary are contradictory, and even its supporters disagree about what it means.

One of the most egregious provisions in the initiative text and ballot summary is the language related to Article XI, Section 7, Florida Constitution. Proponents suggest that this language was inserted because they “believed that the electorate was entitled to know that a provision of the Constitution inserted by electoral approval of a 1996 initiative petition just five years ago would not apply.” *Floridians’ Br.*, 28 (emphasis in original). This belief is an interpretation, as evidenced by the need for four pages of argument. *Floridians’ Br.*, 29-33.³

³ If the language is only an attempt to reassure voters about new taxes, the summary would be the “type of ‘political rhetoric’ that was condemned by this Court in [*Save Our Everglades*].” *Advisory Op. to the Att’y Gen. Re: Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (quoting *Advisory Op. to the Att’y Gen. - Save Our Everglades*, 636 So. 2d 1336, 1342 (Fla.

Enacting the proposed initiative would enshrine this interpretation in the Constitution.⁴ If this interpretation is placed into the Constitution, the initiative performs a judicial function, separate and distinct from the legislative and executive functions also performed by the proposed language. *See Save Our Everglades*, 636 So. 2d at 1340.

The danger inherent in initiatives performing a judicial function is highlighted by the contrasting and conflicting views of the initiative supporters. *Compare* Floridians' interpretation with the brief of the supporters, which contends that "the proposed amendment merely creates a limited exemption from the supermajority voting requirement under Article XI, Section 7." Initial Br. of Florida Horsemen's Benevolent and Professional Association, *et al.* ("Horsemen's Br."), 13. One group says Article XI, Section 7 does not apply; the other says it applies, but the initiative creates an exemption.

Voter confusion over these conflicting interpretations will be worsened, not eased, by reading the ballot summary. The ballot summary language itself is

1994)).

⁴ It is possible to craft an initiative where "superfluous" language is not placed into the Constitution, by simply separating preambulatory and amendatory language. *See, e.g., Ray*, 742 So.2d at 1278 (non-codified portion of initiative used to understand purpose of initiative); *Advisory Op. to the Att'y Gen. re Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1130 (Fla. 1996).

wrong. Not “superfluous” or “unnecessary,” Floridians’ Br., 36 n.7, but **wrong.**

The ballot summary says it “permits voters to authorize the taxation of slot machines by simple majority vote rather than the 2/3 majority vote for new state taxes provided in Article XI, Section 7.” The proposed initiative’s supporters suggest that voters would want to do this because “the benefit inur[es] to Florida’s most vulnerable citizens – seniors and children.” Horsemen’s Br., 21. Yet only the legislature can authorize taxation of slot machines. A voter who wishes to obtain the power to tax slot machines (at, for example, permissive or confiscatory rates) will think her vote on this initiative will give her that power, but it will not.

The proponents compare this erroneous or legally-binding language with the effect of later-developed law, citing *Ray v. Mortham*, 742 So. 2d 1276. They urge that their language should be deemed “unnecessary or superfluous” in that light. Floridians’ Br., 36 n.7. Yet, superfluity is not the issue; the issue, by their own declaration, is “truth.” *Id.* at 33.

Again, Proponents make a correct statement – that they “should not be faulted for **telling the electorate the truth**,” Floridians’ Br., 33, but fail to recognize that they don’t meet that simple test. Far from helping the electorate understand the relationship of this proposal to Article XI, Section 7, the ballot summary affirmatively misleads and confuses the voters.

The ballot text, summary and title are all confusing, erroneous, and misleading, both because they do not describe the inevitable effects of the initiative and because the effects they do describe are simply wrong. This makes the initiative language, ballot summary and ballot title, in and of themselves, “clearly and conclusively defective.” *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).⁵

II. THE PROPOSAL VIOLATES THE SINGLE SUBJECT REQUIREMENT BECAUSE IT SUBSTANTIALLY PERFORMS MULTIPLE FUNCTIONS OF FLORIDA GOVERNMENT AND AFFECTS MULTIPLE LEVELS OF GOVERNMENT.

The instant proposal, while ostensibly only about authorizing local referenda to allow slot machines, also performs a variety of other functions substantially affecting other levels and branches of government.

A. **Proponents’ single subject analysis dilutes this Court’s decisions.**

Proponents’ long discussions concerning this Court’s single subject

⁵ Proponents’ analysis of the “clear and conclusively defective” standard is flawed and incomplete. This standard only applies to the ballot summary and title. *See, e.g., Florida League of Cities*, 607 So. 2d at 399; *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). Since *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984), a more rigorous review of single subject compliance has been used. *See also Advisory Op. to the Att’y Gen., re Amendment to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 891 (Fla. 2000). Nevertheless, even under the lenient standard claimed by proponents, the proposed initiative is defective and must be struck down.

jurisprudence, quoting standards for compliance with the single subject requirement, merely conclude that the initiative complies with the standards, without subjecting the initiative to the analysis recently discussed. Applying the correct analysis, or even that suggested by the proponents, shows that the proposed initiative violates the single-subject rule.

Floridians, for example, suggest that the only subject involved in the proposed initiative is “to authorize slot machines within existing State-licensed pari-mutuel facilities, in counties where authorized by vote of the electorate. There is no other subject in the proposed amendment, when viewed through the lens of ‘oneness of purpose.’” *Floridians Br.*, 12.

This statement expands “oneness of purpose,” to suggest that any language which supports the general purpose of an initiative will suffice. *Fine*, 448 So. 2d at 990. Yet merely “enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement.” *Advisory Op. to the Att’y Gen. - Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994); *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984); *Advisory Op. to the Att’y Gen. re People’s Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1307 (Fla. 1997); *Advisory Op. to the Att’y Gen. re Tax Limitation*, 644 So. 2d

486, 490 (Fla. 1994). As amply shown in No Casinos' initial brief, the proposed initiative performs judicial, legislative and executive functions, and dramatically alters functions of several branches (particularly by shifting power).

Floridians' conclusory analysis of single subject jurisprudence, however, is in the pattern for their initial brief. Thus, Proponents argue on page 19 that initiative provisions requiring tax revenues be appropriated to senior citizen and education programs do not constitute "logrolling," concluding simply that their appropriations wish list "may refer to any number of programs," is not geographically restricted, and thus logically relates to a slot machine proposal.

This "cloak of a broad generality" dilutes this Court's teachings on linking appropriations and initiative purposes. Floridians tries to avoid this link by claiming: "The mere fact that the taxation and appropriation provision here is more specific . . . **is of no moment**. Taxation and appropriation are **functions** of the Legislature, and the mere fact that a specification of multiple uses is made does not render a proposed amendment non-conforming to the single-subject requirement." Floridians' Br., 22, emphasis added. Yet the performance by a single initiative of multiple "functions", *id.*, (plural emphasis added) is exactly what the single-subject requirement is intended to forbid. *See, e.g., Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d

563, 565 (Fla. 1998); *Save Our Everglades*, 636 So. 2d at 1340; *Evans*, 457 So. 2d at 1354; *Fine*, 448 So. 2d at 990.

The more straightforward view is found in the Horsemen's Brief, which defines the initiative's purpose in a way that clearly discloses logrolling: "Its fundamental and natural oneness of purpose is to authorize county voters to decide whether to permit licensed, regulated, and taxed slot machines to operate within existing pari-mutuel facilities with the benefit inuring to Florida's most vulnerable citizens – seniors and children." *Horsemen's Br.*, 21.

This is classic logrolling. Voters are promised referenda on slot machines, sweetened with tax revenues to be appropriated solely for "Florida's most vulnerable citizens." A voter considering this amendment is obliged to accept slot machines in order to help "Florida's most vulnerable citizens." Disregarding generalities, the specific logical oneness of purpose? It "is of no moment."⁶

⁶ The irony is that this denial of importance illustrates just how attractive this form of logrolling really is. "Across the desert West, and in other retirement havens and casino capitals around the country, senior care providers and community groups have begun taking tougher stands against a problem they say is becoming ever more serious: elderly gambling addiction." Sanchez, "Senior Betting May be Big Gamble," *The Washington Post*, July 8, 2001, A1, available at: <<http://www.washingtonpost.com/wp-dyn/articles/A31448-2001Jul7.html>>. Perhaps Proponents do not wish to discuss the link because these additional funds will in fact be needed to pay for addiction programs for "Florida's most vulnerable citizens."

Floridians' Br., 22. This type of conclusory statement cannot justify an initiative which will perform as many varied functions and tie together as many different subjects as the instant proposal. The proposed initiative should be rejected.

B. This initiative differs substantially from other gambling initiatives approved by this Court.

Just as their analysis of the single-subject standard is incomplete, so is Proponents' claim of support from prior cases. Floridians seek to link their initiative with other gambling-related initiatives which this Court has approved in the past. *See, e.g., Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337 (1978); *Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986); *Limited Casinos*, 644 So. 2d 71 (Fla. 1994); *Advisory Op. to the Att'y Gen. Re Fla. Locally Approved Gaming*, 656 So. 2d 1259 (Fla. 1995).

Proponents rely heavily on *Floridians Against*, 363 So. 2d 337 (Fla. 1978). Floridians' Br., 14-16, 19. *Floridians Against* was important for explaining logrolling. However, like its counterpart, *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976), *Floridians Against* represents a pre-1984 period when this Court subjected initiatives to lesser scrutiny, and most importantly, did not consider initiatives in terms of their effects on functions and levels of government, as has been the case since *Fine*. An examination of initiatives approved since 1984 demonstrates that no approved initiative performed as many functions as does the instant proposal.

The lottery initiative, approved in *Carroll v. Firestone*, discussed in Floridians' Brief, 16-17, created the state lottery, and provided that its proceeds be placed in a trust fund. 497 So. 2d at 1205. However, the lottery initiative left appropriation of revenue proceeds entirely to the discretion of the Legislature. *Id.* at 1206 (noting that the Legislature was free to alter the disposition of lottery revenues). The instant proposal commands taxation, and then also directs the appropriation of slot machine tax revenues to specific approved purposes.

The initiative approved in *Limited Casinos* would have allowed for casinos in certain Florida counties, at pari-mutuel facilities, and on riverboat facilities. 644 So. 2d at 73. According to the Court, the petition's details on number, size, location and type of gambling facilities served only to provide for "scope and implementation" of the proposal. *Id.* The initiative also required legislative implementation, which the Court approved as "incidental and reasonably necessary to effectuate the purpose of the proposed amendment." *Id.* at 74. Again, however, the Legislature was left free to determine the use of any proceeds.

The same problem is apparent with Proponents' reliance on *Locally Approved Gaming*, 656 So. 2d 1259 (Fla. 1995). Floridians' Br., 21-22. Unlike the 1995 casino initiative, the instant proposal does not merely require implementing legislation, but seeks to direct and control the implementation

through the initiative itself. As a result, the proposed initiative here does not merely “affect” appropriations or taxation functions, but **performs** these two quintessentially legislative functions **in addition to** performing the admitted chief purpose or function of the initiative, i.e. “to authorize slot machines within existing State-licensed pari-mutuel facilities, in counties where authorized by vote of the electorate.” *Floridians’ Br.*, 12.⁷

The problem with the instant initiative is overreaching. It does not merely touch other branches or functions, but seeks to control their operations. Not content with establishing the referenda and requiring implementation, Proponents seeks to mandate taxation and appropriation for their preferred purposes. “A proposal that affects several branches of government will not automatically fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test.” *Advisory Opinion to the Att’y Gen. re Fish & Wildlife Conservation Comm’n*, 705 So. 2d 1351, 1353-54 (Fla. 1998) (citing *Save Our Everglades*, 636 So. 2d at 1340).

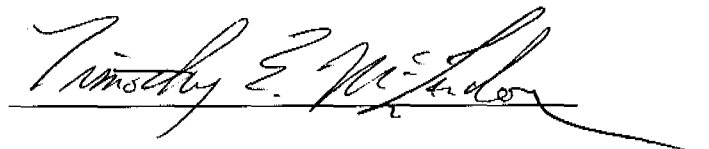
⁷ In addition, the *Locally Approved Gaming* initiative provided for both municipal and county referenda, with county referenda being effective only in unincorporated areas. 656 So. 2d at 1261. The instant initiative, by contrast, provides only for county referenda. This apparently modifies the relationship of non-charter counties to their municipalities, and would thus seem to impact Article VIII, Sections 1(f), 2(b) and 4, Florida Constitution.

Like the initiative in *People's Property Rights*, 699 So. 2d at 1308, the instant initiative proposal performs multiple functions of multiple levels and branches of government, and is thus fatally flawed.

CONCLUSION

Because the proposed initiative, "Authorization for County Voters to Approve or Disapprove Slot Machines within Existing Pari-Mutuel Facilities," performs multiple functions which substantially affect multiple branches of government, and because its summary and title are inaccurate and misleading, both in terms of what they say and what they do not say about the initiative, this Court should invalidate the proposal.

RESPECTFULLY SUBMITTED,



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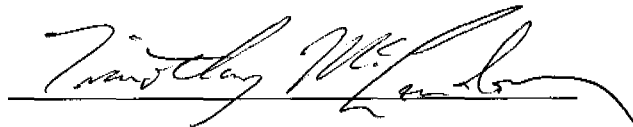
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 13th day of July, 2001, to The Honorable ROBERT A. BUTTERWORTH, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050; to DANIEL K. ADKINS, Floridians for a Level Playing Field, West Flagler Associates, Ltd., P.O. Box 350940, Miami, Florida 33126; to PARKER D. THOMSON, ESQUIRE and GREGG D. METZGER, ESQUIRE, Thomson, Muraro, Razook & Hart, P.A., One Southeast Third Avenue, Suite 1700, Miami, Florida 33131-1710; to PETER ANTONACCI, ESQUIRE, Gray, Harris & Robinson, P.A., 301 South Bronough Street, Tallahassee, Florida 32302; to BRUCE D. GREEN, ESQUIRE, 600 South Andrews Avenue, Suite 400, Fort Lauderdale, Florida 33301-2861; and to MARK HERRON, ESQUIRE, P.O. Box 1701, Tallahassee, Florida 32302-1701.

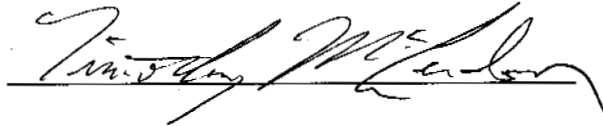


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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times
New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R.

APP. P.

A handwritten signature in cursive script, appearing to read "Timothy J. Anderson", written over a horizontal line.

Attorney