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**SC22-25**

# In the Supreme Court of Florida

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:
LIMITED AUTHORIZATION OF CASINO GAMING

## SPONSOR'S BRIEF
## IN RESPONSE TO ORDER TO SHOW CAUSE

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## INTRODUCTION

The Court has ordered Florida Voters in Charge ("FVIC"), the sponsor of Initiative Petition No. 21-16 ("Limited Authorization of Casino Gaming"), to show cause why this case should not be dismissed as moot in light of it "appearing that the initiative petition at issue in this case did not receive the number of signatures required for placement on the ballot." The case is not moot and this Court's jurisdiction persists.

First, this Court reviews initiative petitions pursuant to its mandatory advisory-opinion jurisdiction, which by its very nature is not subject to the justiciability rules, like mootness, that govern adversary proceedings. Thus, the question is whether the Court's advisory-opinion jurisdiction is stripped by a petition's failure to garner enough signatures for ballot placement in a given year. The answer is no. This Court's mandatory jurisdiction in initiative-review cases is triggered by a signature threshold entirely independent of the signature threshold for ballot placement in a given year. *Compare* Art. IV, § 10, Fla. Const., Art. V, § 3(b)(10), *and* § 15.21(3), Fla. Stat., *with* Art. XI, § 3, Fla. Const., *and* § 100.371(1), Fla. Stat. Having met the threshold to trigger jurisdiction, and with the initiative petition

still active, the sponsor is "entitle[d] to an advisory opinion from this Court." *Advisory Op. to the Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 467 (Fla. 1995). Indeed, the very purpose of amending the Constitution in 1986 to add advisory-opinion jurisdiction for initiatives was "'to allow the Court to rule on the validity of an initiative petition *before* the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot.'" *Roberts v. Brown*, 43 So. 3d 673, 678 (Fla. 2010) (quoting *Armstrong v. Harris*, 773 So. 2d 7, 13 n.18 (Fla. 2000)). Accordingly, this Court has exercised jurisdiction in these same circumstances in the past. *See Casino Authorization*, 656 So. 2d at 467 (after Attorney General petitioned for review in 1994, "it became apparent" that the sponsor "could not provide a sufficient number of verified signatures to meet the constitutional requirements in time for the 1994 election," but "enough signatures were collected to entitle [the sponsor] to an advisory opinion from this Court"). Indeed, just last year, the Court issued an advisory opinion after the same mootness issue had been raised by the Florida Senate and fully briefed by the Attorney General and the petition sponsor. The Attorney General maintained that her

request for an advisory opinion remained pending and that the Court had continuing jurisdiction, and this Court agreed. *See Advisory Op. to the Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1177 (Fla. 2021) ("We have jurisdiction.").

Second, even if—contrary to plain text and precedent—this Court were now to conclude that jurisdiction turns on the signature requirement for ballot placement in a specific year, the signature count for 2022 is in dispute and subject to pending litigation. If FVIC prevails in that litigation, the official signature count may show that the petition has qualified for the 2022 ballot. Accordingly, the case is not moot.

Finally, because the initiative may still qualify for the ballot *this* year, FVIC respectfully requests that the Court reestablish a briefing schedule (detailed below) that will permit this Court to render its advisory opinion by April 1, 2022. *See* Art. IV, § 10, Fla. Const.

## ARGUMENT

Mootness is generally understood as a doctrine that prevents courts from issuing "what amounts to an advisory opinion." *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla. 2d DCA 2005).

*See also* Erwin Chemerinsky, Federal Jurisdiction § 2.2, at 54 (6th ed. 2012) ("[J]usticiability doctrines exist largely to ensure that federal courts will not issue advisory opinions."). As an initial matter, then, it is not clear that traditional concepts of mootness apply to this Court's advisory-opinion jurisdiction. After all, this Court's role in providing advisory opinions is to *advise*, not necessarily to resolve a dispute among parties. Thus, "a real controversy as to the issue or issues presented" is required "***except*** in those rare instances in which advisory opinions are authorized in the Constitution." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720–21 (Fla. 1994) (emphasis added). *See also Roberts v. Brown*, 43 So. 3d 673, 680 (Fla. 2010) (noting difference between advisory opinions and declaratory-judgment actions); *Ray v. Mortham*, 742 So. 2d 1276, 1284–85 (Fla. 1999) (noting that advisory opinions do not have the same stare decisis effect as "binding precedent"); *In re Advisory Op. to the Governor*, 509 So. 2d 292, 301 (Fla. 1987) (noting differences between the Court's advisory opinions and adversary proceedings); *Brady v. P3 Grp. (LLC)*, 98 So. 3d 1206, 1209 n.9 (Fla. 3d DCA 2012) (noting that advisory-opinion jurisdiction does not operate pursuant to normal justiciability rules). Accordingly, the question here is

probably best framed as follows: whether this Court, once it has obtained the advisory jurisdiction requiring it to opine on the validity of an initiative petition, retains that jurisdiction if the petition remains active but has not met the signature threshold for ballot placement in a given year.

Regardless of the terminology, the relevant constitutional and statutory provisions make clear that, once the requisite signature threshold is met, the Court "shall … render an advisory opinion." Art. V, § 3(b)(10). Petition No. 21-16 remains active, and even if it has not qualified for the 2022 ballot (a disputed proposition), it may qualify for a later ballot. Thus, even under a traditional view of mootness, the issue has not "been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). This Court's advisory opinion will determine whether Petition No. 21-16 can appear on ***a ballot*** if it eventually meets the separate signature threshold for ballot position. And that question is the same one this Court has answered in many initiative-review cases, long before ballot placement was assured.

## I. THE CASE IS NOT MOOT BECAUSE THE TRIGGER FOR THIS COURT'S MANDATORY DUTY TO REVIEW INITIATIVE PETITIONS IS DISTINCT FROM THE TRIGGER FOR BALLOT PLACEMENT IN A GIVEN YEAR.

### A. The Initiative-Petition Process Has Three Independent Phases, Which Can Unfold Across Election Cycles.

The Florida Constitution reserves to the voters the right of amendment through initiative petition. Art. XI, § 3, Fla. Const.[1] "It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such district respectively and in the state as a whole in the last preceding election in which presidential electors were chosen." *Id.* The initiative process, governed by the Constitution and various implementing statutes and rules, proceeds in three distinct phases, each with its own requirements.

First, to begin circulating a petition, the sponsor must meet certain basic requirements. The sponsor must "submit the text of the proposed amendment to the Secretary of State" and obtain the

[1] For authorization of casino gaming, the initiative process is the *exclusive* lawmaking process, as the voters have reserved that decision entirely to their control. *See* Art. X, § 30, Fla. Const.

Secretary's approval of "the form on which the signatures shall be affixed." § 100.371(2), Fla. Stat. That form must include the ballot title and summary. §§ 15.21(2), 101.161(2), Fla. Stat.; Fla. Admin. Code § 1S-2009(2)(b)2.a.–b. If, after review "solely for sufficiency of the form," the Secretary approves, then the Secretary assigns a serial number to the petition. Fla. Admin. Code §§ 1S-2.009(2)(b)–(c). So long as there are no "material change[s]" to the petition form, that serial-numbered petition may be used to gather signatures for as long as the sponsor seeks placement on a ballot. *Id.* § 1S-2.009(3). In other words, a serial-numbered petition can still be circulated for signatures even if it does not qualify for the ballot in the first election after which it is approved by the Secretary.[2]

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[2] For example, in 2019, an initiative sponsor submitted to the Secretary of State a petition titled "Adult Use of Marijuana." On August 23, 2019, the Secretary assigned the petition serial number 19-10. *See* https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_1910_EN.pdf. In January 2020, the sponsor announced that it would no longer seek ballot placement in 2020, but thereafter the sponsor continued collecting signatures on the same serial-numbered petition in an effort to place the initiative on the 2022 ballot. *See* Florida Senate's Mot. to Dismiss at ¶ 5 & n.1, *Advisory Op. to the Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176 (Fla. 2021) (No. SC-2116) (motion filed Jan. 13, 2020).

Second, once the petition obtains a requisite number of verified signatures—equal to two percent of the votes cast in the last presidential election—it qualifies for mandatory review by this Court. Specifically, once the petition obtains verified signatures "equal to 25 percent of the number of electors statewide required by s. 3, Art. XI of the State Constitution in one-half of the congressional districts of the state," then the Secretary of State must "immediately submit [the] initiative petition to the Attorney General." § 15.21(3), Fla. Stat. The Attorney General, in turn, must, "as directed by general law, request the opinion of [this Court] as to the validity of [the] initiative petition." Art. IV, § 10, Fla. Const. As more specifically "directed by general law," the Attorney General must, within thirty days after receipt of the initiative, "request[] an advisory opinion regarding":

> the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution, whether the proposed amendment is facially invalid under the United States Constitution, and the compliance of the proposed ballot title and substance with s. 101.161.

§ 16.061(1), Fla. Stat. Once "requested by the attorney general pursuant to the provisions of Section 10 of Article IV," this Court "***[s]hall*** … render an advisory opinion." Art. V, § 3(b)(10), Fla. Const. (emphasis added). Once triggered, this Court's initiative-review

jurisdiction is mandatory. *See Wheaton v. Wheaton*, 261 So. 3d 1236, 1243 (Fla. 2019) ("We have previously held that '[t]he word 'shall' is mandatory in nature.'") (quoting *Sanders v. City of Orlando*, 997 So. 2d 1089, 1095 (Fla. 2008)). The Court must render its opinion "no later than April 1 of the year in which the initiative is to be submitted to the voters." Art. IV, § 10, Fla. Const.

If this Court opines that an initiative satisfies constitutional and statutory requirements, then the initiative may appear on a ballot. *See, e.g.*, *Advisory Op. to the Att'y Gen. re Voter Control of Gambling*, 215 So. 3d 1209, 1218 (Fla. 2017) ("we approve the Voter Control of Gambling in Florida Initiative for placement on the ballot"). If not, then the initiative may not appear on a ballot, even if it ultimately obtains enough signatures. *See, e.g.*, *Advisory Op. to the Att'y Gen. re Prohibits Possession of Defined Assault Weapons*, 296 So. 3d 376, 382 (Fla. 2020) ("this Initiative cannot be placed on the ballot").

Third, a ***separate*** process—dictated by distinct constitutional provisions and statutes—governs the specific ballot for which an initiative qualifies. An initiative petition qualifies for the ballot in a particular election year if, by February 1 of that year, the requisite number of signatures are obtained—an amount far greater than is

necessary to trigger this Court's review. *See* Art. XI, §§ 3, 5, Fla. Const.; § 100.371(1), Fla. Stat. If the petition does not garner the requisite number of signatures for a particular ballot, then, as noted above, the initiative sponsor may continue collecting signatures on that very same serial-numbered petition to qualify for a future ballot.

* * *

In sum, this Court's mandatory review of an initiative petition is governed by Article IV, Section 10, and Article V, Section 3(b)(10), of the Florida Constitution, as well as by sections 15.21 and 16.061, Florida Statutes. By contrast, whether a proposed amendment qualifies for ballot placement in a particular election year is governed by Article XI of the Constitution and section 100.371, Florida Statutes. Indeed, the plain text of section 100.371's timing requirement makes clear that signatures are valid only until February 1 of an even-numbered year "for the purpose of the amendment qualifying on the ballot" that same year. § 100.371(11)(a), Fla. Stat. No such timing requirement limits the validity of signatures for purposes of invoking the Court's jurisdiction. The two phases—judicial review and ballot qualification—thus operate on separate tracks and are governed by

independent provisions that impose separate signature requirements and resultant rights and duties. This Court's initiative-review jurisdiction arises if a distinct signature threshold is met. And once that threshold is met, no constitutional or statutory provision states or even hints that the Court is thereafter divested of jurisdiction in the event of a failure meet the *separate* signature threshold for placement on a particular ballot.

Petition No. 21-16 met the signature threshold to trigger this Court's mandatory jurisdiction. Thus, so long as that same serial-numbered petition is still active—as this one is[3]—this case is not moot and this Court "shall … render an advisory opinion." Art. V, § 3(b)(10), Fla. Const.[4]

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[3] *See* App. at 1 (Secretary of State's website showing FVIC's petition is still "active" and signatures can be collected and submitted). FVIC has not informed the Secretary of State of any "material change" to Petition No. 21-16. Fla. Admin. Code § 1S-2.009(3). Nor has FVIC informed the Secretary of State that it will disband. *See* § 106.03(5), Fla. Stat. To the contrary, FVIC remains committed to placing Petition No. 21-16 on the ballot, assuming this Court opines (as it should) that the initiative is substantively valid.

[4] The Attorney General's request for an advisory opinion in this case provides: "The date of the election during which the sponsor is planning to submit the proposed amendment to the voters: November 8, 2022, *provided the sponsor successfully obtains the requisite number of valid signatures by February 1, 2022*." Letter from Hon. Ashley Moody, Attorney General of Florida, to Chief Justice Canady

### B. This Court's Uniform Precedent Demonstrates the Court's Mandatory Jurisdiction Persists and an Initiative-Review Case is Not Mooted by a Petition's Failure to Meet the Independent Signature Threshold for Ballot Qualification in a Particular Year.

This Court's precedent confirms the plain-text reading of the Constitution and Florida Statutes described above. The Court has confronted this very situation before—i.e., the Court's mandatory initiative-review jurisdiction was triggered and the initiative failed to meet the signature threshold for ballot qualification in a given year, prior to the Court rendering its opinion. The Court has *not* found such cases to be moot and has instead rendered its advisory opinion when this situation has arisen.

For example, on "July 25, 1994, the Attorney General … petitioned this Court for an advisory opinion concerning the validity of an initiative petition" that was "scheduled to appear on the 1994 general election ballot." *Casino Authorization*, 656 So. 2d at 467. "Thereafter, it became apparent that [the petition sponsor] could not

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and Justices at 6 (Jan. 7, 2022) (emphasis added). If November 2022 were the only election contemplated for this proposed amendment, there would be no purpose for the second clause, which reserves the option of placement on a subsequent ballot in the event FVIC is unable to gather sufficient signatures to appear on the 2022 ballot.

provide a sufficient number of verified signatures to meet the constitutional requirements in time for the 1994 election." *Id.* This Court found, "[h]owever, enough signatures were collected ***to entitle [the sponsor]*** to an advisory opinion from this Court under the authority of sections 15.21 and 16.061, Florida Statutes." *Id.* (emphasis added).[5] Accordingly, this Court rendered its opinion. *Casino Authorization* thus conclusively answers the mootness question the Court has posed in its order here: once "enough signatures [are] collected" to trigger review, the sponsor is "entitle[d] … to an advisory opinion" because the *separate* statutory threshold governing this Court's review has been met.

More recently—just last year—the Court again confronted this same situation. "On December 19, 2019, the Attorney General petitioned the Court for an advisory opinion regarding the validity of

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[5] In 1994, section 15.21—as it does today—included a separate signature threshold triggering this Court's review, but it was lower than the one in the current version of the statute. *See* § 15.21, Fla. Stat. (1994) (requiring "forms signed and dated equal to 10 percent of the number of electors statewide and at least in one-fourth of the congressional districts required by s. 3, Art. XI of the State Constitution"). Section 16.061(1) also had the same operative language as it does today, save for the requirement to review the proposed amendment for compliance with the U.S. Constitution. *See* § 16.061(1), Fla. Stat. (1994).

an initiative petition." *Adult Use*, 315 So. 3d at 1178. On January 13, 2020, the Florida Senate alerted this Court that "the initiative is not going to meet the criteria for placement on the 2020 ballot," and moved to dismiss on mootness grounds. Florida Senate's Mot. to Dismiss at 1–2, *Advisory Op. to the Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176 (Fla. 2021) (No. SC19-2116) (motion filed Jan. 13, 2020). The Attorney General and the initiative sponsor filed response briefs explaining that the case was not moot and that the Court retained jurisdiction. *See* Att'y Gen.'s Supp. Br. re Jurisdiction, *Adult Use*, 315 So. 3d 1176 (brief filed Mar. 20, 2020); Make It Legal, Florida's Resp. in Opp. to Mot. to Dismiss, *Adult Use*, 315 So. 3d 1176 (brief filed Jan. 28, 2020). The Attorney General explained, at length, the independent constitutional and statutory schemes that govern (1) this Court's mandatory review, on the one hand, and (2) signature qualification for the ballot, on the other hand. The Attorney General concluded that once this Court's jurisdiction is triggered, failure to qualify for the ballot in a given cycle does *not* moot the case or otherwise divest this Court of its jurisdiction and obligation to render an advisory opinion regarding the initiative's validity.

After receiving this extensive briefing on mootness, this Court did ***not*** dismiss the case for want of jurisdiction, but instead scheduled oral argument and heard that argument on May 6, 2020. *Adult Use*, 315 So. 3d at 1178. The sponsor continued collecting signatures to qualify for the 2022 ballot but, as of April 2021, still had not collected enough signatures to qualify.[6] The Court nonetheless rendered its advisory opinion. If *Adult Use* was moot as of January 2020, then neither the oral argument nor this Court's subsequent opinion would have been a proper exercise of jurisdiction. But this Court was quite clear in *Adult Use*: **"We have jurisdiction."** *Id.* at 1177 (emphasis added). Although the subject matter of the petitions differs, there is no difference between the posture of the *Adult Use* case and this case.[7] Thus, the same result

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[6] *See* Florida Department of State, "Adult Use of Marijuana, 19-11," https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74455&seqnum=2 (showing that, as of April 2021, petition had 556,049 signatures of 891,589 needed for 2022 ballot placement).

[7] More precisely, there is no procedural difference if the assumption in the Court's Order to Show Cause is accepted ("that the initiative petition at issue did not receive the number of signatures required for placement on the ballot"). As explained below, the signature count for 2022 is disputed and subject to ongoing litigation.

must obtain here. *See Thompson v. DeSantis*, 301 So. 3d 180, 184 (Fla. 2020) ("We will not lightly conclude that the precedents of this Court are clearly erroneous.").

### C. Departing from this Court's Precedent Would Call into Question the Review Process Employed Since 1988.

A case is moot if the issue has "been so fully resolved that a judicial determination can have no actual effect." *Godwin*, 593 So. 2d at 212. That is not the case here because Petition No. 21-16 remains active—it may appear on a ballot beyond 2022—and thus its substantive validity still matters and can have an actual effect. The advisory opinion will determine whether the initiative petition at issue can appear on ***a*** ballot if it eventually meets the signature threshold for ballot position. And ***that*** question is one this Court has answered in many initiative-review cases, long before ballot placement was assured.[8]

In other words, if the Court loses jurisdiction to assess the validity an active petition because it has failed to meet the signature

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[8] *See, e.g., Advisory Op. to Att'y Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888 (Fla. July 13, 2000) (never qualified for ballot); *In re Advisory Op. to Att'y Gen. re Authorizes Miami-Dade and Broward Cnty. Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So.

threshold for the ballot in a given year, then it is not clear how this Court has ever had jurisdiction to assess a petition's validity *before* it has met that same threshold. "[R]ipeness,' and 'mootness,'" after all, "are but … manifestations … of the [same] primary conception." *Poe v. Ullman*, 367 U.S. 497, 503–04 (1961). *See also Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 374 (W.D. Pa. 2020) (ripeness "stems from the same principle" as mootness "but is stated in the inverse"). Ripeness restrains the judiciary from

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2d 522 (Fla. May 13, 2004) (qualified for ballot on July 23, 2004; election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Pub. Purpose*, 880 So. 2d 630 (Fla. July 15, 2004) (never qualified for ballot); *Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646 (Fla. July 15, 2004) (never qualified for ballot); *Advisory Op. to Att'y Gen. re Repeal of High Speed Rail Amendment*, 880 So. 2d 624 (Fla. July 15, 2004) (qualified for ballot on July 29, 2004; general election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Pub. Protection from Repeated Med. Malpractice*, 880 So. 2d 667 (Fla. July 15, 2004) (qualified for ballot on July 29, 2004; election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient*, 880 So. 2d 659 (Fla. July 15, 2004) (never qualified for ballot); *In re Advisory Op. to the Att'y Gen. re Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d 675 (Fla. July 15, 2004) (qualified for ballot on July 19, 2004; election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Referenda Required for Adoption and Amendment of Local Gov't Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. June 22, 2006) (qualified for ballot on June 22, 2009; election held Nov. 2, 2010).

adjudicating a case if it "involve[s] contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580–81 (1985). Accordingly, if the failure to obtain the requisite number of signatures for ballot position in a given year renders moot the review of an active petition, it would be equally true that such a case is not ripe until that threshold is met. And that conclusion would not only contravene the plain text of section 15.21(3) but also would call into question this Court's unbroken practice of issuing petition-review opinions before the petitions qualified for the ballot. It "would require much more clarity from the constitutional framers to justify an interpretation that is not compelled by the text and that produces such anomalous results." *Thompson*, 301 So. 3d at 186.

The reason ripeness was not an issue in these many cases—just like its mirror image of mootness is not an issue here—is that this Court's jurisdiction is governed by a distinct signature threshold that, once met, "entitle[s]" a sponsor of an active petition to an advisory opinion. *Casino Authorization*, 656 So. 2d at 467. Any other conclusion would render unworkable the constitutional and

statutory scheme and would render incomprehensible the history of initiative cases in this Court since 1988.

### D. The Purpose of the 1986 Constitutional Amendments Establishing this Court's Advisory-Opinion Jurisdiction Was to Separate this Court's Review from Ballot Qualification.

There is a reason why this Court's initiative-petition review is separate from, and can long precede, ballot qualification. In 1984, this Court struck from the ballot two initiatives that had already qualified. *See Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984). Justice Overton, concurring, urged—as he had in the past—the adoption of "'a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal.'" *Evans*, 457 So. 2d at 1356 (Overton, J., concurring) (quoting *Askew v. Firestone*, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J., specially concurring)). The result was the 1986 amendment of the Constitution to create this Court's advisory-opinion jurisdiction for initiatives through the adoption of Art. IV, § 10, and Art. V, § 3(b)(10). Thus, as this Court has since recognized, the "purpose" of the 1986 amendments to the Constitution "creat[ing] the advisory opinion review process for

citizen initiatives" was "'to allow the Court to rule on the validity of an initiative petition *before* the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot.'" *Brown*, 43 So. 3d at 679 (quoting *Armstrong*, 773 So. 2d at 13 n.18 (citing William A. Buzzett & Deborah K. Kearney, *Commentary*, 1986 House Joint Resolution 71, 26 Fla. Stat. Ann., Art. IV, § 10, Fla. Const. (West Supp. 2000))).[9] *See also id.* at 683 ("[T]he purpose for the advisory opinion amendments was to allow citizen-initiative sponsors time to correct, if necessary, an invalid proposal in time for the proposed amendment to appear on the ballot."). Confirming this constitutional intent, the Legislature in 1987 enacted sections 15.21 and 16.061, triggering this Court's

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[9] The commentary states Article IV, Section 10 to the Florida Constitution:

> was prompted by two 1984 decisions of th[is] … Court[,] which struck initiatives from the ballot after those initiatives had secured the requisite signatures for ballot placement. It was felt that fairness dictated that ballot sponsors be able to obtain an opinion with regard to the technical requirements prior to going to the great effort and expense of collecting all of the necessary signatures for ballot placement.

*Id.*

mandatory review at a far lower signature threshold than exists for ballot placement.

In short, the constitutional and statutory scheme recognizes that gathering ample support for ballot placement requires a major investment of time and money. In the interim—under Article IV, Section 10 and its implementing statutes—initiative sponsors are entitled to learn what, if anything, is defective about the title, summary, and text of their proposed amendment.

Moreover, the Court's advisory opinion is especially important for initiatives that—like this one—seek to authorize casino gaming, because citizen initiative is the "exclusive" lawmaking power in this sphere. Art. X, § 30, Fla. Const. If a citizen initiative seeking to authorize casino gaming is defective, the electorate—in order to exercise its exclusive lawmaking power—must receive prompt notice of the deficiency.

### E. The 2020 Amendments to Section 100.371 Do Not Affect the Jurisdictional Analysis.

While *Adult Use* was pending in 2021, the Legislature enacted Ch. 2020-15, Laws of Florida, which amended section 100.371 of the Florida Statutes to state that a petition signature "shall be valid until

the next February 1 occurring in an even-numbered election year for the purpose of the amendment appearing on the ballot for the general election occurring in that same year." § 100.371(11)(a), Fla. Stat. (2021). Previously, the statute had stated each signature "shall be valid for a period of 2 years." § 100.317(11)(a), Fla. Stat. (2019). This new provision does not change the jurisdictional analysis.

First, by its express terms, the amendment provides that signatures expire "***for the purpose of the amendment appearing on the ballot***" that year, not for the purpose of this Court's review, which is separately governed by section 15.21. The Legislature also amended section 15.21 in that same bill, but only to increase the signature threshold triggering this Court's review. *See* Sec. 1, Ch. 2020-15, Laws of Fla. If the Legislature wanted to dictate—for the first time since 1988—that the signatures triggering this Court's review could expire and thus divest this Court of jurisdiction, it could have done so, especially in light of the contemporaneous change to section 100.371. The material difference in the two amendments is indicative of a difference in meaning. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning.").

Second, if the February 1 signature expiration moots a petition-review case, then mootness will be a problem *every* time this Court has not completed its review by February 1, even though the Constitution provides the Court until April 1. *See* Art. IV, § 10, Fla. Const. This Court avoids interpreting statutes in ways that conflict with the Florida Constitution. *See The Fla. Bar v. Sibley*, 995 So. 2d 346, 350 (Fla. 2008) ("To the extent possible, courts have a duty to construe a statute in such a way as to avoid conflict with the Constitution."). This is especially true for laws that regulate the "self-executing" and "fundamental" right to initiative petitions. *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566 (Fla. 1980); *see also Browning v. Fla. Hometown Democracy*, Inc., 29 So. 3d 1053, 1063 (Fla. 2010).

Third, even under the prior version of the statute, signatures expired after two years, § 100.371(11)(a), Fla. Stat. (2019), such that it was always possible some of the signatures necessary to trigger this Court's review expired while the case was pending. As the Attorney General pointed out in her brief in *Adult Use*, this Court has *never* thought that the signature-expiration provision of section

100.371 applies to the signature threshold in section 15.21. If that were true, then, under the prior version of section 100.371:

> The Court would [have] los[t] jurisdiction any time that, due to staleness, the number of valid signatures fell below the … threshold [specified in section 15.21]. By statute, a signature [wa]s "valid for a period of 2 years." § 100.371(11), Fla. Stat. [(2019)]. The Court would therefore [have] be[en] obliged to continually revisit the signature count to ensure jurisdiction was still supported by enough valid signatures. Put differently, [under the prior version of section 100.371(11)(a),] the Attorney General might properly request an advisory opinion only to see the Court be divested of jurisdiction the very next day were enough of the sponsor's signatures to become stale overnight.

Att'y Gen.'s Supp. Br. re Jurisdiction at 12, *Adult Use*, 315 So. 3d 1176 (brief filed Mar. 20, 2020).

Finally, in *Adult Use*, this Court ordered supplemental briefing to "address[] the implications, if any, of chapter 2020-15, Laws of Florida." Order at 1, *Adult Use*, 315 So. 3d 1176 (SC19-2116) (entered April 13, 2020). Following that briefing, this Court continued to exercise jurisdiction and rendered its opinion. If the 2020 amendments altered the jurisdictional analysis, this Court could not have concluded: "We have jurisdiction." *Adult Use*, 315 So. 3d at 1177.

## II. The Case Is Not Moot Because the Signature Count Is Disputed and Subject to Active Litigation.

As just explained, the signature count for ballot qualification in a given election cycle is irrelevant to this Court's jurisdiction and thus this case is not moot. If, however, the Court disagrees and decides to depart from precedent, the case is still not moot for an independent reason: namely, the signature count for *this* election cycle is not settled.

As of 5 p.m. on February 1, 2022, the Secretary of State reported that supervisors of elections had verified 814,211 signatures submitted by FVIC. Prior to that time, however, FVIC had submitted hundreds of thousands of additional signatures that had not been processed. FVIC contends that the failure to process and count these signatures was unlawful, and FVIC has brought a lawsuit seeking a court order requiring the processing of these signatures and the inclusion of verified signatures in the Secretary of State's count for this election cycle. *See Fla. Voters in Charge v. Lee*, No. 2022 CA 000168 (Fla. 2d Cir. Ct. Jan. 31, 2022) ("*FVIC v. Lee*") (App. at 3). Additionally, FVIC contends that tens of thousands of signatures have been rejected for lack of signature match without a notice-and-

cure process. *Id.* A remedy correcting for that unlawful practice would also likely result in ballot qualification this year.

An issue is moot only when "the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin*, 593 So. 2d at 212. That is not the case here. The signature count for the 2022 ballot has not been fully resolved. Instead, it is the subject of active litigation. If FVIC prevails in that litigation, then the petition may well qualify for the ballot and this Court's judicial determination of the substantive validity will have an actual effect this year.

## III. Because the Initiative May Still Qualify for the 2022 Ballot, FVIC Respectfully Requests that this Court Reestablish a Briefing Schedule and Render Its Advisory Opinion by April 1, 2022.

In 2020, the last time this Court exercised jurisdiction in a case with an initiative that had not obtained the signatures sufficient for ballot placement in the same cycle in which review was triggered, the Attorney General advised that—although the case was not moot—the Court no longer had to render its opinion by April 1, 2020. *See* Att'y Gen.'s Supp. Br. re Jurisdiction at 14, *Adult Use*, 315 So. 3d 1176. This case, however, is in a different posture. The *FVIC v. Lee* litigation

may result in a judicial order requiring the Secretary to count signatures that were submitted but not verified by February 1, 2022. If so, then Petition No. 21-16 will qualify for the 2022 ballot and this Court's obligation to render its opinion by April 1, 2022, will be triggered. Art. IV, §10, Fla. Const.

While it is possible that the judicial process in *FVIC v. Lee* may not be complete by April 1, FVIC respectfully requests that this Court nonetheless render its opinion by that date to ensure all constitutional requirements are met should FVIC prevail. To that end, FVIC respectfully requests that the Court reestablish a briefing schedule as follows:

- FVIC and any other interested party to submit answer briefs within seven days of the Court's order;
- opponents that filed initial briefs to submit reply briefs within seven days of the filing of the answer briefs;
- oral argument, if any, as soon as reasonably convenient thereafter.

## CONCLUSION

For the foregoing reasons, this initiative-review case is not moot and this Court should exercise its mandatory jurisdiction and render an advisory opinion as to the validity of Petition No. 21-16 ("Limited

Authorization of Casino Gaming"). FVIC respectfully requests that the Court do so by April 1, 2022.

Dated: February 14, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Response to Order to Show Cause has been served via *ePortal* to all addresses on the *ePortal* service list for this matter on February 14, 2022.

/s/ *Jesse Panuccio*
Jesse Panuccio

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Brief complies with the style requirements of Rule 9.045, Fla. R. App. P.

/s/ *Jesse Panuccio*
Jesse Panuccio