IN THE SUPREME COURT OF FLORIDA

CASE NO. 15-1929

L.T. NOS. 1D14-3483; 2013050343

GRETNA RACING, LLC,

Petitioner,

vs.

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

Respondent.
_____/

PETITIONER GRETNA RACING, LLC'S
REPLY BRIEF

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ARGUMENT

In its Answer, the Attorney General ("the AG") dedicates considerable argument to the policy merits of gambling expansion in an attempt to convince this Court that legislative activity in *2010* provides guidance as to how this Court should answer the following certified question:

> **Whether the Legislature intended that the third clause of section 551.102(4), Florida Statutes, enacted in 2009, authorize expansion of slot machines beyond Miami-Dade and Broward Counties via local referendum in all other eligible Florida counties without additional statutory or constitutional authorization after the effective date of the act?**

As set forth clearly by this question, the statutory language at issue was enacted in *2009*—one year before much of the "legislative intent" evidence proffered by the AG in its brief. This is an orchestrated deflection from the fact that the certified question can be definitively answered by looking at the unambiguous text enacted in *2009* and applying the rules of grammar to it. Should this Court need to look beyond the text and the canons of statutory interpretation, the legislative history from *2009* strongly supports Gretna's argument. As such, this Court must reject the AG's anti-gambling policy rhetoric and answer the certified question in the affirmative, giving effect to the referenda ordinances and resolutions adopted by the county commissions in Gadsden, Lee, Brevard, Washington, Hamilton, and Palm Beach Counties and to the vote of the electorate authorizing the conduct of slot machine gaming at pari-mutuel facilities in their respective counties.

I. The AG misapplies the Rules of Grammar

In its Answer, the AG attempts to gloss over the rules of grammar to achieve its policy objectives on gambling. At page 21, the AG states that "context is key to understanding what the Legislature meant" by the operative Third Clause. Without analysis, the AG cites to this Court's decision in *Miele v. Prud.-Bache Secs.,* 656 So.2d 470 (Fla. 1995) as support for this statement. In *Miele,* this Court's task was to define the term "civil action" as it was used in a statute; and in doing so looked to the full statute in which the term was found to determine the meaning. Here, the three clauses now contained within amended §551.102(4) act independently of each other by identifying the distinct group of pari-mutuel permitholders to which each clause is uniquely applicable—there being no overlap between any of the three groups. Because the Third Clause, like the other clauses, is a law "complete in itself"[1] and has its own field of operation totally independent of the operation of the other two clauses, the analysis performed in *Miele* has no application here.

In discerning legislative intent, this Court has repeatedly said that first it looks to the actual words used in the statute. See *Overstreet v. State*, 629 So.2d 125, 126 (Fla. 1993) ("legislative intent must be determined primarily from the language of the statute"); and *State v. Burris*, 875 So.2d 408, 410 (Fla. 2004) (when a statute is clear, courts will not look behind the statute's plain language for

[1] *Connor v. Joe Hatton, Inc.*, 216 So.2d 209, 212 (Fla. 1968) (holding that before a law leaves the legislative branch, it should be "complete in itself", a law "complete in all of its terms"). Also see the related discussion at page 11 below.

legislative intent or resort to rules of statutory construction to ascertain intent). Sentence diagramming has long been used to graphically depict the grammatical function of the words and word groups in a sentence;[2] and for this reason Gretna offered into evidence a diagram that provides a grammatical analysis of the *actual* words of the Third Clause. (R. 633-642). The diagram confirms that Gretna's interpretation is in accord with the rules of grammar and gives due consideration to the meaning and context of each word and word group within the Third Clause. Without contesting the diagram's grammatical correctness or submitting a counter-diagram, the AG instead offers an incorrect view of the Third Clause's plain text.

The AG's argument at pages 22-23 that the "nearest reasonable referent" doctrine gleaned from the *Chicago Manual of Style* supports its statutory construction is a misapplication of that doctrine. The doctrine requires identification of the nearest *reasonable* word to which the modifier *can grammatically apply*. Critical to the doctrine's application is proper identification of the ***type*** of modifier at issue. In the phrase "*held pursuant to a statutory or constitutional authorization after the effective date of this section,*" the AG claims that the phrase "*after the effective date of this section*" functions as an *adjective phrase* modifying the preceding word "*authorization*" by "explaining ***when*** the 'statutory or constitutional authori-

[2]See p. 436, John E. Warriner, English Composition and Grammar (Harcourt Brace Jovanovich Inc., 1988) (hereinafter "Warriner").

zation' ***would occur***."[3] This argument hoists the AG on its own petard.

By the AG's own words, the phrase "*after the effective date of this section*" explains "***when***" an event is to ***occur***—meaning that the phrase is functioning as an *adverbial phrase*, not as an *adjective phrase* as the AG claims. (See fn. 3 below explaining that adverbs modify verbs by telling ***when*** the action of the verb is done). Because the subject phrase tells "***when***" the action is done, per fn. 3 the nearest *reasonable* referent for this *adverbial phrase* is the nearest verb or verb form included within the statute's text, which inarguably is the participle "***held***."[4]

The AG's flawed analysis requires the insertion of the legislatively omitted verb infinitive "*to occur*" to achieve its result, much like the prior efforts of the AG and the Division required the engrafting of the omitted verb "*enacted*" into the Third Clause to achieve their desired construction.[5] The AG's example reinforces Gretna's argument that without the forced insertion of a verb between the words

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[3]An adjective is used to modify a noun/pronoun. Warriner, at 416. An adverb is used to modify a verb, adjective or another adverb. *Id*. at 423. **Adjectives or adverbs are identified based on their function in a sentence. Adjectives modify nouns or pronouns by telling *what kind* or *how many* or by indicating *which one*.** *Id.* at 416. **Adverbs modify verbs by telling *how*, *when, where*, or *to what extent* the action of the verb is done.** *Id.* at 423**.**

[4]Another flaw in the AG's argument concerns the last prepositional phrase, "*in the respective county.*" Applying the AG's logic to this phrase would cause it to modify the ***preceding*** word in the statute "*section*"—rendering another nonsensical result. Because the last phrase tells "***where"***—an *adverbial* function—consistent with Gretna's argument above, the nearest *reasonable* referent again per note 3 is the nearest verb form included within the statute's text—the participle "***held.***"

[5]See AGO 2012-01 (R. 17), the Denial Letter (R. 1), the Pre-Hearing Stip. (R. 648), the Recommended Order (R. 751) and the Final Order (R. 782).

"authorization" and "after", the AG's construction makes no sense grammatically.

At page 24, the AG claims that the phrase, "*[a] regular session of the legislature shall convene on the first Tuesday after the first Monday in March*," shows the fallacy of Gretna's argument. In reality, the grammatical structure of the proffered phrase compares to the Third Clause ***only*** in the fact that both contain a series of prepositional phrases, one of which begins with the word "***after***." What is far more telling is that the three prepositional phrases in the AG's proffer that follow the verb phrase "*shall convene*" **do not share the same grammatical function** as those in the language before this Court. Two prepositional phrases, "*on the first Tuesday*" and "*in March*," function as *adverbial phrases* modifying the verb phrase "*shall convene*" to tell ***when*** the Legislature will meet. The prepositional phrase "*after the first Monday*" functions as an *adjective phrase* modifying the noun "*Tuesday*" to denote ***on which*** Tuesday the Legislature will meet. Unlike the *adverbial phrases* that, in this case and in the AG's example, may be freely repositioned without changing the meaning, the *adjective phrase* "*after the first Monday*" modifies the noun "*Tuesday*" and must immediately follow "*Tuesday*" in order to retain the sentence's original meaning. The proffer therefore fails under the rules of grammar because the proffered phrase beginning with "***after***" functions as an *adjective phrase* indicating ***on which*** Tuesday the Legislature "*shall convene*", whereas the phrase *sub judice* beginning with "***after***" functions as an *adverbial phrase* telling ***when*** a referendum may be "*held*." Proper application of the rules of

grammar wholly supports Gretna's interpretation.

II. *Watt v. Firestone*, 491 So.2d 592 (Fla. 1st DCA 1986), *rev. denied,* 494 So.2d 1153 (Fla. 1986), affirms the authority to conduct the Referendum

The AG repeatedly questions the specific authority by which counties may conduct slot machine referenda, insisting that no such authority exists. In *Watt*, the First District dealt with the specific question of whether Florida charter and non-charter counties possess the authority to conduct local option referenda on gambling expansion. It rejected the AG's current argument that the Legislature must affirmatively grant counties the authority to conduct gambling referenda, stating:

> **"We find this argument to be without merit. Charter counties have the authority to conduct *such referenda* under Article VIII, section 1(g) of the Florida Constitution and non-charter counties have similar power under Article VIII, section 1(f) of the state constitution and section 125.01 of the Florida Statutes."**

Id. at 593. *Watt* has existed unquestioned for nearly 30 years and is in accord with this Court's seminal home rule decision in *Speer v. Olson,* 367 So.2d 207 (Fla. 1979) and numerous AGOs in which *Speer* served as the AG's authority for the opinion.[6] Furthermore, *Watt* is also in accord with this Court's rejection of similar arguments raised by gambling opponents in *In re Advisory Opinion re Authorization for County Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities*, 813 So.2d 98, 100, **fn. 2** (Fla. 2002). Finally, the AG has

[6]Prior to *Speer*, the AG opined that home rule powers of a non-charter county were dependent upon a specific grant from the Legislature. However, in AGO 81-48, this position was revised. Accord, AGOs 83-4, 85-52, 87-20, 96-23, 96-42.

not cited a single law that prohibited the conduct of the Gadsden Referendum or is inconsistent with a county's authority to adopt resolutions or ordinances calling for a referendum.[7] For these reasons,[8] the AG's attack on such authority is a dead end.

III. Legislative history inapplicable

It is axiomatic that when the wording of a statute is clear, the legislative history of the statute is irrelevant. *Maryland Casualty Co. v. Sutherland*, 169 So. 679 (Fla. 1936). The AG, however, spends considerable pages attempting to find support for its position in the legislative history. This case is analogous to *DOR* v. *Fla. Mun. Power Agency,* 789 So.2d 320 (Fla. 2001), in which DOR argued that even when the wording of the statute is clear, legislative history can serve as the basis for the agency's alternative interpretation. This Court rejected that argument, ruling that "[l]egislative history cannot be used to change the plain and clear language of a statute." *Id.* at 324. Similarly, in *Aetna Cas. & Surety Co. v. Huntington Nat. Bank*, 609 So.2d 1315 (Fla. 1992), this Court applied this same rule when rejecting floor statements of a bill's sponsor inconsistent with the bill's text.

While not conceding its relevance, the limited legislative history favors Gretna's interpretation. The AG places unwarranted emphasis on heavily excerpted text from the 2009 floor colloquy involving Rep. Galvano and others. The AG's

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[7]See §125.01(1)(t) and (w) and (3) (counties have all powers not inconsistent with or prohibited by law and that such powers "shall be liberally construed").
[8]See *Crescent Miami Center, LLC v. DOR*, 903 So.2d 913, 918 (Fla. 2005).

excerptions and paraphrasing on page 8 are misleading and incorrect.[9] On account of the constant use of the word "they", statements about "reading minds" and uncertainty related to the exact meaning of questions, Rep. Galvano provides answers that make it difficult to know whether his answers refer to "the counties" or to "the pari-mutuel facilities". However, at the conclusion of the relevant colloquy, Rep. Sachs posed the following questions—*ironically not mentioned by the AG in its Answer*—that go directly to the heart of the matter:

"**Representative Sachs**: Thank you, Representative Galvano and Representative Waldman, for the work you've done on this. My question is this: In Palm Beach County, we have some jai-alai places—frontons, thank you. **Will this gaming compact, by easing the restrictions on these facilities, will it then open these facilities up for card rooms and for card games and for slot machines**?

* * *

Representative Sachs: So, in other words, and we have a very large—I believe it's in Mangonia Park—we have a large, empty fronton that was used for jai-alai. **These restrictions and the easing of these restrictions would allow these facilities and then open up for slot machines and card games, while before they were not allowed to do that. Is that basically what we're looking at in this compact?",**

to which Rep. Galvano responded: **Correct**. *Id.* at fn. 9.

The foregoing Q&A—directly applicable to one of the five counties that has also conducted a successful slot machine referendum—completely supports Gretna's interpretation. The response to Rep. Sachs is also consistent with the Act's

[9]In fact, the AG misquotes Rep. Galvano by attributing this statement to him: "***A county*** could come back to the Legislature, which could authorize that type of referendum." He actually said "***They*** could come back to the Legislature …" referring to the pari-mutuel facilities. Fla. H.R., recording of proceeding at 24:30-29:00 (on file in the Florida State Archives).

title, discussed on page 33 of the Initial Brief, explaining that the purpose of §19 was to expand slot machine use to licensed facilities in other county jurisdictions.

IV. "Unthinkable"

The AG attempts to support its interpretation by railing that it is "unthinkable" that the legislature would enact the Third Clause "knowing" that it could result in the State losing "billions" of dollars under the 2010 compact.[10] From a chronological standpoint, it must be noted that the Third Clause was enacted more than a year ***before*** the drafting of the 2010 Compact. Furthermore, uncertainty over federal effectuation of the compact led to a 2010 legislative amendment to §285.710(3) mandating that: "The Governor shall cooperate with the Tribe in seeking approval of the compact from the United States Secretary of the Interior." These facts beg a very basic question as to the value and logic of the AG's argument: How is it that a compact drafted more than a year after Ch. 2009-170 was enacted and which had no certainty of federal approval can have any relevance when interpreting statutory language enacted in 2009?

Further to the AG's "unthinkable" advocacy, this Court is well aware that the separation of powers doctrine precludes this Court from weighing in on the

[10]See the Answer at pages 2, 5 and 17. The absence of a citation to the record regarding the "billions" that purportedly will be "lost" demonstrates that this statement is simply argument of counsel and not evidence in the record. *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So.2d 1015 (Fla. 4th DCA 1982).

wisdom, policy or motive of a legislative enactment.[11] This Court's decision in *Fla. House of Reps. v. Crist,* 999 So.2d 601, 611-612 (Fla. 2008), makes it clear that the formulation and adoption of significant changes in Florida's public policy regarding gambling is "precisely" the type of action particularly within the Legislature's exclusive power. Additionally, the "unthinkable" advocacy ignores that, in another provision of Ch. 2009-170, the Legislature reserved the right to decide at any time to *substitute* revenue generated by expanded gaming at pari-mutuel facilities for revenue generated under a compact.[12] This provision, enacted contemporaneously with the Third Clause, provides a specific remedy when gaming expands outside of Miami-Dade and Broward Counties. As Rep. Galvano explained in the exchange with Rep. Taylor excerpted by the AG and referred to in fn. 9:

"…what we did that was different from the original compact, **instead of having the addition of certain games through referendum, for example, be an automatic cessation of the compact.** Instead, we took the Tribe's number of 1.37 billion as a floor number and we have spelled out **that in the event there is a referendum in another county**-for example, Class III-or in the event other games that are not specifically delineated and accepted come online, it will adjust the number that the Tribe is paying."

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[11]See *Volusia County Kennel Club v. Haggard*, 73 So.2d 884, 897-8 (Fla. 1954) (**it is unnecessary to remind this Court that the wisdom, policy, motive and determination with reference to that [the State's gambling] policy is a legislative and not a judicial function**). Accord*, Rodriguez v. Jones*, 64 So.2d 278, 280 (Fla. 1953); *Div. of Pari-Mutuel Wagering v. Fla. Horse Council, Inc*., 464 So.2d 128, 130 (Fla. 1985) and *Crist, supra*.

[12]See Part XII of §2 of Ch. 2009-170 explaining how revenue sharing would be adjusted after gambling expansion occurred and concluding in ¶H: "Nothing in this Compact is intended to affect the ability of the State Legislature to enact laws ***either further restricting or expanding gambling on non-tribal lands***."

The foregoing evidences that the 2009 Legislature did indeed ***think*** about the expansion of slot machine gaming into other counties by providing that if such expansion caused the Tribe's gaming revenue to drop below $1.37 billion per year, then a reduction in tribal payments could occur. All of this leads to the conclusion that the AG's "unthinkable" argument lacks substance and therefore must fail.

V. Meaningless

At page 25, the AG claims that parts of the Third Clause are surplusage—essentially because it contains too much statutory detail. The requirement emanating from the earlier cited decision, *Connor v. Joe Hatton, Inc*., that legislation should be "complete in all of its terms" is particularly important in regulated industries like the pari-mutuel industry in which this Court has enforced by mandamus pari-mutuel licensing statutes because "each detail is clearly defined" by statute, leaving but "little discretion" to the agency in the issuance of the requested permit/license. *State ex rel. Palm Beach Jockey Club v. Fla. State Racing Comm'n,* 28 So.2d 330 (Fla. 1946). Logically, one would assume that the AG would always favor a precisely written law, yet the AG's litigation position here is that the Third Clause is flawed because it is too precise. The AG's objection notwithstanding, the Third Clause complies with the requirements of *Connor* in that every detail of a qualifying referendum is clearly defined: ***how*** the referendum will be held ("pursuant to a statutory or constitutional authorization"); ***when*** the referendum will be held ("after the effective date of this section"); and ***where*** the referendum will be

held ("in the respective county"). No unintended consequences are possible because the law is "complete in all of its terms".

The AG also says at page 25 that "the Legislature could have saved some ink" by not including the phrase "*pursuant to a statutory or constitutional authorization*" if existing §125.01 provides authorization to county commissions to conduct qualifying slot machine referenda. This argument is based on the incorrect assumption that a county commission is required to place a slot machine referendum on the ballot merely upon request or demand by a pari-mutuel—a requirement that certainly is not contained within the text of the Third Clause.[13] Instead, referenda under the Third Clause occur solely at the discretion of the county commission. Indeed, because of the limitation on referenda "*pursuant to a statutory or constitutional authorization*," the Third Clause clearly prevents a permitholder-funded citizen's initiative to circumvent the county commission's control over the scheduling of a slot machine referendum.[14]

In point of fact, it is the AG's interpretation that renders the entire Third Clause meaningless by stating at page 34 that "*there is nothing to suggest that the*

[13]Contrast the Third Clause with §550.0651 affording pari-mutuel permitees the right to a countywide ratification referendum.

[14]Accord, *In re Advisory Opinion,* 813 So.2d at 100, ***fn. 2,*** in which this Court rejected constitutional concerns over whether certain voters will not have a chance to vote to authorize slot machines at pari-mutuel facilities in the county if their county commissioners do not call a referendum; and *Holzendorf v. Bell*, 606 So.2d 645 (Fla. 1st DCA 1992), recognizing that no fundamental right exists for county voters to establish policy by use of the initiative petition process.

Legislature intended every 'eligible facility' to receive a license"—epitomizing the preposterousness of the AG's entire theory of the case.

VI. The denial of Gretna's application constitutes a deviation from the Division's prior agency practice in violation of §120.68(7)(e)3

The contention at page 31 that Hialeah qualified for licensure because its facility is located in Dade County, while Gretna did not qualify because it is not located in Dade or Broward Counties, is wholly unsustainable. As stated, the title provides that the purpose of §19 of Ch. 2009-170 was to redefine the term "*eligible facilities*" "to include licensed facilities in ***other jurisdictions***." In this context, the words "***other jurisdictions***" can only refer to county jurisdictions ***other than the original two (2) county jurisdictions*** identified in Ch. 551 (2005), i.e., other than Dade and Broward Counties. Further, the AG argues at page 35 that Gretna cannot rely on the Division's licensure of Hialeah because Hialeah's license was erroneously granted. As noted by the First District in *Battles v. State*, 919 So.2d 621 (Fla. 1st DCA 2006), a party is precluded from arguing inconsistent positions in the course of litigation.[15] As such, this argument must be rejected. Finally, the suggestion that Hialeah's slot machine license should be revoked shows the AG's lack of

[15]During the informal hearing at R. 717-719 and before the First District, the Division defended the propriety of the issuance of the slot machine license to Hialeah. The AG has now disavowed its client's prior position and has inappropriately advanced an inconsistent position that must be disregarded. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (no deference accorded to what appears to be nothing more than an agency's convenient litigating position).

understanding of the APA.[16] An agency cannot simply "change its mind". *Cleveland Clinic Fla. Hosp. v. AHCA,* 679 So.2d 1237 (Fla. 1st DCA 1996). Section 120.68(7)(e)3 requires all agencies to consistently apply prior agency practice; and accordingly, Gretna is statutorily entitled to have its application treated in the same manner as Hialeah's application. *Gessler v. DBPR*, 627 So.2d 501, 504 (Fla. 4th DCA 1993) (administrative *stare decisis* applies in Florida, requiring that like cases be treated alike and following prior decisions in similar circumstances).

VII. Strict construction of the Third Clause does not change its meaning

Strict construction of the Third Clause does not change its meaning. Strict construction of a statute requires close adherence to a statute's text, excluding from the statute's operation matters not clearly covered by the text. See *Lester v. Dept. of Prof. & Occ. Regulations*, 348 So.2d 923, 925 (Fla. 1st DCA 1977). Gretna's position closely adheres to the statute's text. Conversely, the AG's position belies strict construction, as to accept the AG's argument would require this Court to deviate from the text—through the impermissible forced insertion of a word omitted by the Legislature—in order to achieve the AG's desired policy results.

VIII. The arguments of the *Amici*

Gretna incorporates the arguments contained in the three briefs filed by the

[16]It is likewise difficult to reconcile the suggested revocation of Hialeah's slot machine license with the Division's recent renewal of that license on December 21, 2015, as indicated on the Division's website.

amicus curiae in support of Gretna's position and notes the AG's failure to address the points raised therein. Conversely, the briefs filed in support of the Division and their advocacy should be rejected because both ask this Court to ignore the doctrine of *stare decisis* and to overturn longstanding precedent absent any change in circumstances since this Court last rejected this exact same argument in 2004. Gretna notes the AG's own rejection of these arguments at page 41, fn. 16, and suggests that Senator Graham and No Casinos, Inc. be required to follow the usual procedure of initiating constitutional challenges in circuit court. *Memorial Hosp.-West Volusia, Inc. v. News-Journal Corp.,* 729 So.2d 373, 384 (Fla. 1999).

CONCLUSION

The Third Clause says what it means and means what it says. Accordingly, the certified question must be answered in the affirmative, thereby entitling Gretna to the immediate issuance of the slot machine license it was wrongfully denied.

Respectfully submitted this 29th day of March, 2016.

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CERTIFICATE OF SERVICE

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/s/Marc W. Dunbar

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

/s/ Marc W. Dunbar