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SC15-1929

In the Supreme Court of Florida

GRETNA RACING, LLC,
Petitioner,

v.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING,
Respondent.

ANSWER BRIEF OF RESPONDENT DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL
Case No. 1D14-3484

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INTRODUCTION

With few exceptions, Florida has long prohibited slot machines. Although a 2004 constitutional amendment allowed Miami-Dade and Broward voters to legalize slot machines in their counties, the Legislature continued to prohibit slot machines elsewhere. More recently, the Legislature approved the Seminole Compact, which allows the Seminole Tribe to operate slot machines in its facilities. In 2009 and again in 2010, the Legislature enacted provisions in conjunction with the Seminole Compact and established a framework for future changes to Florida's gambling laws.

The issue in this case is whether the Legislature—through a 2010 amendment to a statutory definition—abandoned its longstanding policy of limited gambling and effected a widespread expansion of slot machines beyond Miami-Dade and Broward. More specifically, the issue is whether the legislative change allows slot machines in Gadsden County, even though the Legislature did not modify a separate statutory provision restricting slot-machine licenses to Miami-Dade and Broward Counties. This question turns exclusively on statutory interpretation, and the parties present two starkly different views.

In the view of Petitioner Gretna Racing, LLC ("Gretna"), an entity seeking to operate slot machines in Gadsden County, the Legislature gave Gadsden County voters (and voters of other counties) the independent authority to legalize slot

machines through local referenda. The Legislature did this, Gretna contends, in the same enactment that it approved the Seminole Compact, under which the State (i) guaranteed the Tribe the exclusive right to offer slot machines outside Miami-Dade and Broward Counties and (ii) stood to forfeit billions of dollars if it broke that promise. Under Gretna's view, the Legislature left it to individual counties and their voters to decide when, where, and how quickly gambling would expand in Florida. Slot machines could never expand, or they could explode overnight. The Legislature, Gretna suggests, left that to others.

There is another view, one that is shared by Respondent Division of Pari-Mutuel Wagering (the "Division"), a 2012 Attorney General Opinion, and the First District Court of Appeal. Under this view, any future expansion of slot machine gambling requires additional legislative or constitutional authority. This view enjoys support from statutory and constitutional construction principles, legislative history, the historical legal landscape, and plain common sense. As the First District held, "nothing in the language, structure, or history of slot machine legislation . . . provides authorization for the holding of slot machine referenda in counties other than Miami-Dade and Broward counties." R. 106.[1] This Court should approve the First District's judgment.

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[1] Citations to the record appear as "R. [volume, when applicable]:[page]." Gretna's initial brief is cited as "IB."

STATEMENT OF THE FACTS AND CASE

A. Florida Has Long Carefully Regulated Gambling and Slot Machines.

Gambling is generally illegal in Florida. *See* § 849.08, Fla. Stat. Over time, however, the State has allowed certain forms of gambling, subject to strict legal limitations. But where the State has authorized gambling, it has subjected the activity to careful and comprehensive regulation. *See, e.g.*, Ch. 24, Fla. Stat. (regulating the state lottery); *id.* Ch. 550 (pari-mutuel wagering regulations).

Like other forms of gambling, slot machines have been illegal for much of the State's history. Although the Legislature approved slot machines in 1935, that experiment proved short-lived. "Within two years[,] the operation of slot machines in Florida had become so obnoxious to the citizens of this State that the people of a great majority of the counties in the State . . . voted overwhelmingly to prohibit the operation of all slot machine devices licensed under the 1935 Act." *Eccles v. Stone*, 183 So. 628, 631 (Fla. 1938). At the same time, an overwhelming majority of the 1937 Legislature promised constituents it would "enact laws which would abolish the operation of slot machines in Florida." *Id.* The 1937 Legislature did just that, *id.*, enacting a complete ban on slot machines that remained in place until the beginning of this century. *See* § 849.15, Fla. Stat.; *In re Advisory Op. to the Att'y Gen. re Authorizes Miami-Dade & Broward Cnty. Voters To Approve Slot Machs.*

In Parimutuel Facilities ("*Advisory Opinion*"), 880 So. 2d 522, 526 (Fla. 2004).

B. Voters Approved a Limited Expansion by Adopting Article X, Section 23.

Florida voters opened the door to a limited exception in 2004, passing a constitutional amendment to authorize slot machines at certain Miami-Dade and Broward pari-mutuel facilities, if approved through local referenda. Art. X, § 23(a), Fla. Const. (the "Constitutional Authorization").

After voters approved the Constitutional Authorization, the Legislature enacted Chapter 551, Florida Statutes, to govern slot machines. Ch. 2005-362, Laws of Fla. The Legislature authorized the Division to "administer Chapter 551," "regulate the slot machine gaming industry," and set out rules governing the approval of slot machine licenses. § 551.123, Fla. Stat.

Section 551.104, Florida Statutes, establishes the criteria for slot machine licenses. Two requirements are relevant to this case.

First, the applicant must be an "eligible facility," as defined by section 551.102(4), Florida Statutes. *Id.* § 551.104(1). As originally enacted, an "eligible facility" was "any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution" that was the subject of a successful referendum and satisfied the Constitutional Authorization's other conditions. Ch. 2005-362, § 1, Laws of Fla.

(codified at § 551.102(4), Fla. Stat.).

Second, the facility must be in a county that has approved slot machines "in that county as specified in s. 23, Art. X of the State Constitution [the Constitutional Authorization]," which allowed slot machine referenda in Miami-Dade and Broward Counties. § 551.104(2), Fla. Stat. By 2008, voters in both Miami-Dade and Broward Counties had approved slot machines through referenda pursuant to the Constitutional Authorization, effectively reducing the section 551.104(2) requirement to a requirement that the facility be in Miami-Dade or Broward County. *See Fla. Gaming Ctrs., Inc. v. Fla. Dep't of Bus. & Prof'l Regulation*, 71 So. 3d 226, 228 (Fla. 1st DCA 2011).

C. The State Entered the Seminole Compact and Revised the "Eligible Facility" Definition.

During the 2009 and 2010 sessions, the Legislature took steps to change the definition of "eligible facility" to allow additional pari-mutuel facilities in Miami-Dade County in conjunction with its consideration of a Seminole gaming compact. By the 2010 session's end, the Legislature would approve a Compact giving the Tribe the exclusive right to offer slot machines outside Miami-Dade and Broward. The Legislature did not permit pari-mutuel facilities in other counties to offer slots—understanding that offering slots in other counties would jeopardize billions of dollars under the Compact—and left in place the section 551.104(2) ban on non-

Miami-Dade and Broward County slot machines. Indeed, the Legislature made clear that slot machines would remain illegal in other counties unless the Legislature or the Constitution authorized a slot machine referendum, along the lines of the Constitutional Authorization.

1. The 2009 Session Left "Eligible Facility" Revisions Contingent on Compact Approval.

The 2009 session saw the Legislature reject a proposed gaming compact with the Seminole Tribe and craft a revised "eligible facility" definition that would cover slot machines in Miami-Dade that did not qualify under the Constitutional Authorization and address facilities in other counties. But the Legislature provided that the new definition would have no effect absent future Legislative action: the approval of a suitable compact. All of this was embodied in a single law, Chapter 2009-170, Laws of Florida.

After this Court rejected Governor Crist's effort to bind the State to a compact without legislative approval, *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 616 (Fla. 2008), the Legislature rejected the proposed compact and directed the Governor to continue negotiating with the Tribe, Ch. 2009-170, § 1, Laws of Fla. In doing so, the Legislature directed the Governor to negotiate a compact containing particular terms, *id.* § 2, (directing the Governor to "negotiate a gaming compact . . . in the form substantially as follows"), including giving the

Tribe the exclusive right to offer slot machines outside Miami-Dade and Broward Counties. *Id.* § 2, Part XII.B.3.

In the same enactment, the Legislature created a revised definition of "eligible facility," adding a Second and Third Clause to section 551.102(4)'s original First Clause. Ch. 2009-170, § 19, Laws of Fla. The new definition would read:

> "Eligible facility" means **[1]** any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility in the respective county; **[2]** any licensed pari-mutuel facility located within a county as defined in s. 125.011 [*i.e.*, Miami-Dade County], provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter; or **[3]** any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter.

Id. (clause numbering added).

During the same 2009 session, the law's sponsor, Representative Galvano, explained that the revision would have no immediate impact on counties other than Miami-Dade and Broward. Rather, any other county would have to return to the

Legislature to obtain authorization for a referendum to allow slot machines, or as with the Constitutional Authorization for Miami-Dade and Broward, convince the voters to pass a constitutional amendment.

For example, Representative Taylor asked whether the "bill would allow for the slot machines at the pari-mutuel facilities" outside Miami-Dade and Broward, seeking to confirm that "a local area would need to have a referendum, and in order to do that, they would have to come back to the House or to the Legislature to get approval for the referendum." Representative Galvano confirmed this understanding: "Yes, if you are talking about Class III games [which includes slot machines], you are correct. A county could come back to the Legislature, which could authorize that type of referendum. It could also be through constitutional amendment, [whether] through a joint resolution or a citizen petition." Fla. H.R., recording of proceedings at 24:30-29:00 (May 8, 2009) (on file in the Florida State Archives).

Moreover, although the Legislature created the language for what would become a revised definition of "eligible facility," it chose to leave the revision contingent on future legislative action. The revised "eligible facility" definition would take effect "only if" the Legislature approved a renegotiated Seminole compact. Ch. 2009-170, § 26, Laws of Fla. If the Legislature took no future action, the revised definition would never take effect.

2. The 2010 Session Approved the Compact and Passed the Revised "Eligible Facility" Definition into Law.

The Tribe and Governor Crist agreed to a new Compact on April 7, 2010, leading to additional action on, and debate about, the revised "eligible facility" definition. *See* Gaming Compact Between the Seminole Tribe of Fla. and the State of Fla. (the "Compact") (Apr. 7, 2010) (available at https://www.flsenate.gov/PublishedContent/Committees/2014-2016/RI/Links/2010%20Compact-Signed1.pdf).

Under the Compact, the State would receive payments consisting primarily of a portion of the Tribe's gambling income, known as the "Net Win." Compact, Parts III.U, XI, at 11, 31-38. The Tribe guaranteed that payments would meet or exceed $150 million in each of the Compact's first two years, $233 million in the third, and $234 million annually in the fourth and fifth years. *Id.* Parts III.M, III.Y, at 7, 12.

In exchange for the payments, the State promised "substantial exclusivity" to the Tribe for the games covered by the Compact, along the lines contemplated in Chapter 2009-170. Compact Part XI.A, at 31. That substantial exclusivity specifically allowed then-existing pari-mutuel facilities in Miami-Dade and Broward Counties to have slot machines without affecting payments to the State, *id.* Part XII.B.2, at 40. If, however, any slot machines (or other Class III gaming)

were authorized elsewhere, the State could forfeit Net Win proceeds. *Id.* Part XII.A. For slot machines, this exclusivity would continue for twenty years. *Id.* Part XVI.B-C.[2]

The Legislature approved the new Compact in Chapter 2010-29, Laws of Florida. *Id.* § 1. In the same law, the Legislature also made effective the revisions to the "eligible facility" definition. *Id.* § 5 ("Sections 4 through 25 of chapter 2009, 170, Laws of Florida, shall take effect July 1, 2010."). As in 2009, the Legislature did not repeal section 551.104(2)'s prohibition on slot machine licenses outside Miami-Dade and Broward Counties.

As the floor debates show, the Legislature was aware of the potential conflict between the Compact's exclusivity provisions and allowing slot machines outside of Miami-Dade and Broward Counties, as the Third Clause contemplated. The law's Senate sponsor, Senator Jones, did not foresee a problem because the Third Clause did not allow slot machine referenda without further authorization. In response to a question about how a county could permit slot machines, Senator Jones explained that "should we want to expand in the future, the Legislature would come back . . . and file [a bill], and should that bill pass to allow [a county] to have a referendum of the people, and then the people vote on it, if it was passed,

[2] The dissent below incorrectly stated that the Compact had expired. R. 150 n.17 (Benton, J., dissenting). Only the five-year authority to conduct banking or banked card games has expired. Compact, Part XVI.B-C, at 49.

we could get Class III slots." Fla. Sen., recording of proceedings at 11:41:56–11:43:39 A.M. (Apr. 8, 2010) (on file in the Florida State Archives). Senator Jones was clear about the consequences, however, noting that authorizing slots in a new county would "break the compact with the Indians." *Id.* The Senator later reiterated these points: "If they have a referendum in a county outside of Miami-Dade and Broward for the purpose of Class III gaming [such as slots], and the Legislature passes the legislation to allow the county to have that referendum, the county has that referendum and that referendum passes, then that would effectively break the payments of the Compact." *Id.* There is no indication that at any point during the 2009 or 2010 sessions there was any suggestion that the Third Clause would allow county voters to authorize slot machines at referenda without further legislative or constitutional authorization.

D. The Division Applied the Revised "Eligible Facility" Definition and Denied Gretna's Application.

After the revised definition of "eligible facility" became effective, pari-mutuel facilities sought slot machine licenses under both the Second and Third Clauses. The Division approved a license to a Miami-Dade facility, Hialeah Park, that satisfied the Second Clause's requirements. R. IV:651. Although six counties other than Miami-Dade and Broward have asked their residents to vote on allowing slot machines at pari-mutuel facilities, the Division has not granted a license to any

facility applying under the Third Clause. IB 5; Br. of *Amicus Curiae* Inv. Corp. of Palm Beach *et al.* 6-8.[3]

Gretna applied for its license after Gadsden County voters responded to a ballot question about slot machines. R.IV:651. (Gadsden County held that vote after the Attorney General issued an opinion finding that the Third Clause does not allow any county to legalize slot machines absent additional statutory or constitutional changes. *See* Op. Att'y Gen. Fla. 2012-01 (Jan. 12, 2012).) The Division first denied Gretna's application on December 23, 2013, "for at least two, separate, independent reasons." R. I:1. First, Gretna did not satisfy section 551.104(1)'s "eligible facility" requirement because it did not hold a referendum pursuant to a post-effective-date referendum authorization. R. I:1. Second, under section 551.104(2), Florida Statutes, no slot machine license could be issued to any facility outside Miami-Dade or Broward Counties. R. I:1.

Gretna challenged both grounds for the denial in an informal hearing. R. IV:751-63, 782-90.[4] First, Gretna contended that Gadsden County held its

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[3] The five other counties are Brevard, Hamilton, Lee, Palm Beach, and Washington. The Fourth District has stayed a challenge to the Division's denial of the Palm Beach County facility's permit pending the outcome of this case. Or., *Inv. Corp. of Palm Beach v. Dep't of Bus. & Prof'l Regulation*, Case No. 4D15-0460 (Jan. 4, 2016).

[4] The Division's decision consists of the Recommended Order, R. IV:751-63, as adopted with modifications by the Final Order, R. IV:782-90.

January 31, 2012, vote pursuant to the county's "preexisting authority under § 125.01(1)(y) to hold a referendum on any topic," satisfying the Third Clause's requirement of a "referendum held pursuant to a statutory or constitutional authorization after the effective date of this section." R. IV:649. Noting that there was no "statute or constitutional provision: (1) specifically authorizing a referendum to approve slot machines; and (2) enacted after section 551.102(4) of the Florida Statutes became effective on July 1, 2010," the Division rejected this argument based on the Third Clause's language, the legislative history, and the potential effect on the contemporaneously approved Seminole Compact. R. IV:758-62, 784. In doing so, the Division cited Attorney General Opinion 2012-01, after finding that the opinion was correct, R. IV:758, and determining, more generally, that the Division's arguments were "more persuasive than the legal reasoning offered by Gretna," R. IV:784-85.

Second, Gretna contended that denying its application under section 551.104(2), which limits licenses to counties that passed slot machine referenda pursuant to the Constitutional Authorization, was inconsistent with the Department's previous decision to approve an application from Hialeah Park, a Miami-Dade pari-mutuel facility. The Division disagreed, however, because section 551.104(2) allows licenses in Miami-Dade County, where Hialeah Park is located, but not Gadsden County, where Gretna operates. R. IV:762, 787

Overruling these objections, the Division again denied Gretna's application, and Gretna appealed to the First District Court of Appeal. R. IV:789, 791.

E. The First District Rejected Gretna's Challenge.

The First District rejected Gretna's claim, with one judge dissenting. The First District agreed with the Division's conclusion that the Third Clause offers no current ability for counties outside Miami-Dade and Broward to allow slot machines, but instead creates a framework for potential slot machine expansion by allowing counties (or others) to seek statutory or constitutional authorization to hold a referendum. Put differently, "the legal 'authorization' for such a vote is not already on the books; the authorization must be 'after' the section's effective date." R. 124. This interpretation is "consistent with a plain reading of the statute, the rules of statutory construction, and the history of slot machine legislation in Florida." R. 123.

The First District alternatively held that even if the Third Clause's authorization requirement could be satisfied by a general, preexisting authority to hold referenda, section 125.01(1)(y), on which Gretna exclusively relied, allowed only a nonbinding expression of voter sentiment, which is not a referendum. R. 133-35.

Having found the Division's decision justified because Gretna was not an "eligible facility," as required by section 551.104(1), the court did not address the

Division's independent basis for denying the application, section 551.104(2).

Gretna sought review, and this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Division correctly denied Gretna's application for a slot machine license for failing two independent requirements of section 551.104, Florida Statutes.

First, Gretna does not qualify as an "eligible facility," as required by subsection (1). That is because the Third Clause of the "eligible facility" definition requires a successful referendum "held pursuant to a statutory or constitutional authorization after the effective date" of the Third Clause. Because Gretna can point to no post-effective date constitutional or statutory authorization to hold a referendum to authorize slot machines, it is not an "eligible facility." Gretna agrees that no such authorization exists, but argues instead that any post-effective date referendum satisfies the Third Clause, because the "authorization" required is not authorization to hold a slot-machine referendum, but rather any general authority to hold a referendum, even a preexisting general authority. Gretna points to three statutory and constitutional provisions as the source of sufficient authority. Gretna is also wrong on this point, because nothing it cites inherently permits a non-charter county like Gretna to hold a "referendum."

Second, Gretna cannot satisfy subsection (2)'s requirement to be in a county that has passed a referendum "as specified in" the Constitutional Authorization,

because the Constitutional Authorization applies only to Miami-Dade and Broward Counties. Gretna argues that subsection (2) is inconsistent with the 2010 changes to "eligible facility," so it must be ignored. In reality, however, any inconsistency flows exclusively from Gretna's flawed interpretation of the Third Clause. By leaving subsection (2) in while changing the "eligible facility" definition, the Legislature made clear that it did not intend to allow slot machines outside Miami-Dade and Broward Counties.

Gretna's construction also ignores the legislative history, which makes it even clearer that the Legislature did not intend to allow slot machines in other parts of Florida, and the simultaneously approved Seminole Compact, in which the State promised the Seminole Tribe the exclusive right to offer slot machines outside Miami-Dade and Broward in exchange for billions of dollars of revenue. Even if the text of the licensing statutes were not clear, the history surrounding the 2010 amendment to "eligible facility" shows that the Legislature simply could not have intended to allow counties across the state to legalize slot machines.

ARGUMENT

The outcome of the case hinges on what the meaning of the Legislature's 2010 addition of a Third Clause to the definition of "eligible facility." As with any statutory interpretation case, the analysis begins with the text of the statute. To the extent the text's meaning is doubtful, it should be construed against Gretna,

because Florida has a long history of prohibiting slot machines and the Division's interpretation is entitled to deference. In any event, the text is clear. Gretna is not an "eligible facility" under section 551.104(1). Although the Legislature revised the "eligible facility" definition in 2010 to address counties other than Miami-Dade and Broward, no facility in those counties would be an "eligible facility" absent a subsequent change to state law—an authorization to hold a county-level slot-machine referendum. Separately, Gretna is not located in Miami-Dade or Broward County, as required by subsection (2), providing an independent basis to deny Gretna's application.

Limiting slot machines to Miami-Dade and Broward was important to the Legislature, as both the legislative history and the contemporaneously approved Seminole Compact show. The Legislature understood that allowing slot machines outside those counties would jeopardize the revenue due to the State under the Compact, reinforcing the conclusion that enacting the Third Clause was not a green light to counties to allow slot machines in their borders.

I. CHAPTER 551 SHOULD BE CONSTRUED NARROWLY, WITH DEFERENCE TO THE DIVISION'S CONSTRUCTION.

This case involves an issue of statutory construction, reviewed *de novo*. *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n*, 164 So. 3d 663, 666 (Fla. 2015). Two factors require the Court to approve the Division's denial if at all

possible.

First is the "well-recognized" practice of construing statutory exceptions "narrowly and strictly." *Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1100 (Fla. 1990). Because gambling in general, § 849.08, Fla. Stat., and slot machines in particular, *id.* § 849.15, are generally illegal under Florida law, any doubt concerning Chapter 551's limited exceptions authorizing slot machines must be construed against granting Gretna's application.

Second, because the Division is charged with "administer[ing]" Chapter 551 and "regulat[ing] the slot machine gaming industry," § 551.123, Fla. Stat., its construction of the statute is entitled to "great deference," including on pure issues of statutory construction. *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 603-04 (Fla. 2006) (according "great deference" to Division's construction of § 550.6305(9)(g)(1), Fla. Stat.); *accord GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007) ("when a statutory term is subject to varying interpretations and that statute has been interpreted by the executive agency charged with enforcing the statute, this Court follows a deferential principle of statutory construction") (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). Thus, the Court should not reverse unless the Division's decision was "clearly erroneous or contrary to legislative intent." *Fla. Dep't of Revenue v. Fla. Mun.*

Power Agency, 789 So. 2d 320, 323 (Fla. 2001).[5]

As explained below, however, this Court may approve the Division's decision without reference to either of these well-established interpretive principles because the proper outcome is clear: Gretna is not entitled to a slot machine license under section 551.104, Florida Statutes.

II. GRETNA IS NOT AN "ELIGIBLE FACILITY," AS REQUIRED BY SECTION 551.104(1), FLORIDA STATUTES.

Under section 551.104(1), Florida Statutes, a pari-mutuel facility seeking to offer slot machines must be an "eligible facility" under section 551.102(4), Florida Statutes. Gretna claims that it is an "eligible facility" under the Third Clause, which requires a successful "referendum held pursuant to a statutory or constitutional authorization after the effective date of this section." Gretna claims that this requirement may be satisfied by a referendum held after the effective date of the section pursuant to any preexisting authority to hold any referendum at the county level. There are two problems with this argument. One, the kind of

[5] The dissent suggested that no deference was due because the Division's decision was, first, a matter of statutory construction not requiring expertise and, second, based in part on an Attorney General Opinion. R. 151-52 & n.18 (Benton, J., dissenting). As to the first, this Court has accorded the Division deference on pure matters of statutory interpretation. *Gulfstream Park*, 948 So. 2d at 603-04. As to the second, depriving the Division of the deference otherwise owed simply because it took the prudent step of seeking the Attorney General's input both creates an unwise incentive and ignores that the Division relied on the Attorney General opinion because it explicitly determined the opinion was correct. R. IV:758; *supra* p. 13.

"authorization" required is a future authorization specifically to hold a slot-machine referendum, not a preexisting, general authorization to hold a referendum. Two, even if a preexisting general authority to hold a referendum sufficed, Gretna has not identified any such authority.

A. A Pari-Mutuel Facility Cannot Qualify As an "Eligible Facility" Under the Third Clause Absent a Statutory or Constitutional Authorization Specifically Authorizing a Slot-Machine Referendum.

The Third Clause presents a framework for counties other than Miami-Dade and Broward to allow slot machines after obtaining a specific statutory or constitutional authorization to hold a slot machine referendum; it does not offer counties an immediate opportunity to hold such a referendum. This interpretation uses context to accurately assess the Legislature's meaning, comports with ordinary English usage, and gives effect to all of the words of the clause. Gretna's contrary interpretation does none of this.

1. The Division's Interpretation Considers the Third Clause's Plain Language in Context.

A court's duty in statutory construction is to "give effect to legislative intent, which is the polestar that guides the court in statutory construction." *Citizens Prop. Ins. Corp.*, 164 So. 3d at 666. This task "begin[s] with the 'actual language used in the statute,'" *id.* (citation omitted), but the Court must not construe statutory text in a vacuum. Rather, as this Court has recognized, "the plain

meaning of [the statutory text] must be derived from the context in which the language lies." *Miele v. Prudential-Bache Secs., Inc.*, 656 So. 2d 470, 472 (Fla. 1995). Context is key to understanding what the Legislature meant when it required an "authorization after the effective date of this statute" before a county's voters could legalize slot machines at a referendum.

The modern legalization of slot machines began with an authorization to hold a referendum to allow slot machines in pari-mutuel facilities in Miami-Dade and Broward Counties, the Constitutional Authorization in Article X, Section 23 of the Florida Constitution. When the Legislature created Chapter 551, the only kind of "eligible facility" was one made eligible after a successful referendum pursuant to the Constitutional Authorization, which the First Clause of section 551.102(4) references by name. The Constitutional Authorization specifically provides that Miami-Dade and Broward Counties "may hold a county-wide referendum," which, if successful, would create an exception to the statutory prohibition of slot machines.

The Third Clause sets out the conditions for pari-mutuel facilities elsewhere to qualify as "eligible facilities," and like the First Clause, it refers to an authorization to hold a slot machine referendum. Unlike Miami-Dade and Broward Counties, which "may hold a county-wide referendum" pursuant to the Constitutional Authorization, Art. X, § 23(a), Fla. Const., there was, and still is, no

authorization for other counties to hold referenda to authorize slot machines. While the First Clause could reference the existing Constitutional Authorization, the Third Clause can only anticipate that the authority for such referenda would come "pursuant to a statutory or constitutional authorization after the effective date of this section." § 551.102(4), Fla. Stat. This contrast between the specific reference in the First Clause and the generic reference in the Third Clause speaks volumes, as both the First and Second Clauses specifically cite then-existing law when relevant. *Id.* (citing "s. 23, Art. X of the State Constitution" and "s. 125.011"). One would have expected the Legislature to do the same if it believed there was an authorization—or as Gretna contends, multiple authorizations, IB 22—to hold such a referendum under current law. After all, as Gretna notes, IB 23, the Legislature is deemed to know the law when it passes a new statute. Gretna cannot explain this inconsistent treatment.

Context aside, Gretna's argument that a general, preexisting authorization to hold a referendum satisfies the Third Clause ignores ordinary English usage. By placing "after the effective date of this section" directly after "authorization," which it modifies, the Legislature placed the modifier "as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings." *Chi. Manual of Style* § 5.175, at 248 (16th ed. 2010). The "doctrine of the last antecedent" is the canon of construction that makes this guidance a default rule of

statutory construction. *See Kasischke v. State*, 991 So. 2d 803, 811 (Fla. 2008) (defining the cannon as providing that "relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote"). Although, like most grammatical rules and canons of construction, its application depends on the context, *id.* at 811-12, the context here supports viewing "after the effective date of this section" as explaining when the "statutory or constitutional authorization" would occur. Indeed, had the Legislature wanted "after the effective date of this section" to apply to the timing of the referendum, not the authorization, it could easily have reorganized the clause to read "referendum held after the effective date of this section pursuant to a statutory or constitutional authorization." The Legislature chose differently.

Gretna's initial brief has nothing to say about the context of the language in the Third Clause, because that context favors the Division's interpretation. Instead it isolates the Third Clause and insists that the only tools at the Court's disposal are grammar rules that it insists settle the issue. First, Gretna seeks to get around the doctrine of the last antecedent by summarily insisting that "after the effective date of this section" cannot modify "authorization" because the phrase is adverbial and adverbs modify verbs ("held"), not nouns ("authorization"). But after emphatically stating that "***an adverb cannot modify a noun***," IB 29 (emphasis in original),

Gretna acknowledges that "after the effective date of this section" is a prepositional phrase, IB 30. And as many people know, prepositional phrases may serve either as adverbs or as adjectives. *Chi. Manual of Style* § 5.173, at 248 ("A prepositional phrase can be used as . . . an adverb . . . or an adjective.").[6] Thus, Gretna's claim that "after" cannot modify "authorization," a noun, is quite wrong. Our own Constitution provides a neat example: Under Article III, Section I, Florida Constitution, "[a] regular session of the legislature shall convene on the first Tuesday after the first Monday in March." There, "after the first Monday" modifies "Tuesday," a noun.

Second, Gretna repeatedly claims, *e.g.*, IB 26-27, that the Division and the First District's interpretation would require the Third Clause to read "authorization *enacted* after the effective date." But this claim makes no more sense than an argument that the Constitution should read "first Tuesday *that comes* after the first Monday." In both cases the meaning is the same, with or without the verb. Gretna's grammatical arguments are incorrect and impermissibly ignore the context in which the Third Clause words are situated.

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[6] The Division did not err by refusing to consider Gretna's "grammar and sentence structure expert." IB 8. "Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of 'expert opinion.'" *Lee Cnty. v. Barnett Banks*, 711 So. 2d 34, 34 (Fla. 2d DCA 1997). Regardless, any error was harmless as the hearing officer instructed Gretna's counsel that he was "free to argue the substance of the affidavit during his case in chief." R. IV:752; *see also* R. IV:788.

2. Gretna's Interpretation Renders Statutory Language Superfluous.

Gretna's interpretation is not just in conflict with the context and English grammar; it also renders "pursuant to a statutory or constitutional authorization" superfluous. On Gretna's reading, preexisting constitutional and statutory provisions allowing counties to hold referenda, *but see infra* pp. 28-31, mean there is no need for a county to obtain any additional authorization to hold a slot-machine referendum. Gretna makes much of the presumption that the Legislature knows the law when it enacts a new statute, IB 23, but if Gretna's reading were correct, the Legislature could have saved some ink by deleting the phrase "pursuant to a statutory or constitutional authorization" entirely, leaving "referendum held after the effective date of this section." Because a reasonable construction exists that gives effect to all the words of the statute, Gretna's construction must be rejected. *Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 215 (Fla. 2009).

3. The Presumption Against Purposeless Enactments Does Not Support Gretna's Interpretation.

Gretna next faults the First District for ignoring the canon that it is "never presumed that the Legislature intended the amendment to be a purposeless or useless enactment." IB 27. But the Division does not, nor has it ever, suggested that the Third Clause was "useless or purposeless" just because it hinged on future

legislative action. On the contrary, the Third Clause explains the process for pari-mutuel facilities outside Miami-Dade and Broward to obtain permission to offer slot machines. Their county must obtain a statutory or constitutional authorization to hold a referendum. The dissent rejected this reality, suggesting it could not read the statute as "stat[ing] the obvious." R. 144 (Benton, J., dissenting). Although it might be obvious that the Legislature or the people (through initiative) *can* authorize a slots-specific referendum—consider, *e.g.*, the Constitutional Authorization—it is not obvious that the Legislature intended for that to be the exclusive manner for other counties to legalize slot machines. After all, in passing the Second Clause, the Legislature allowed slot machine at additional pari-mutuel facilities in Miami-Dade County without the need for a referendum.

In this regard, the Third Clause is hardly unusual. All manner of statutes state the obvious in some sense, in that they say what may occur in the future, but in doing so, they give indications to the public concerning how the Legislature plans to act. Among the six actions the "Legislature may" (or may not) take under section 216.1827(4), Florida Statutes, are "create, amend, and delete performance measures and standards" and "confer with the Executive Office of the Governor for state agencies and the Chief Justice of the Supreme Court for the judicial branch prior to any such action." *Id.* § 216.1827(4)(a). It may be obvious that the Legislature has the power to take these actions, but it is not obvious that the

Legislature contemplates doing them in the future. Similarly, another statute advises that the "Legislature may elect to offset the need for funding the construction of residential facilities to meet the projected need through the establishment of programs alternative to incarceration," or it may not. *Id.* § 944.096(2). To some, that might be "stating the obvious," but it does not mean that the statute serves no purpose. *Cf. also id.* § 626.9362(6) ("The Legislature may, at its discretion, review any cooperative reciprocal agreement entered into by the Chief Financial Officer and the office with another state or group of states.").

Nevertheless, Gretna chides the First District for not citing "even one example in which the Legislature conditioned the effectiveness of any statute, much less a licensing statute, upon its own future action on the same subject." IB 31. Gretna need not look far. Gretna's entire case depends on revision to the definition of "eligible facility," but the Legislature explicitly provided that the revised definition would become effective "only if" the Legislature approved a compact with the Seminole Tribe. Ch. 2009-170, § 26, Laws of Fla. Without future legislative action, the definition would not take effect. This is indeed a strong "example in which the Legislature conditioned the effectiveness of any statute, much less a licensing statute, upon its own future action on the same subject." IB 31. As the First District astutely noted, "[n]ot all statutes are blossoms; some are

only seeds." R. 130.[7]

4. Chapter 2009-170's Title Offers No Support to Gretna's Position.

Gretna also points to the title of Chapter 2009-170. Because is it improper to "disregard the plain language" of a statute based on its title, *Leigh v. State ex rel. Kirkpatrick*, 298 So. 2d 215, 217 (Fla. 1974), there is no need to consider the title. In any event, the title has nothing to say about the outcome in this case. To say that the revised definition of "eligible facility" "includes licensed facilities in other jurisdictions" sheds no light on what the Legislature meant by the "statutory or other authorization after the effective date" required for facilities outside Miami-Dade and Broward.

B. Even If A General, Preexisting Statutory or Constitutional Authorization To Hold a Referendum Satisfied the Third Clause, Gretna Has Not Identified One.

The First District correctly held in the alternative that section 125.01(1)(y), Florida Statutes, does not permit Gretna to hold a referendum at which voters may approve a question. Instead, it merely authorizes a poll to obtain voter sentiments. R. 133-35. Although Gretna claims now to have identified additional constitutional authorizations, that reliance, too, is misplaced. Thus, even if Gretna's interpretation

[7] Indeed, what "rings hollow" is not the court's observation, but rather Gretna's accusation that the observation was "merely an effort to justify a policy objective of restricting gambling as opposed to giving effect to the words enacted by the Legislature." *See* IB 31.

of the Third Clause were correct, the Division was still right to deny Gretna's application.

Gretna does not dispute that the Third Clause at least requires a "referendum" that is "held pursuant to a statutory or constitutional authorization" to hold a referendum. § 551.102(4), Fla. Stat. Before the Division, Gretna contended that it held a referendum pursuant to section 125.01(1)(y), R. IV:649, which permits county governments to "place questions on the ballot . . . so as to obtain an expression of elector sentiment with respect to matters of substantial concern within the county." As the District Court explained, an "expression of voter sentiment" under section 125.01(1)(y) is "simply a nonbinding opinion poll" with "no official effect." R. 134 (quoting *City of Miami v. Staats*, 919 So. 2d 485, 487 (Fla. 3d DCA 2005)). In other words, it is not a referendum. 5 McQuillin Mun. Corp. § 16:51 (3d ed. 2005) ("Ordinarily, 'referendum' does not include nonbinding public questions."). A county is free to ask its residents any question it likes under 125.01(1)(y), of course, but such votes are not the referenda contemplated by the Florida Statutes.[8]

To avoid relying exclusively on section 125.01(1)(y), as it did before the

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[8] Although section 125.01(1)(y) does not authorize local referenda, numerous other statutes provide that counties may (or must) hold referenda on certain issues. *E.g.*, § 100.2010 *et seq.*, Fla. Stat. (referendum to approve bonds); *id.* § 163.511 (referendum to create special neighborhood improvement district).

Division, Gretna now makes a new argument: that all counties have the power to hold binding referenda under Article VIII, Section 1(f) and (g)'s grant of home rule authority—that is, that there is a constitutional authorization for counties to hold referenda. IB 22. But as the First District recognized, however, the Constitution specifically allows referenda "as provided by law," Art. VI, § 5, Fla. Const.—that is, "by an act of the legislature," *Holzendorf v. Bell*, 606 So. 2d 645, 648 (Fla. 1st DCA 1992). *See* R. 145. Article VIII, Section 1(g) does not apply, because Gadsden is not a charter county. And Article VIII, Section 1(f), nowhere mentions referenda, instead giving non-charter counties, such as Gadsden County, IB 6 n.5, only "such power of self-government as is provided by general or special law." In other words, it does not give any Gadsden County any power not accorded by statute. And Section 125.01(1), Florida Statutes, which gives Gadsden County "the power to carry on county government," is not tantamount to a "statutory authorization" to hold a referendum.

All Gretna offers in response is the First District's nonbinding decision in *Watt v. Firestone*, 491 So. 2d 592 (Fla. 1st DCA 1986), in which the court addressed a fundamentally different issue. The question in *Watt* was whether counties could hold referenda if a proposed constitutional amendment "permit[ing] casino gambling in Florida in specific geographic locations approved in an initiative referendum by electors of the county" were passed. The First District

answered yes. *Watt* perhaps would be on point if this Court faced the argument that Miami-Dade or Broward could not hold referenda to legalize slot machines, notwithstanding the Constitutional Authorization. *Watt* says nothing, however, about whether the provisions Gretna cites on their own satisfy the Constitution's "as provided by law" requirement, Art. VI, § 5, Fla. Const.[9]

Because Gadsden County voters have not approved slot machines at a qualifying referendum, Gretna is not entitled to a license.

III. ONLY FACILITIES IN MIAMI-DADE AND BROWARD COUNTIES MAY OBTAIN LICENSES UNDER SECTION 551.104(2), FLORIDA STATUTES.

Separate and apart from whether Gretna qualifies as an "eligible facility," as required by section 551.104(1), Gretna fails section 551.104(2)'s requirement that a facility be located in Miami-Dade or Broward County. Under that section, the Division may approve an application "only after the voters of the county where the

[9] Gretna alternately contends that it does not matter if the Gadsden County vote was not a referendum, because the Division did not raise the issue during administrative proceedings. Even the dissent acknowledged that the "tipsy coachman" doctrine allowed the Division to rely on the argument. R. 160 n. 21 (Benton, J., dissenting). *Powell v. State*, 120 So. 3d 577 (Fla. 1st DCA 2013), and similar cases holding that a new issue requiring fact-finding cannot be raised on appeal, *see* IB 44-47, do not suggest a contrary result, as the parties agree this is purely legal issue. And the administrative review cases Gretna cites (at 47-48) apply the well-worn rule that a party *challenging* a decision cannot do so on a basis not articulated below. *E.g.*, *Dep't of Bus. & Prof'l Regulation v. Harden*, 10 So. 3d 647, 649 (Fla. 1st DCA 2009).

application's facility is located have authorized by referendum slot machines within pari-mutuel facilities in that county as specified in s. 23, Art. X of the State Constitution." Because the Constitutional Authorization allows referenda only in Miami-Dade and Broward Counties, a Gadsden County facility like Gretna cannot satisfy this statutory requirement.

Gretna does not argue that the Division could approve its application under this provision. It cannot. Instead, Gretna accepts the plain language, but argues that because it is an "eligible facility" under the Third Clause and the Third Clause was enacted after section 551.104(2), the more recent amendment to the definition of "eligible facility" requires the Court to ignore the admittedly "contrary" prohibition against granting licenses to facilities outside Miami-Dade and Broward Counties. *See* IB 43 n.22. Never mind that Gretna accuses the First District of violating separation of powers by engrafting "enacted" into the Third Clause; Gretna asks this Court to delete an entire statutory subsection that, it claims, the Legislature simply forgot to repeal. Never mind that the Legislature supposedly forgot to repeal it not once, but twice.[10] Statutes that the Legislature has not

[10] As Gretna notes, a First District panel initially sided with Gretna's interpretation. IB 10-11. In the short time after that opinion issued but before it ws vacated, Gretna argued that the Legislature's inaction proved the correctness of its position *See* R. 77 (Resp. to Mot. for Reh'g & Reh'g En Banc) ("If the Attorney General's oft-repeated assertion that the legislature never intended the result reached by the majority panel is accurate, then most certainly the legislature would

repealed (accidentally or otherwise) have a name: "current law."

Gretna's argument starts with the conclusion that the statutes conflict, IB 41 ("When amending § 551.102(4) in 2009, the Legislature left in place several pro[visions] of the pre-existing Chapter 551 that are unquestionably inconsistent with the 2009 amendments . . . ."), but it should have begun with the principle the "legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so." *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 9 (Fla. 2004) (citation omitted). It is a basic rule of construction that "statutes relating to the same subject or object be construed together to harmonize the statutes." *Hopkins v. State*, 105 So. 3d 470, 474 (Fla. 2012) (citation omitted); *accord* IB 43 n.22. Therefore, a court should depart from plain statutory language only when there is a "hopeless inconsistency." *Knowles*, 898 So. 2d at 9 (citation omitted).

Here, any conflict results only from Gretna's flawed interpretation of the Third Clause. There is no conflict between interpreting the revised definition of "eligible facility" as written and enforcing section 551.104(2)'s requirement that an applicant be in Miami-Dade or Broward County. Construed consistent with their

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have 'fixed' the problem at its very first opportunity."). Gretna now, of course, no longer relies on legislative inaction to support its position. At any rate, the Legislature has not changed the law in light of the First District's decision and the Division's consistent license denials.

plain language, neither provision allows the Division to approve an application from a facility outside Miami-Dade or Broward County. And even if Gretna is right that it is an “eligible facility” as defined in section 551.102(4), there is nothing to suggest that the Legislature intended every “eligible facility” to receive a license. On the contrary, the Legislature set the requirement to be in Miami-Dade or Broward in a separate subsection from the “eligible facility” requirement.

Without any plausible construction of section 551.104(2) that would allow the Division to issue it a license, Gretna claims that the decision to deny Gretna’s application is inconsistent with its decision to grant a license to Hialeah Park. This argument is both incorrect and irrelevant. It is incorrect because the Division denied Gretna’s application based on factors that set it apart from Hialeah Park’s application. The Division denied Gretna’s license because Gretna is not an “eligible facility” under the Third Clause of section 551.102(4), and does not satisfy section 551.104(2)’s requirement that an applicant be located in Miami-Dade or Broward Counties. R. I.1. Neither problem afflicted the Hialeah Park application. As Gretna knows, IB 40, Hialeah Park is located in Miami-Dade County, qualifying as an “eligible facility” under the Second Clause as required by section 551.104(1), and satisfying section 551.104(2)’s requirement to be in

Miami-Dade or Broward County.[11]

The argument is irrelevant because the appropriate remedy for granting Hialeah Park a license that the Division was not authorized to grant would be to revoke the Hialeah Park license,[12] not to grant an unauthorized license to Gretna. Regardless of what it has done in the past, the Division cannot issue a license that the statutes prohibit.

IV. THE LEGISLATURE DID NOT INTEND TO RISK STATE REVENUE FROM THE SEMINOLE COMPACT BY ALLOWING INDIVIDUAL COUNTIES THE POWER TO AUTHORIZE SLOT MACHINES.

Even if Gretna had the better of the arguments above—and it does not—its position requires the Court to believe the unbelievable: in the same law that the Legislature approved the Seminole Compact, a complex tapestry the State and Tribe had worked years to weave together, the Legislature left a loose string for voters in just one county to unravel it by legalizing slot machines outside Broward and Miami-Dade Counties. *See* Ch. 2010-29, § 1, Laws of Fla. (approving the Compact); *id.* § 5 (making the revised "eligible facility" definition effective July 1,

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[11] Gretna cites (at 41) various statutes that it contends would have prevented Hialeah Park from being an eligible facility, none of which were the basis for the Division's denial of Gretna's application. Moreover, none of those statutes appear in section 551.104, which governs slot machine licensing.

[12] *See* § 551.103(5), Fla. Stat. ("The division shall revoke or suspend the license of any person . . . who is found, after receiving a license, to have been unqualified at the time of application for the license.").

2010). As the Attorney General Opinion observed, the "basic canons of statutory interpretation" require the rejection of "such an absurd result." Op. Att'y Gen. Fla. 2012-01 (2012).

Under the Compact, the State guarantees the Tribe's right to offer certain games "on an exclusive basis throughout the State." Compact Part XII, at 39; *see also supra* p. 9. Chapter 2010-29 reflects the importance of this exclusivity, providing that the Compact will be void if the exclusivity provisions are invalidated by a court, agency, or subsequent legislation. Ch. 2010-29, § 1, Laws of Fla. (codified at § 285.710(5)-(6)). More significantly, Chapter 2010-29 confirms the Legislature's understanding that the Tribe's payments under the Compact are "for the benefit of exclusivity." *Id.* (codified at § 285.710(9)).

Although the Compact contemplates slots at facilities in Miami-Dade and Broward Counties, the State risks forfeiting the right to receive payments from the Tribe if it allows slot machines anywhere else. *See supra* p. 9. Exclusivity and the risk of losing the Compact payments were front of mind for the Legislature. The Staff Analysis explains that the "Tribe will have exclusivity of class III slot machines at Tribal facilities outside of Broward & Miami-Dade," Fla. Sen. Comm. on Reg'd Indus., CS/SB 622 (2010) Staff Analysis 6 (Mar. 24, 2010), and the bill's sponsor, Senator Jones, himself said that authorizing slots outside those counties would "break the Compact with the Indians." *See supra* p. 11.

The Legislature anticipated this issue during the 2009 session, when it included a suggestion for an acceptable compact in section 2 of Chapter 2009-170, the same law creating the revised "eligible facility" definition. Similar to the Compact approved in 2010, the suggested compact provided the Tribe "the right to operate Covered Games on an exclusive basis," subject to certain exceptions. Ch. 2009-170, § 2, Part XII, Laws of Fla. The suggested compact contained an exception for existing authorized gaming, *id.* § 2, Part XII.A, and also provided that "[a]ny Class III slot machine gaming authorized after the effective date of this compact for pari-mutuel facilities in Miami-Dade County or Broward County will not be a breach or violation of the exclusivity provisions." *Id.* § 2, Part XII.B.2. There was, however, no exception to the exclusivity provisions for any slot machines outside those two counties. In short, the same law creating the revised "eligible facility" definition shows that the Legislature intended to limit slot machines to Miami-Dade and Broward Counties to comply with the Seminole Compact.

Nevertheless, Gretna apparently believes, against all evidence and common sense, that preserving exclusivity was not important to the Legislature and that, instead, the Legislature essentially decided to gamble with future Compact revenue—betting that no county would vote to authorize slots at a pari-mutuel

facility.[13] The legislative history specifically contradicts such an absurd suggestion.

V. LEGISLATIVE HISTORY CONFIRMS THAT THE LEGISLATURE DID NOT INTEND TO AUTHORIZE SLOT MACHINES OUTSIDE MIAMI-DADE AND BROWARD COUNTIES.

Even if any ambiguity remained as to either requirement, the legislative history further confirms that the Legislature did not intend to allow slot machines outside Miami-Dade and Broward absent further changes to state law. *See Magaw v. State*, 537 So. 2d 564, 566 (Fla. 1989) ("In construing a statute which is susceptible to more than one interpretation, it is often helpful to refer to legislative history."). Three crucial points emerge from the legislative history:

> (1) the Legislature understood that the Third Clause would not allow a county-level referendum to authorize slot machines until the Legislature or Constitution authorized such a referendum in the future;
>
> (2) the Legislature understood the Seminole Compact to guarantee the Seminole Tribe the exclusive right to offer slot machines outside Miami-Dade and Broward Counties; and
>
> (3) the Legislature believed that if it authorized a referendum in any other county, and if the referendum succeeded, the State would violate the Compact and risk the right to future payments under the Compact.

The first point was addressed by bill sponsors in both the 2009 session in which the Third Clause's phrasing was approved, and the 2010 session in which it the Legislature made the revision effective and approved the Compact in the same bill.

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[13] This would have been a bad bet, indeed, as voters in six counties have now voted in favor of allowing slot machine gaming at pari-mutuel facilities in their counties. *See supra* p. 11.

See supra pp. 7-8, 10-11. The second point is clear from the 2010 Staff Analysis and the 2010 Senate sponsor's remarks. *See supra* pp. 10-11, 36 . The third point flows from the Senate sponsor's clear and repeated statements that authorizing slot machines outside Miami-Dade and Broward Counties would "break the Compact with the Indians," or more specifically, "break the payments of the Compact." *See supra* p. 11. In short, the Legislature understood the Compact to prevent the State from expanding slot machines beyond Miami-Dade or Broward Counties if it wanted to receive payments, and it also understood that, absent another constitutional authorization, the Legislature need not worry about violating the Compact, because the Third Clause left it in the driver's seat.

Gretna can offer no competing legislative history. Instead, it is left to quibble with the Division's citation to floor statements. But the law is clear: a "statement of a sponsoring legislator is admissible to clarify ambiguity in legislative intention." *Asphalt Pavers, Inc.*, v. *Dep't of Revenue*, 584 So. 2d 55, 58 (Fla. 5th DCA 1991) (citation omitted). In *Johnson v. State*, for example, floor statements from the sponsor of the House bill informed this Court's conclusion that ingesting a controlled substance that would pass to a newborn through the umbilical cord did not violate Florida's law against providing controlled substances to children. 602 So. 2d 1288, 1293 (Fla. 1992). Similarly, in *Magaw*, this Court looked to a staff analysis and Senate floor debate transcript to discern

legislative intent, finding them "instructive" and "most persuasive." 537 So. 2d at 566-67. The legislative history offered here is no different from what the Court has considered in previous cases.

The cases Gretna cites disapproved relying on later testimony from legislators, a situation not presented here.[14] On the other hand, Gretna's authority supports relying on contemporaneous legislative statements. In *American Constitutional Party v. Munro*, 650 F. 2d 184, 186 (9th Cir. 1981), the legislator's statement at issue came from a litigation-related affidavit. But the Ninth Circuit acknowledged that had the statement "been made contemporaneously with the passage of the legislation," it would have been a different question. *Id.* at 188.[15]

There is no impediment to considering the legislative history if the Third Clause is ambiguous, and that legislative history strongly supports the conclusion that leaving section 551.104(2)'s requirement that an applicant be in Miami-Dade or Broward Counties was no accident. Rather, the legislative history points exclusively toward seeing it as part of the legislative design to limit slot machines

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[14] To be clear, statements from the 2010 session are not subsequent legislative history, as Chapter 2010-29 is the law that rendered the new "eligible facility" definition effective.

[15] *See also United States v. City of Miami, Fla.*, 664 F.2d 435, 437 n.1 (5th Cir. 1981) (refusing to consider statements from legislators about legislative intent after law was challenged in court); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980) (dismissing legislator's statement after the statute was already in effect and made in connection with different statutes).

to Miami-Dade and Broward, consistent with the Legislature's understanding of the Compact.[16]

CONCLUSION

Because Gretna is not eligible for a slot machine gaming license under section 551.104, Florida Statutes, this Court should approve the judgment below.

Respectfully submitted,

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[16] Although certain *amici curiae* intend to argue that the constitutional lottery ban prohibits slot machines outside Miami-Dade and Broward, the Court should not reach that issue. Neither party has ever raised the issue, *see Riechmann v. State*, 966 So. 2d 298, 304 n.8 (Fla. 2007) ("[I]t is axiomatic that amici are not permitted to raise new issues."), and the Division's decision may be justified purely on statutory grounds, *see Johnson v. Feder*, 485 So. 2d 409, 412 (Fla. 1986) ("courts should not decide constitutional issues unnecessarily"). In any event, as both the concurring and dissenting judges recognized, R. 141, 145, this Court already held that it is "long since settled" that the lottery ban does not apply to slot machines, *Advisory Opinion*, 880 So. 2d at 525, and contrary language in *Greater Loretta Improvement Association v. Boone*, 234 So. 2d 665 (Fla. 1970) is *dicta*.

CERTIFICATE OF COMPLIANCE

I 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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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished by electronic service through the Florida Courts E-Filing Portal on this 11th day of February, 2016, to the following:

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