IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-1929
(Lower Tribunal No. 1D14-3484)

GRETNA RACING, L.L.C., PETITIONER,

vs.

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

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF *AMICUS CURIAE* NO CASINOS, INC.

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IDENTITY AND INTEREST OF THE AMICUS

No Casinos, Inc., is a Florida not-for-profit corporation and grassroots organization which has operated in the public interest to oppose the expansion of casino gambling in Florida. It devotes most of its resources to informing the public (and as an amicus, the courts) of the dangers and social and economic costs of casino gambling, including public slot machine gambling.[1]

No Casinos supports the Department of Business and Professional Regulation's (Department's or DBPR's) decision to deny the Petitioner a permit for slot machines at its pari-mutuel facility in Gadsden County, under the statutory definition of "eligible facility" in Ch. 551. No Casinos asserts that slot machines are "lotteries" prohibited by Fla. Const. Art. X § 7, except as specifically authorized by Art. X § 23 (and by a valid compact between the state and a sovereign Native American tribe under federal law). Therefore statutes regulating pari-mutuel facilities in Fla. Stat. Ch. 551 must be construed as not expanding slot machine authority beyond constitutional limits, to preserve the statutes' validity. This statutory construction issue is within the scope of the case, and should be addressed, as argued below at pp. 17-19.

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[1] Proponents prefer the word "gaming" to "gambling," but "gaming" fosters a misleading illusion of fair play. Slot machines are not a level playing field, but a business designed to addict and exploit gamblers for the slot machine owner's profit as argued below at pp. 15-17.

SUMMARY OF THE ARGUMENT

No Casinos commends the opinion of Judge Makar, writing for the Court in *Gretna Racing LLC v. Dep't of Bus. and Prof. Reg.*, 178 So.3d 15 (Fla. 1st DCA 2015), as a sound analysis of the history and intent of the disputed statute.

No Casinos addresses a point Judge Makar recognized as essential: whether the Legislature has constitutional authority to expand slot machines outside Miami-Dade and Broward Counties, which is "a serious unresolved question, ... for which a clear resolution is needed." 178 So. 3d p. 23; *see also id.* pp. 20, 30.

Slot machines offer all 3 elements that define lotteries (chance, prize, and consideration), and are therefore lotteries prohibited by Fla. Const. Art. X § 7, except in pari-mutuel facilities in Miami-Dade and Broward Counties upon referendum approval, as allowed by exception in Art. X § 23. The Constitution thus confines slot machines to these Miami-Dade and Broward County facilities.

The other two DCA Judges assumed that slot machines are never lotteries, so the Legislature is free to authorize them anywhere and everywhere in Florida. This ignores the definition of lottery and controlling case law, which holds slot machines are lotteries, either *per se* or when used in a public gambling business.

The confusion arises from a 2004 advisory opinion on a ballot initiative, which in turn cited a 1935 case. However, the 1935 case held that slot machines can be lotteries if in widespread operation, which creates a public nuisance (thus

imposing a fourth test or element). The 2004 advisory opinion did not analyze this earlier case, or cases before and after it, that either did not impose this fourth test for a lottery (public nuisance), or held this test was satisfied if the use was for a public gambling business. The 2004 advisory opinion thus misapplied the law.

Petitioner's proposed scheme easily meets and exceeds any public nuisance test, allowing slot machines at its public gambling facility and at similar facilities all over the state. This is a constitutionally prohibited "lottery" by any definition.

It is irrational to treat slot machines different from other lotteries. Indeed, slot machines are particularly dangerous, as designed to addict users for the machine owner's profit, as shown by Florida's unfortunate brief experiment with slot machines in the mid-1930's, and by current scientific research.

The Legislature cannot expand slot machines outside constitutional limits imposed by Fla. Const. Art. X §§ 7 and 23. Judge Makar's reading of the statute to limit slot machines to the two counties allowed in Art. X § 23 (and tribal lands, if allowed by a federally authorized state compact with a Native American tribe), should be followed for reasons he cites, and to preserve the law's constitutionality. Otherwise, the law would be invalid under Art. X §§ 7 and 23.

The Respondent Department's (DBPR's) administrative decision denying Petitioner a slot machine license is correct and should not be disturbed.

ARGUMENT

FLA. STAT. CH. 551 SHOULD BE CONSTRUED NOT TO ALLOW SLOT MACHINES OUTSIDE MIAMI-DADE AND BROWARD COUNTY PARI-MUTUEL FACILITIES, TO PRESERVE THE LAW'S VALIDITY UNDER FLA. CONST. ART. X § 7, WHICH PROHIBITS SLOT MACHINES AS LOTTERIES ELSEWHERE IN FLORIDA.

Standard of Review

Constitutional and statutory construction issues are reviewed *de novo*.

Factors for Determining a "Lottery" Under Florida Law

Fla. Const. Art. X § 7 prohibits "lotteries." Lotteries are universally defined by 3 elements – chance, prize and consideration. A device with these 3 elements is a lottery. This definition of "lottery" is longstanding and flexible, and applies to the multitude of lottery forms, often disguised as games or amusements.

Slot machines indisputably involve these 3 elements, and are thus lotteries. But the Court has on a few occasions added a fourth element, widespread operation for public gambling, so as to be a public nuisance, to determine whether slot machines are "lotteries." Thus the following positions may be argued:

1. Slot machines have all 3 elements and are always lotteries.

2. Slot machines have the 3 basic elements, and are lotteries if they are in widespread operation for public gambling so as to create a public nuisance.

Petitioner assumes that slot machines are never lotteries, even if offered for public gambling, based on some unknown definition of the term "lottery."

Shields, *Slot Machines in Florida? Wait a Minute,* 87 Fla. Bar. Jour. 8 (Sept. – Oct. 2013) (Shields article) analyzed the case law to conclude that the controlling and better reasoned cases hold slot machines are lotteries, and that the 2004 advisory opinion suggesting to the contrary is a "mistake." *Id.* p. 16.

Early cases defining a "lottery" applied the standard 3 element definition: chance, prize and consideration. *Bueno v. State*, 23 So. 862, 863 (Fla. 1898), applied this definition in a case charging violation of an ordinance. *State v. Vasquez*, 38 So. 830 (Fla. 1905), held that a machine with these three features, in which the element of chance predominates, was a prohibited lottery under Fla. Const. Art. III § 23 (1885). *D'Alessandro v. State*, 153 So. 95 (Fla. 1934), confirmed this 3-factor test for a lottery, citing *Bueno* and a dictionary definition.[2]

In 1935 the state passed a law licensing slot machines. *Lee v. City of Miami*, 163 So. 486 (Fla. 1935), considered a dispute between state and local officials as to whether this law was facially invalid under the 1885 Constitution's prohibition of lotteries. The Court held this law was not facially invalid, citing a common law rule that lotteries and all forms of gambling are illegal only if they became public nuisances, *i.e.*, not confined to a few persons and places, but in widespread operation to infest the whole community. *Id.* at 489-90. As *Lee* concerned only the

[2] Contemporary dictionaries broadly defined "lottery." *Black's Law Dictionary* 735 (1891) ("any scheme for the distribution of property by chance among persons who have paid... valuable consideration for the chance"); II *Bouvier's Law Dictionary* 127 (1889) (similar). These definitions would include slot machines.

law's facial validity, it does not appear that the parties in *Lee* presented any factual record on the nature or extent of this slot machine's use.

Distilled to its essence, *Lee* held this: even if a statute allows slot machines, the statute alone does not make slot machines lawful in all circumstances, as the statute can only apply if it does not violate the constitutional prohibition against lotteries. Slot machines are not lotteries *per se*, but become "lotteries" if the fourth element, "public nuisance," is present.

Hardison v. Coleman, 164 So. 520 (Fla. 1935), reviewed an arrest warrant which alleged possession of a single state-licensed slot machine. *Id.* at 521. The charge did not allege that the accused ran a slot machine business so as to be a public nuisance, and it appears the single machine was incidental to other lawful business. The Court concluded that possession of a single state-licensed slot machine did not give rise to a lottery, citing *Lee*.

Lee did not define "public nuisance," but contemporary cases fill this gap. *Pompano Horse Club v. State*, 111 So. 801 (Fla. 1927), held premises operated for a gambling business are a public nuisance and enjoined the operation. Although citing a statute, the Court recognized that use of premises for a gambling business is also a nuisance at common law. *Id.* at 811, citing authorities. Later cases confirm *Pompano*'s definition of a gambling business as a "nuisance." *Merry-Go-Round v. State*, 186 So. 538, 539 (Fla. 1939) (suppressing gambling business as nuisance,

citing *Pompano*; noting such nuisances have been suppressed under common law for over 300 years and in practically every state); *Valdez v. State*, 194 So. 388, 389-92 (Fla. 1940) (gambling business known as bolita or cuba is a public nuisance, quoting discussion in *Pompano*).

Lee did not change the common law rule discussed in *Pompano* and its progeny that operating premises for a public gambling business is a public nuisance. Thus slot machines and other devices used in public gambling businesses are a common law "public nuisance," and thus a "lottery," under *Lee*.

An Oregon judge helpfully explained the reasoning in *Lee* as follows:

> "*When, however, the community at large is entitled to come in, a new and very serious objection springs up.* Independently of the opportunity for fraud by the managers of such enterprises, their publication imparts *an excited spirit of gambling to the public generally*. On the one side, often ensue gross cases of deception as to the scheme itself; on the other, the sacrifice of savings by the ignorant and credulous, and excitement, destruction of regular industry, often inducing insanity. It is to suppress that species of lottery, we should remember, that the lottery statutes are aimed. *The test, therefore, as to any scheme for the distribution of property by chance, is, Is it private or public.*" 2 Wharton's Criminal Law, 11th Ed., p. 1945, § 1776.
>
> These recognized authorities on criminal law express the view that the reason for the law prohibiting lotteries is *that they are, or are capable of becoming, widespread in their evil effect.* (e.s.)

State v. Coats, 74 P.2d 1102, 1111 (Or. 1938) (concurring opinion).

Soon after *Lee* and *Coleman*, both the political and judicial branches held that slot machines were public nuisances. In 1937 the Legislature repealed the slot

machine license law, and enacted Ch. 18143, the predecessor of current Fla. Stat. §§ 849.15-849.23, to prohibit slot machines. *Eccles v. Stone*, 183 So. 628, 631 (Fla. 1938), explained the reason for this enactment as "common knowledge:"

> The opposition to slot machines was the direct result of the baneful and destructive effect which the operation of those machines had had upon the morals of the people of Florida of all ages and classes. It is a matter of common knowledge, of which we must take judicial cognizance, that the lure to play the slot machine had become so great as to undermine the morals of many and to lead to the commission of or the indulgence in vices and crime to procure the coins with which to play the machines.

Pasternack v. Bennett, 190 So. 56 (Fla. 1939), allowed forfeiture of slot machines, without regard to the machines' actual use, because it is "definitely settled" that slot machines are a "menace to public welfare and public morals," and such property "is itself a public nuisance." *Id.* at 57-59.

Little River Theatre Corp. v. State ex rel. Hodge, 185 So. 855, 861 (Fla. 1939), held an advertised public gambling business using a spinning drum – ticket lottery operation was a nuisance under Section 7832 C.G.L. (1927), which defined a public nuisance as a building "where games of chance are engaged in violation of law," predecessor to Fla. Stat. § 823.05, *id.* at 857. The Court restored the 3-factor definition for a lottery, without reference to any fourth "public nuisance" element:

> The authorities are in accord that a lottery has three elements: first, a prize; second, an award by chance; and, third, a consideration.

By defining a lottery without referring to the fourth "public nuisance" element in *Lee*, the Court cast doubt on whether that test under *Lee* survived.

Slot Machines are Lotteries Prohibited Under the 1968 Constitution

The 1968 Constitution continues the 1885 Constitution's prohibition of lotteries, but with a grandfather exception for lotteries that had been authorized by law as of the 1968 effective date. Fla. Const. Art. X § 7 (1968) provides:

> Lotteries ... are hereby prohibited in this state [exception omitted].

The common definition of "lottery" at the time was the standard 3-factor test. *Black's Law Dictionary* 1097 (4th ed. 1968) (citing cases from many states).

Soon after the adoption of the 1968 Constitution, the Court recognized a need to define what lotteries are allowed (excepted) and what lotteries are not allowed under Art. X § 7. *Greater Loretta Imp. Ass'n v. State ex rel. Boone*, 234 So. 2d 665 (Fla. 1970), took on this task, and explained:

> Obviously, the makers of our 1968 Constitution recognized horse racing as a type of lottery and a 'pari-mutuel pool' but also intended to include in its sanction those other lotteries then legally functioning; namely, dog racing, jai alai and bingo. *All other lotteries including bolito, cuba, slot machines, etc., were prohibited. Id.* at 671-72 (e.s.)

Thus slot machines are lotteries, just like bolito or cuba (*see Valdez* and *Fuller v. State*, 31 So. 2d 259 (Fla. 1947), discussing these lotteries), without qualification or condition, or reference to *Lee* or the fourth "public nuisance" element in *Lee*.

Three dissenting Justices held bingo was not allowed, and criticized the "widespread operation" test in *Lee* as contrary to the purpose for Art. X § 7:

> ... the requirement of 'widespread effect' ... is not a logical basis for determining whether a scheme is a lottery or not. It is saying, in effect,

> that a lottery drawing or event would not offend against the constitution so long as the scope of the lottery and the number of participants are limited. This is not what the people envisioned. *Id.* at 679.
>
> ... the primary concern of the people was with the deleterious effects of any scheme involving consideration, selection of a winner by random chance, and a prize, whether occurring throughout the State or in a single neighborhood. Our lottery prohibition, therefore, should embrace any such scheme. *Id.* at 680.

Both the majority and the dissent in *Greater Loretta* unconditionally prohibit slot machines as lotteries under Art. X § 7, without reference or resort to any public nuisance test. If the majority tacitly retained the public nuisance test in *Lee*, it held that slot machines satisfy this test. There the matter rested for three more decades.

Adoption of Art. X § 23 Did Not Authorize Slot Machines Statewide

Advisory Opinion to Atty. Gen. re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 880 So. 2d 522 (Fla. 2004), approved a constitutional ballot initiative that became Art. X § 23, to allow slot machines only at Miami-Dade and Broward County pari-mutuel facilities. Art. X § 23 did not allow slot machines in any other locations.[3]

[3] The 2004 amendment campaign emphasized that a "yes" vote would confine slot machines to these two counties. *See* advertisements for Amendment 4 at http://www.tottencommunications.com/gaming-2/, viewed Nov. 2, 2015. Express mention of these specific locations in Art. X § 23 impliedly excludes all others. *See Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) (applying *expressio unius* rule). *Florida Gaming Centers, Inc. v. Florida Dep't of Bus. & Prof'l Reg.*, 71 So. 3d 226 (Fla. 1st DCA 2011), allowed an eighth pari-mutuel facility in Miami-Dade County to offer slot machines, without addressing whether slot machines are "lotteries."

The advisory opinion dismissed an argument that slot machines are lotteries, citing *Lee* for this point. 880 So. 2d at 525.[4] Assuming it intended to confirm the rule in *Lee,* this means that a slot machine is still a lottery if used in a common law public nuisance operation, under *Lee* and other cases cited above.

Petitioner attempts to expand this advisory opinion to except all slot machines from the constitutional prohibition against lotteries in Art. X § 7, so the Legislature can authorize slot machine businesses all over the state. This reading is contrary to *Lee* and all other Florida precedent on this issue, before and after *Lee*, especially *Greater Loretta.* The advisory opinion did not offer any novel definition of a "lottery" that excludes all slot machines, no matter how used; nor did it discuss whether slot machines could meet the test for a lottery under *Lee.*

It would be surprising if the Court intended to use an advisory opinion on a ballot initiative (a proceeding limited to two issues, *id.* at 523), as a vehicle to overrule a century of precedents on the meaning of "lottery," a publicly important issue developed with great judicial labor; and invent a new - but unspecified – definition of "lottery," to allow Florida to become a public slot machine magnet, which could substantially change the moral fabric of the state. Petitioner reads the

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[4] The Court also cited Fla. Stat. § 849.09 (prohibiting lotteries) and §§ 849.15 and 849.16 (prohibiting slot machines), as separate prohibitions. *Id.* at 526. However, it is common for criminal statutes to overlap or duplicate one another. *See, e.g., Soverino v. State*, 356 So. 2d 269, 272 (Fla. 1978). These statutes could not affect and did not intend to affect the constitutional prohibition of "lotteries."

advisory opinion itself to do exactly that, effectively amending the meaning of "lottery" in Art. X § 7 to except all slot machines from the constitutional prohibition, contrary to precedent, with no explanation or supporting authority.

Petitioner Seeks a "Lottery" Under Any Definition

Petitioner hopes to provide slot machines as a public gambling business. Its argument will open the door for even more widespread public nuisance slot machine businesses in 20 pari-mutuel facilities around the state,[5] each offering as many slot machines as traffic will bear (up to 2000 per facility under Fla. Stat. § 551.114 (1)). This is a public nuisance under the common law rule in *Pompano* and progeny cases, intended to foster the "excited spirit of gambling to the public," *see Coats*, 74 P.2d at 1111; and is thus a lottery under *Lee* and the other cited cases, even if the Legislature can resist pressures to further expand the availability of slot machines. To the extent the 4-element definition of "lottery" in *Lee* survives today, Petitioner's planned operation is clearly a "lottery" under *Lee*.

Local home rule powers do not change this result. Such general powers must yield to this specific preemptive constitutional prohibition. *See generally Metro. Dade Cty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

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[5] Pari-mutuel facilities are convenient to the whole state. *See Gretna Racing,* 178 So. 3d at 22 n. 6. *See* DBPR's website map of current permit holders at http://www.myfloridalicense.com/dbpr/pmw/track.html, viewed Sept. 24, 2015. The Legislature could of course allow more pari-mutuel facilities, or otherwise further expand opportunities for slot machines, under Petitioner's theory.

Slot Machines are Lotteries Under Rules for Applying Conflicting Precedents

Rules that generally guide courts in choosing between conflicting precedents give the 2004 advisory opinion minimal or no precedential weight.

First, the great majority of decisions support the rule that slot machines are either lotteries *per se* or in the circumstances presented by Petitioner's application.

Second, advisory opinions have less weight than contested cases. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 n. 3 (Fla. 1992), cited in the Shields article, n. 39. The 2004 advisory opinion has less weight than the other cited cases.

Third, courts follow an earlier decision over a later conflicting decision, to promote stability in the law. *See Walker v. Mortham*, 158 F.3d 1177, 1188-89 (11th Cir. 1998). An interpretation at the time the law is adopted has greater weight than a later changed interpretation. *Compare Debary Real Estate Holdings LLC v. State Dep't of Bus. and Prof. Reg.*, 112 So. 3d 157, 167 (Fla. 1st DCA 2013) with *Comm. Wkrs. v. City of Gainesville*, 65 So. 3d 1070, 1076 (Fla. 1st DCA 2011).

Applying these rules, the initial 3-factor definition of "lottery" under the 1885 Constitution has greater weight than the later 4-factor definition in *Lee*. Also, *Greater Loretta,* decided soon after the 1968 Constitution, has greater weight in construing the 1968 Constitution than the 2004 advisory opinion.

All other cases combined outweigh the unsupported and unprecedented statement in the 2004 advisory opinion that slot machines are not lotteries.

Other Legal Sources Support Rule that Slot Machines are Lotteries

The Court has relied on cases from other states in addressing gambling issues. *E.g.*, *Pompano* cited out-of-state cases for the rule that a gambling business is a nuisance, including *J.B. Mullen & Co. v. Mosley*, 90 P. 986, 990 (Idaho 1907), which upheld seizure of slot machines, ruling that "Gambling itself was a nuisance at common law, ... and it therefore appears that the instruments and devices by and with which it is carried on must themselves be nuisances." 111 So. at 811.

Little River cited out-of-state cases to confirm the 3-factor definition of lottery (chance, prize and consideration), noting the need for flexibility to address lottery purveyors' ingenuity in disguising their offerings. 185 So. at 857-61.

The consensus in other states is that slot machines are lotteries under the standard 3-factor definition, without regard to their breadth of operation. *E.g.*, *State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 796-97 (Wash. 1952):

> Now as to the question of whether a slot machine is a lottery. We have analyzed from other jurisdictions far too many decisions relative to this question to attempt to cite and quote them all. ...All of the large group of cases to which we refer have involved the question of whether slot machines are included within the definition of the term 'lottery.' The overwhelming weight of authority is to the effect that slot machines as here involved and of the usual type and variety are lotteries. (citing encyclopedia and cases from many states)

And see Harris v. Missouri Gaming Comm'n, 869 S.W. 2d 58, 64 (Mo. 1994):

> Slot machines...involve no skill. Almost all other state courts have held slot machines to be lotteries. (citing cases from many states)

No Rational Basis to Treat Slot Machines Different from Other Lotteries

Slot machines offer chance, prize and consideration. No one suggests otherwise. It is artificial and absurd to argue that slot machines' spinning internal wheels or rotating screen images are materially different from lotteries in the form of roulette wheels, wheels-of-fortune, or wheels used to draw winning tickets. A dollar lost in slot machines is no different from a dollar lost in any other lottery.

No further analysis is needed to discern whether slot machines will have public nuisance effects; the cited cases show that a public slot machine business, as Petitioner intends, is a common law public nuisance and thus a lottery.

In fact, slot machines are more insidious than other lotteries. In roulette, informed gamblers can calculate the odds of winning and the payoff in advance. In slot machines, these variables are concealed and unpredictable. Slot machines can be rigged to provide whatever payoff and frequency the owner thinks will maximize its profit. Fast-repeated slot machine play provides no check against impaired or addicted persons gambling more than they can afford.

Scientific research confirms that slot machines are designed to addict gamblers in order to be a major revenue source for the machine owners. An associate professor at MIT summarized this research as follows:

> Modern slot machines – which typically feature video screens instead of mechanical reels, buttons instead of handles, and accept player loyalty cards instead of coins – are the driving force behind campaigns to expand legalized gambling in the United States. The

devices generate upwards of three-quarters of gambling revenue. Even in so-called destination-resort casinos, they bring in twice as much as all other games put together.

But slots are noteworthy for more than their extraordinary revenue performance.

Studies by a Brown University psychiatrist, Robert Breen, have found that individuals who regularly play slots become addicted three to four times faster (in one year, versus three and a half years) than those who play cards or bet on sports.

The particular addictiveness of modern slots has to do with the solitary, continuous, rapid wagering they enable. It is possible to complete a game every three to four seconds, with no delay between one game and the next. Some machine gamblers become so caught up in the rhythm of play that it dampens their awareness of space, time and monetary value.

Research has found that these devices, which create three-fourths of casino revenue, addict people more quickly than other types of gambling.

"They don't talk about competition or excitement," says Robert Hunter, the clinical director of the Problem Gambling Center in Las Vegas. "They talk about climbing into the screen and getting lost." They are after "time on device," to use the gambling industry's term for a mode of machine gambling that is less about risk and excitement than about maintaining a hypnotic flow of action – a mode that is especially profitable for casinos.

So-called problem gamblers are known to contribute a grossly disproportionate percentage of slot machine revenues – 30 to 60 percent, according to a number of government-commissioned studies in the United States, Canada, and Australia. But they aren't the only ones whose finances and well being are at stake in expansion of machine gambling. "Over-spending and/or losing track of time or money occurs for the majority of regular players," a 2011 Canadian report found. As the psychologist Mark Dickerson explains, the modern slot machine "erodes the player's ability to maintain a

sequence of informed and rational choices about purchasing the next game offered."[6]

Slot machines are as dangerous or more dangerous than other lotteries. The state's unhappy experiment with slot machines in the mid-1930's proved this point. *See Eccles* and *Pasternack*, above. It would be irrational to treat slot machines different from other lotteries. It is for state voters as a whole, not the Legislature, the courts, an agency, or a limited county referendum, to decide whether to except slot machines from the constitutional prohibition against lotteries.

Court Should Construe Statute to Avoid Constitutional Invalidity

If different constructions of Fla. Stat. Ch. 551 are possible, the Court should construe the law to avoid grave and doubtful constitutional questions. *State v. Presidential Women's Center*, 937 So. 2d 114, 116 (Fla. 2006). Petitioner's construction to allow slot machines anywhere a pari-mutuel facility obtains local voter approval would render the statute invalid, as in violation of the prohibition against lotteries in Art. X § 7, and outside the limited exception in Art. X § 23.

The Department asks the Court not to reach this point as a "new issue." Ans. Br. 41 n. 16. This is not a new issue, as it bears on the proper interpretation of Ch. 551. The Court recognizes a "duty" to interpret statutes to avoid invalidity. *Doe v.*

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[6] Schull, Slot Machines are Designed to Addict, New York Times (Oct. 10, 2013), http://www.nytimes.com/roomfordebate/2013/10/09/are-casinos-too-much-of-a-gamble/slot-machines-are-designed-to-addict, viewed Oct. 12, 2015.

Mortham, 708 So. 2d 929, 934 (Fla. 1998). To apply the proper analysis, the Court must first recognize what the Constitution prohibits as "lotteries."

Also, each of the three DCA Judges discussed this point. *See* 178 So. 3d at 20, 23, 30 (Judge Makar, noting "a serious unresolved question, ... for which a clear resolution is needed;" *compare id.* at 32 (Judge Bilbrey), *id.* at 33-34 (Judge Benton) (both finding laws allowing slot machines constitutionally authorized). The constitutional issue is unavoidably present in the case.

The Department prefers not to advance this argument (that Petitioner's reading renders the statute invalid), apparently to avoid tying the Legislature's hands if it should pass a different law in the future. However, this preference not to argue a reason does preclude the Court from considering it. *See Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596 (Fla. 1961) (Court's jurisdiction extends to decision below, not just question that lower court certified; piecemeal rulings are not favored); *Keating v. State ex rel. Ausebel*, 157So. 2d 567, 569 (Fla. 1st DCA 1963) (amici are not confined to theories advanced by the parties).

It serves the public well to decide this issue. The Court should not give effect to a lottery business that the Constitution prohibits, just because the state preferred not to assert a constitutional argument. As the Shields article and the DCA opinions point out, the Court's prior decisions on this point are inconsistent. A ruling on this point will not only bring much needed clarity to the law, but will

allow the People to intelligently decide if they want to amend the Constitution further (through the legislative, constitutional revision, or initiative process).

Conclusion

Petitioner's scheme for a slot machine business is a "lottery" under any definition. The standard 3-factor test, applied in almost all Florida and other precedents, has the virtues of simplicity, predictability, longevity, and consistency, and does not artificially discriminate between slot machines and other lottery schemes or devices. Here Petitioner clearly intends to operate slot machines as a public gambling business, inviting such operations statewide. Even under *Lee*, applying the fourth "public nuisance" test, this is a lottery, and not a close case.

The Court should not disturb the Department's administrative decision, for the reasons cited in Judge Makar's opinion below; and also because the construction urged by Petitioner and its supporting amici would allow the Legislature to open the door to slot machines used as lotteries statewide, outside the only locations specifically authorized in the Constitution, or by federal law, in violation of Constitutional limits on legislative powers.

Respectfully submitted this 22nd day of February, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by E-Mail through the Court's E-Filing Portal system on counsel listed below, this 22nd day of February, 2016.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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