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No. SC15-1929

SUPREME COURT OF FLORIDA

GRETNA RACING, LLC,
Petitioner,

v.

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

On Discretionary Review from
the First District Court of Appeal

No. 1D14-3484

THE HONORABLE BOB GRAHAM'S *AMICUS CURIAE* BRIEF SUPPORTING THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

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IDENTITY OF AMICUS

The Honorable Bob Graham has been a long-standing public servant in Florida. In 1966, he was elected to the Florida House of Representatives, and, in 1970, he was elected to the Florida State Senate. He served as governor of Florida from 1979 to 1987 and served as a United States senator representing Florida for 18 years. He served in the Florida House of Representatives as the Legislature drafted the Florida Constitution, including the prohibition against lotteries. As one of Florida's leading public officials over the last half century, and as a participant in the crafting of the 1968 Constitution, Bob Graham has an interest in protecting the Florida public's right to decide gambling issues.

INTRODUCTION

Florida's current Constitution expressly provides that "[a]ll political power is inherent in the people." FLA. CONST. art. I, § 1. In that same 1968 Constitution the people made it clear that they did not want any expansion of lotteries—including slot machines—unless such expansion was authorized by the people in the Constitution itself. Under Gretna Racing, LLC's interpretation of the Florida Statutes, 6042 voters in Florida can expand the use of slot machines in Florida, in contravention of a constitutional provision that states otherwise: "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state." FLA. CONST. art. X, §7.

Rejecting Gretna Racing, LLC's interpretation enforces the will and voice of the people of Florida. The Florida Constitution prohibits any "lottery" statewide, "other than the types of pari-mutuel pools authorized by law as of" its effective date. As of the Constitution's effective date, slot machines were not authorized by law in Florida. Under the plain meaning of the word "lottery," a slot machine is a lottery. This is bolstered not just by the dictionary but also by this Court's precedent. Throughout history, this Court has defined a lottery as consideration given for a chance at a prize. In 1970, this Court held directly that under the current Florida Constitution a slot machine was a "lottery" as that word was used in the Constitution.

The Florida Constitution's legislative history further supports this unambiguous definition of "lottery." The 1968 Florida Legislature specifically rejected a version of the proposed Constitution that would have delegated to the Legislature the power to legalize any pari-mutuel pools. It chose instead to limit its power to regulate only then-existing pari-mutuel pools.

And, while this Court in a 2004 advisory opinion stated that slot machines were not lotteries, it relied on law interpreting the previous Florida Constitution, not the current one, and failed to discuss, distinguish, or deny its interpretation of "lottery" as used by the current Florida Constitution. Hence, this Court must reject the 2004 Advisory Opinion to the extent it has precedential value today.

In sum, the Florida Constitution prohibits lotteries, including slot machines, and the Florida Legislature cannot amend the Constitution through statutes. To expand the reach of slot machines, the people of Florida must amend the Constitution. And, in fact, since 1978, Florida voters have thrice rejected full-scale gambling, with the closest vote coming in 1994, when an overwhelming 61% of the voters rejected an amendment that would allow full-scale gambling.[1] This Court should not allow Gretna Racing or Gadsden County to sidestep the statewide debate that must occur before slot machines are legal in this State. And this Court should interpret section 551.102(4) of the Florida Statutes as the Florida Department of Business and Professional Regulation does.

SUMMARY OF THE ARGUMENT

1. Under the Florida Constitution, "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state." FLA. CONST. art. X, § 7. Lotteries are defined as a chance at a prize for a price. Slot machines are lotteries under this common definition of the word "lottery." Thus, under the plain language of article X,

[1] In 1978, the people of Florida rejected full-scale gambling casinos by a vote of 71% to 28%. In 1986, Florida voters rebuffed, by a vote of 68% to 31%, attempts to allow full-scale gambling in certain hotels. And, in 1994, they rejected full-scale gambling in certain counties. Only in 2004 did the people of Florida allow a limited expansion of gambling—allowing slot machines in Miami-Dade County and Broward County, alone. Even then, the amendment passed with a razor-thin margin, with 50.8% of voters supporting the amendment.

section 7 of the Florida Constitution, slot machines are lotteries prohibited in Florida.

2. Even if the language in article X, section 7 was ambiguous, the legislative history of the 1968 Constitution underscores that slot machines are lotteries and that the intent was to broaden the gambling prohibition, not diminish it. Before the final provision on lotteries was passed by the Legislature and placed on a statewide ballot for consideration, efforts were made either to eliminate it entirely or to prohibit "lotteries" but broadly allow the legislature to legalize any pari-mutuels. Rather than demur on the issue or weaken the provision, the Legislature passed out for consideration a version that banned lotteries and *all* pari-mutuel pools unless those pari-mutuel pools were authorized by law as of the effective date of the Florida Constitution. The Florida Legislature and the people of Florida thus were clearly seeking to prevent future legislatures from enacting lotteries or pari-mutuels not already in existence.

3. Precedent on this issue acknowledges that slot machines are lotteries. In 1935, while interpreting the predecessor of the current Florida Constitution, this Court held that slot machines were not lotteries unless they became widespread. In 1970, while interpreting the current Florida Constitution, this Court held that slot machines were lotteries. And, in 2004, this Court, in an advisory opinion, overlooked the 1970 precedent and concluded that slot machines were not lotteries.

This Court should follow its 1970 precedent. The 1935 opinion is an outlier that this Court did not follow even before 1970 and was decided based on a previous constitution. The 1970 opinion squarely holds that the term "lottery," as used in our current Constitution, includes slot machines. And, finally, the definition of lottery applied by the 1935 and 2004 opinions clash with the current language used in the Florida Constitution.

4. Courts should not adopt a statute's interpretation if that interpretation renders the statute unconstitutional. Given the weighty constitutional concern raised by the expansion of slot machines, this Court should reject Gretna Racing, LLC's expansive interpretation of section 551.102(4).

ARGUMENT

I. FACIALLY, SLOT MACHINES ARE LOTTERIES.

On November 5, 1968, the Florida people adopted the current Florida Constitution, including a statewide prohibition of "lotteries":

> Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state.

FLA. CONST. art. X, § 7. This language is broad—defining "lotteries" to include pari-mutuel pools—and clear. It prohibits slot machines throughout Florida.

"Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language. If that language is

clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986). The Florida Constitution's words "are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense." *Lewis v. Leon Cty.*, 73 So. 3d 151, 153 (Fla. 2011). These principles confirm that slot machines are "lotteries."

The non-technical definition of lottery is consideration given for the chance at a prize. That is the definition now.[2] It was the non-technical definition in 1968, when the people ratified this language.[3] It was the definition before that.[4] And it has been the definition since time immemorial.[5]

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[2] *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1034 (4th ed. 2009) ("**1.** A contest in which tokens are distributed or sold, the winning token or tokens being secretly predetermined or ultimately selected in a random drawing. **2.** A selection made by lot from a number of applicants or competitors . . . . **3.** An activity or event regarded as having an outcome depending on fate . . . .").

[3] *See Lottery*, BLACK'S LAW DICTIONARY (4th ed. 1968) (LOTTERY. "A chance for a prize for a price.").

[4] *See Lee v. City of Miami*, 163 So. 486, 488 (Fla. 1935) ("Webster defines a lottery as a scheme for the distribution of prizes by lot or chances. Worcester defines it as a distribution of prizes and blanks by chance, a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or in other articles. Other standard dictionaries are to like effect.").

[5] *See Ex parte Ted's Game Enters.*, 893 So. 2d 376, 377–78 (Ala. 2004) ("According to Sir William Blackstone in his *Commentaries on the Laws of England*, the term 'lottery' encompasses a broad array of activities: '[A]ll private lotteries by tickets, cards, or dice . . . are prohibited under a penalty . . . for him that shall erect such lotteries . . . . Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise,

Under the plain definition of "lottery," a slot machine is a lottery, for it accepts money in exchange for the random opportunity at a reward—that is, "[a] chance for a prize for a price." *Lottery*, BLACK'S LAW DICTIONARY (4th ed. 1968).

Because this logic is straightforward, "[a]lmost all other state courts have held slot machines to be lotteries." *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58, 64 (Mo. 1994); *accord Loiseau v. State*, 22 So. 138, 139 (Ala. 1897) (slot machines are lotteries); *State v. Vill. of Garden City*, 265 P.2d 328, 332 (Idaho 1953) (slot machines are unconstitutional lotteries); *State v. Nelson*, 502 P.2d 841, 847 (Kan. 1972) ("Statutory provisions which attempt to legalize bingo or the use and possession of slot machines are inconsistent with our constitution."); *State v. Barbee*, 175 So. 50, 57 (La. 1937) (slot machines are lotteries); *State v. Coats*, 74 P.2d 1120, 1120 (Or. 1938) ("Hence it is held that the operation of a nickel-in-the-slot machine constitutes a lottery and is in violation of the Constitution."); *In re Advisory Op. to Governor*, 856 A.2d 320, 328 (R.I. 2004) ("It cannot seriously be disputed that all of these games [roulette, craps, and slot machines] fall squarely within the definition of a lottery."); *State ex rel. Evans v. B'hood of Friends*, 247 P.2d 787, 797 (Wash. 1952) (agreeing that slot machines are clearly lotteries). *But see Ex parte Pierotti*, 184 P. 209, 210 (Nev. 1919) (slot machines are not lotteries).

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which in the end are equivalent to lotteries, were . . . prohibited . . . ." (alterations in original)).

Not surprisingly, this Court adopted this clear definition of lottery as early as 1898, when this Court upheld a jury instruction defining a lottery as "a gaming contract, by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks." *Bueno v. State*, 23 So. 862, 863 (Fla. 1898). In 1905, this Court refused to provide habeas relief to a petitioner incarcerated for operating slot machines, in part because the Florida Constitution prohibited lotteries. *See State v. Vasquez*, 38 So. 830, 831 (Fla. 1905). This Court continued to rely on this patent definition of lottery throughout its history. *See, e.g.*, *Little River Theatre Corp. v. State ex rel. Hodge*, 185 So. 855, 861 (Fla. 1939) (per curiam) ("[A] lottery has three elements; first, a prize; second, an award by chance; and, third, a consideration.").

And after enactment of the 1968 constitutional provisions at issue here, this Court in *Greater Loretta Improvement Ass'n v. State ex rel. Boone*, with great clarity, held that "lottery" as used in the 1968 Florida Constitution was defined broadly. 234 So. 2d 665 (Fla. 1970).

> 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.

In sum, slot machines are lotteries under the plain meaning of the term "lottery" and under this Court's precedent. Gretna Racing, LLC, therefore, cannot provide slot machines in Gadsden County, and the Florida Legislature could not have legalized these machines.

II. LEGISLATIVE HISTORY CONFIRMS THAT SLOT MACHINES ARE LOTTERIES.

As shown above, the Florida Constitution's prohibition on lotteries is broad and statewide. The language is not ambiguous. But even if the language could be considered ambiguous, the legislative history proves that the Florida Constitution meant to impede the Florida Legislature's ability to legalize slot machines.

Article X, section 7 of the Florida Constitution, as originally proposed by the Legislature, provided the Florida Legislature with unbridled authority to regulate and legalize all pari-mutuel pools: "All lotteries are prohibited other than pari-mutuel pools regulated by law." S. JOURNAL, Spec. Sess. 15 (Fla. Jan. 9, 1967). During deliberations on the Florida Constitution, some legislators even proposed to remove the amendment in whole—which would have given the Legislature total authority to regulate lotteries. S. JOURNAL, Spec. Sess. 51 (Fla. Aug. 31, 1967). But that proposal failed. And, in contrast, the Florida Legislature decided to *expand* the lottery prohibition. Article X, section 7, as ratified by the people of Florida, allows only "pari-mutuel pools authorized by law as of the effective date of" the Florida Constitution of 1968 and prohibits any other type of lottery.

Instead of giving the Legislature authority to legalize any pari-mutuels, the people of Florida restricted the Legislature's power. Under the current version—the one that passed—the Legislature can allow only those lotteries that were already regulated when the Florida Constitution became effective. Since slot machines were not allowed as of the Florida Constitution's effective date, they are wholly prohibited by the Florida Constitution.

III. This Court's 2004 Advisory Opinion Misapprehended Whether Slot Machines Were Prohibited Under the Constitution.

Despite this Court's 1970 pronouncement in *Greater Loretta* that slot machines were lotteries under the 1968 Florida Constitution, this Court, in an advisory opinion in 2004, concluded that slot machines are not lotteries. *See Advisory Op. to Attorney Gen. Regarding Slot Machs.*, 880 So. 2d 522, 525 (Fla. 2004) (per curiam). In so concluding, this Court cited *Lee v. City of Miami*, 163 So. 486 (Fla. 1935), as binding law and ignored *Greater Loretta*. While the case law on this issue—whether slot machines are lotteries—may arguably be muddled, it is still clear that this Court's reliance in 2004 on *Lee* was misplaced. *Lee* is not merely an aberration to the Constitution it interpreted (the 1885 Florida Constitution), it has little relevant precedential value to the current Florida Constitution enacted more than 30 years after *Lee* was decided.

A. *Lee* is an inconsistent outlier.

In *Lee v. City of Miami*, this Court in 1935 held that, despite the definition of "lottery" and despite its previous pronouncements, the 1885 versions of the Florida Constitution merely suppressed "such legalized lotteries as are referred to in the forepart of this opinion, the primary test of which was whether or not the vice of it infected the whole community or country, rather than individual units of it." 163 So. at 490. It upheld this view for some time. *See Pasternack v. Bennett*, 190 So. 56, 57 (Fla. 1939); *Hardison v. Coleman*, 164 So. 520, 524 (Fla. 1935). But, eventually, this Court's requirement that a lottery be widespread disappeared from Florida law. *See Little River Theatre*, 185 So. at 861.

Commentators, including this very Court, underscored the confusing or uneven nature of *Lee*. In *Greater Loretta*, for instance, Justice Carlton concludes that *Lee*'s holding caused "a curious paradox." 234 So. 2d at 676 (Carlton, J., dissenting). Commentators have questioned *Lee*'s holding. *See* David G. Shields, *Slot Machines in Florida? Wait a Minute*, 87 FLA. BAR J. 8 (Oct. 2013). And this Court itself has recognized that *Lee*'s holding has, at best, been unevenly applied. *See Greater Loretta*, 234 So. 2d at 668 ("While some of the subsequent decisions were not entirely consistent with *Lee v. City of Miami*, and the varying opinions were never reconciled with each other, none were ever overruled." (citation omitted)).

Simply put, even under the 1885 Florida Constitution, *Lee* was an outlier, which this Court did not consistently apply.

B. The 2004 Advisory Opinion contradicts *Greater Loretta*'s holding.

Greater Loretta, and not *Lee*, is binding, and it holds that under the current Florida Constitution slot machines are lotteries. The Florida Constitution prohibits all lotteries "other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution." FLA. CONST. art. X, § 7. Before the effective date of the Florida Constitution, the Florida Legislature enacted a statute permitting bingo. *See Greater Loretta*, 234 So. 2d at 670. Bingo is a lottery under the normal definition of lottery, and so this statute was challenged as permitting an unconstitutional lottery.

This Court answered two questions in *Greater Loretta*: first, whether the statute violated the 1885 Florida Constitution, which governed at the statute's enactment, and, second, whether the statute violated the current Florida Constitution. As to the first question, this Court concluded that the Florida Legislature could legalize bingo under the 1885 Florida Constitution because *Lee* muddled the law and it was therefore unclear to the Legislature whether bingo was a lottery. *See id.* at 668–70. In so reasoning, this Court contrasted the 1885 provision prohibiting lotteries to the current provision prohibiting lotteries and

acknowledged that bingo could "be considered as a contemporaneous construction of the word 'lottery' as used in the [1968] Constitution." *Id.* at 670.

Significantly, as to the second question, this Court held that bingo would have been a banned lottery under the current Florida Constitution. But it ultimately decided that bingo was not a banned lottery because it was a permissible pari-mutuel as of the Florida Constitution's effective date and thus grandfathered. In so holding, this Court reasoned that horse racing, dog racing, jai alai, bingo, bolita, cuba, *and slot machines* are *all* lotteries as that word is used in the 1968 Florida Constitution. And it held that horse racing, dog racing, jai alai, and bingo were not prohibited by the Constitution because those lotteries were sanctioned as of the Florida Constitution's enactment. *See id.* at 671–72.

Greater Loretta is the precedent this Court should rely upon. Relying on *Greater Loretta*, Judge Makar noted that "it is not at all clear that the Legislature has the constitutional authority to expand the use of slot machines outside of the geographic areas of Broward and Miami-Dade Counties." *Gretna Racing, LLC v. Dep't of Bus. & Prof'l Regulation*, 178 So. 3d 15, 23 (Fla. 1st DCA 2015). The two remaining judges in the First District Court of Appeal contended that the *Greater Loretta* language was dicta. *See id.* at 32 (Bilbrey, J., concurring in part); *id.* at 33 (Benton, J., dissenting).

But a dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it," *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (Posner, J.), and the statement in *Greater Loretta* is not that. In *Greater Loretta*, this Court reasoned that bingo was a lottery under the Florida Constitution because the term "lottery" in article X, section 7 was broad and included things like bingo, jai alai, and slot machines. It upheld the bingo statute, however, because bingo was legal as of the Florida Constitution's effective date and was therefore grandfathered in under the Constitution's language. This reasoning is anything but peripheral; it goes to the heart of the matter and received the full and careful consideration of the Court. Thus, the 2004 Advisory Opinion should not have disregarded *Greater Loretta*.

The 2004 Advisory Opinion, moreover, is not binding judicial precedent. *See Barley v. S. Fla. Waste Mgmt. Dist.*, 823 So. 2d 73, 82 (Fla. 2002) (per curiam). This Court has noted that advisory opinions are usually persuasive, but they are not binding. *See id.* Here the 2004 Advisory Opinion failed to cite precedent, as did the parties before the Court. The parties in *Greater Loretta* went through the entire adversarial process—lawyers briefed the issues before a trial court, an appellate court, and this Court—whereas the parties in the 2004 Advisory

Opinion did not. Hence, this Court ought to reject the 2004 Advisory Opinion's unreasoned conclusion that slot machines are not lotteries.

Absent clarification by this Court, Floridians will continue to confront potential expansions of gambling without the approval of the Florida people. Slot machines will continue to become more common outside of the only two South Florida counties where they have been authorized by the Constitution. The Legislature will continue to authorize other games that, by any reasonable definition, are also lotteries (e.g., roulette, craps). Thus, the position recommended here would provide needed clarity to an area of law that has become increasingly muddled.

Nor will it be difficult for this Court to clarify which games are constitutionally prohibited and which could be enacted by the Legislature. In *Greater Loretta*, Justice Carlton wrote, "A primary distinction between gambling, which the Legislature can permit, and a lottery, which it has no power to permit, is that the former involves elements of skill and maneuver, while the latter involves only the operation of chance." *Greater Loretta*, 234 So. 2d at 683 (Carlton, J., dissenting). Thus, there is a spectrum. At one end, games of pure chance and no skill—slot machines, roulette, and craps—are unquestionably unconstitutional lotteries. *See Op. to Governor*, 856 A.2d at 328 ("It cannot seriously be disputed that all of these games [roulette, craps, and slot machines] fall squarely within the

definition of a lottery."). At the other end are games in which skill can impact luck—poker, for example—where the constitutionality may be a closer call. [6]

C. *Greater Loretta* meshes with the current constitutional language, whereas *Lee* does not.

As the *Greater Loretta* opinion suggests, the *Lee* holding is irreconcilable with the language of the Florida Constitution. The language of the 1968 Constitution is far broader than the language of the 1885 Constitution, for under the 1968 Constitution the term "lottery" includes pari-mutuels.

"When reviewing constitutional provisions, this Court follows principles parallel to those of statutory interpretation." *Lewis*, 73 So. 3d at 153. Among the most fundamental of canons is this: Provisions are to be read so as not to render any language superfluous. *See Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999). Here, "lottery" must be read broadly. After all, the Florida Constitution's prohibition is broad, using "lottery" as *including* pari-mutuel pools, "other than the types of pari-mutuel pools authorized by law as of the effective

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[6] The Florida Legislature currently openly regulates many of these games. *See, e.g.*, FLA. STAT. § 849.085 (allowing poker, hearts, dominoes, and other skill-based games if done at a residence for low wagers). These and other games, which ostensibly require skill—say, blackjack or sports wagering—may fall somewhere within the spectrum, and they could be analyzed on a case-by-case basis to determine if they are prohibited as a lottery as defined or prohibited as a pari-mutuel game not existing prior to 1968. Of course, as this Court has already held, the Legislature could also freely legislate those games that were legal in 1968, like bingo, even if they are otherwise lotteries. *See Greater Loretta*, 234 So. 2d at 671–72.

date of this constitution." FLA. CONST. art. X, § 7. But this Court's definition of lottery in *Lee* does not include pari-mutuels. To read the term "lottery" as the *Lee* court read the term in the 1885 Constitution would render an entire clause superfluous—"other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution." That is impermissible.

IV. BECAUSE GRETNA RACING'S INTERPRETATION CONFLICTS WITH THE FLORIDA CONSTITUTION, THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION MUST PREVAIL.

"When the constitutionality of a statute is questioned, and it is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, a court must adopt the interpretation that will render the statute valid." *Fla. State Bd. of Architecture v. Wasserman*, 377 So. 2d 653, 656 (Fla. 1979). Here, Gretna Racing's reading of section 551.102(4) of the Florida Statutes would allow slot machines in Gadsden County. But any reading that would allow slot machines in Gadsden County based on that County's local referendum would violate article X, section 7 of the Florida Constitution. Thus, this Court should reject Gretna Racing's interpretation and should follow the Florida Department of Business and Professional Regulation's interpretation, which would bar further expansion of slot machines.

V. THE COURT CAN CONSIDER *AMICUS CURIAE*'S ARGUMENTS.

Finally, in a footnote, the Department of Business and Professional Regulation contends that this Court ought to ignore Bob Graham's argument because (1) this Court should avoid constitutional issues and (2) it is an argument never raised by the parties. Despite this statement, this Court has full authority to consider Bob Graham's argument.

To begin with, this Court's hesitancy to review constitutional issues is a general rule, not a commandment. Once this Court has appellate jurisdiction, "it may, if it finds it necessary to do so, consider any item that may affect the case." *Sullivan v. Sapp*, 866 So. 2d 28, 34 (Fla. 2004). And so, this general rule notwithstanding, this Court delves into constitutional issues where, as here, the issue exudes public and legal importance, clarifies the law, or helps interpret a statute. *See, e.g.*, *id.* 34–35; *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977); *Green v. State ex rel. Phipps*, 166 So. 2d 585, 587 (Fla. 1964). Even Judge Makar concluded in this very case that "a serious unresolved question exists . . . for which a clear resolution is needed." *Gretna Racing*, 178 So. 3d at 23. The general rule must step aside so that this Court can clarify the law on an issue that goes to the fabric of the Florida community and that is, despite 100 years of jurisprudence, uncertain.

Next, while Bob Graham is only an *amicus curiae*, this does not mean he cannot present new theories to this Court. To the contrary, "[a] significant

distinction is apparent as between 'issues' and 'theories' in support of a particular issue." *Keating v. State ex rel. Ausebel*, 157 So. 2d 567, 569 (Fla. 1st DCA 1963). *Amicus curiae* cannot argue new issues but may argue new theories. *See id.* This Brief argues a new theory (namely, that the Department of Business and Professional Regulation's interpretation of section 551.102(4) is the correct one because Gretna Racing's interpretation violates the Constitution) on the issue briefed by the parties (namely, how to interpret section 551.102(4)). In fact, to further "confine amicus would be to place him in a position of parroting 'me too' which would result in his not being able to contribute anything to the court by his participation in the cause." *Id.* That is not—and cannot be—the purpose of *amicus curiae*, which is why this Court can and should fully consider all arguments.[7]

Plus, though the constitutional issue was not presented by the parties, it was certainly presented by Judge Makar in the very opinion this Court is considering. *See Gretna Racing*, 178 So. 3d at 23. The parties' inability to brief the issue should not hinder this Court's plenary review.[8] For these reasons, other supreme courts

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[7] *Riechmann v. State* does not support the argument that this Court cannot consider *amicus curiae*'s argument. 966 So. 2d 298 (Fla. 2007) (per curiam). *Riechmann* is a post-conviction criminal case, in which an amicus sought to argue a never-before raised issue *17 years* after the movant's original conviction. *See id.* at 304. That is, to say the least, a materially different case from this case, where the opinion on appeal squarely considered *amicus curiae*'s argument.

[8] It would be difficult for the Florida Attorney General to advance amicus's contention (that the Florida Constitution limits the Florida Legislature's legislative authority as to slot machines).

appoint *amicus curiae* to defend positions the parties cannot endorse. *See, e.g.*, *United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988); *In re Peierls Family Testamentary Trs.*, 77 A.3d 223, 224 (Del. 2013); *Chandler v. City of Winchester*, 973 S.W.2d 78, 80 (Ky. Ct. App. 1998); *Vill. of Park Forrest v. Bragg*, 230 N.E.2d 868, 869 (Ill. 1967).

Simply put, this Court's plenary review of a noteworthy and jumbled issue should not succumb to the parties' inability to fully vet the issue. This Court should reject the parties' attempt to silence debate on the "lottery" issue.

CONCLUSION

If left unchecked, gambling including lotteries as defined in the 1968 Constitution can inalterably change the very fabric of a community. If unrestrained it can corrupt government, cannibalize business, and deliver a host of social and economic ills that adversely affect not merely a single family or community but an entire region and state. In 1968, the people of Florida—in their newly enacted constitution—made clear that they did not want certain forms of gambling to expand absent the approval of all the people of Florida. They did not want a few people in a particular county or a few representatives in the legislature to authorize these gambling expansions. They wanted the people, all the people, to collectively have a voice in such an important decision.

For these reasons, Bob Graham requests that this Court affirm.

February 22, 2016

Respectfully submitted,

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I certify that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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