SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC05-1563

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: FLORIDA MARRIAGE PROTECTION AMENDMENT

BRIEF OF INTERESTED PARTIES RICHARD NOLAN and ROBERT PINGPANK, ROBERT SULLIVAN and JON DURRE, DEE GRAHAM and SIGNA QUANDT, RICHARD ROGERS and BILL MULLINS, TERESA ARDINES and MELISSA BRUCK, JUAN TALAVERA and JEFFREY RONCI, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES – AFL-CIO, THE ACLU OF FLORIDA, and EQUALITY FLORIDA

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes & Regulations

Other Sources

INTRODUCTION

At issue is the validity of an initiative petition seeking to amend the Florida Constitution to enact a new section to Article I that would read as follows:

> Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent therefor shall be valid or recognized.

The ballot title for the proposed amendment is "Florida Marriage Protection Amendment." The ballot summary states:

> This amendment protects marriage as the legal union of only one man and one woman as husband and wife and provides that no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.

Richard Nolan and Robert Pingpank, Robert Sullivan and Jon Durre, Dee Graham and Signa Quandt, Richard Rogers and Bill Mullins, Teresa Ardines and Melissa Bruck, Juan Talavera and Jeffrey Ronci, the American Federation of State, County, and Municipal Employees-AFL-CIO ("AFSCME"), the American Civil Liberties Union of Florida, and Equality Florida are "interested parties"[1] and submit this brief to challenge the validity of the proposed amendment as violative of both the single-subject rule (Fla. Const. Art. XI, § 3) and the requirement that

[1] Fla. Const., Art. IV, § 10 (the justices, in reviewing an initiative petition, shall "permit interested persons to be heard on the questions presented . . . .").

the ballot title and summary be written in "clear and unambiguous language" (Fla. Stat. § 101.161).

As elaborated below, both of these requirements are designed to ensure fairness to voters when they are called upon as citizens to make a critically important decision – whether to amend the constitution. The single-subject rule prevents the passage of unpopular measures by tacking them onto popular ones. And the demand for clear and unambiguous ballot titles and summaries protects voters from being misled or confused by vague language or political rhetoric and ensures that they are given the opportunity to cast an informed ballot.

As this brief explains, the Florida Marriage Protection Amendment embodies both types of mischief that these requirements were created to prevent. It combines two subjects – a ban on marriage for same-sex couples (which has majority support) and a prohibition against other forms of protection for committed lesbian and gay couples (which is opposed by a majority). And the ballot summary does not fairly inform voters of the impact of the amendment beyond marriage. It uses vague language that obscures the fact that certain protections for same-sex couples, such as civil unions, would be banned by the amendment. And it employs emotional, political advocacy language, telling voters that the amendment is about "protecting" marriage.

Through this scheme, proponents of the amendment are trying to make voters think that support for the amendment is simply a vote to maintain marriage as an institution for heterosexual couples only. Yet it would have far greater impact, barring other protections for lesbian and gay couples and their families. The amendment's language and its ballot title and summary keep this below the radar.

This is an extraordinary violation of both the single-subject and "clear and unambiguous" requirements. The Court has made it clear that these tactics are unfair to the voters and cannot be abided. The proposed amendment therefore should not appear on the ballot.

INTERESTED PARTIES

Richard Nolan and Robert Pingpank

Richard Nolan (a retired Episcopal priest and college professor) and Robert Pingpank (a retired math teacher) have been together in a committed relationship since they met in college in 1955. They just celebrated fifty years together. They are registered domestic partners in West Palm Beach, which means they have the right to hospital visitation should one of them become ill, the right to make medical decisions for the other should he become incapacitated, and when one of them passes away, the survivor will have the right to plan his funeral and burial. As

senior citizens, their need for these protections is far from abstract. Richard has already been hospitalized several times, including for a heart attack and major stomach surgery. Affidavit of Richard Nolan (Exhibit 1).

If the proposed amendment becomes part of the Florida Constitution, there is a risk Richard and Robert will lose this security that they have come to depend on. The proposed amendment bars marriage for lesbian and gay couples as well as recognition of legal unions that are treated as the "substantial equivalent" of marriage. While the proposed amendment does not identify which legal unions are the "substantial equivalent" of marriage, in other states with similar amendments, some government officials have taken the position that they bar the government from providing limited domestic partnership protections and even domestic partner health care benefits for government employees.[2]

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[2] The Michigan Attorney General took the position that Michigan's similarly worded constitutional amendment bars governments from providing domestic partner benefits to their employees. *See* Motion of Attorney General to Intervene as Party Defendant in *National Pride at Work, Inc. v. Granholm*, Circuit Court, County of Ingham, Michigan, Case No. 05-368-CZ, ¶¶ 4-5, 12 (Exhibit 2). The Michigan amendment provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union." Mich. Const., Art., 1 § 25. Similarly, when the mayor of Salt Lake City proposed a domestic partner registry, the state representative who sponsored Utah's similarly worded constitutional amendment took the position that such a registry was barred by the amendment. *See* Heather May, Domestic Partner Registry Proposed, Salt

(footnote continued …)

Robert Sullivan and Jon Durre

Robert Sullivan and Jon Durre live in Pensacola and have been together for 11 years. Jon has terminal prostate cancer. He has been fighting it since 2001 with weekly chemotherapy sessions that make him too weak and sick to work. Robert takes care of him and the couple lives on Robert's salary of about $30,000 a year. Virtually all of Jon's disability income is spent paying for health insurance ($650 per month) and prescription drugs ($500 per month) because Jon is not able to be covered on Robert's health insurance plan, which limits family coverage to spouses and children.

The financial burden on Jon and Robert also affects their extended family. Jon's elderly parents had been living with Jon and Robert for several years because they had limited means. However, because of the cost of Jon's medical insurance and medication, Jon and Robert could no longer afford to live in their house. They had to move into a smaller home and Jon's parents moved into an apartment,

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Lake Tribune, August 13, 2005 (copy attached as Exhibit 3). The Utah amendment provides that "[m]arriage consists only of the legal union between a man and a woman" and "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." Utah Const., Art., 1 § 29.

which Jon's 76 year old father, who is a retired minister, took a job at K-Mart to be able to afford. Affidavit of Jon Durre (Exhibit 4).

Pensacola does not have a domestic partner registry, and thus, Jon and Robert currently have no protected right to hospital visitation, medical decision-making, and funeral/burial decision-making. These are issues of serious concern to them given Jon's medical condition. *Id.*

If the proposed constitutional amendment is adopted, it would limit the government's ability to remedy these extraordinary difficulties endured by Jon and Robert because they are treated as legal strangers. For example, a civil union or domestic partnership statute such as those enacted in Vermont, Connecticut and California[3], which provide all or most of the rights and obligations of marriage for registered same-sex couples, would allow Jon to be covered on Robert's health insurance policy, and thus alleviate the unequal financial burden that this couple faces. It would also provide the couple with assurance that Robert will always be able to be with Jon and take care of him and make end-of-life decisions.

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[3] 15 Vt. Stat. Ann. tit. 15 § 1201 *et seq*. (2004); 2005 Conn. Pub. Acts 05-10, § 1 *et seq.*; Cal. Fam. Code § 297 *et seq*. (West 2004).

Dee Graham and Signa Quandt

Dee Graham and Signa Quandt live in St. Petersburg and have lived together in a committed relationship for the past 28 years. They have raised 3 children together, who are now all young adults, and have a 14 month old grandson who they take care of during the daytime while his mother attends college. Affidavit of Signa Quandt (Exhibit 5).

Dee works in the field of journalism. She is also a minister and works part-time in church ministry. Signa, a former pro golfer, was diagnosed with an immune deficiency disease in 1993. This disease has caused her to suffer from a variety of serious health problems including pulmonary fibrosis, a blood disorder, and diabetes, and her doctors have advised her that she could succumb to the disease at any time. Her illnesses have left her significantly disabled and she requires an oxygen tank to breath and the assistance of a service dog. *Id.*

Throughout Signa's long illness, Dee has taken care of her both physically and financially. St. Petersburg does not have a domestic partnership registry, thus, Dee and Signa have no protected right for Dee to be with Signa when she is in the hospital, or for Dee to make medical decisions when Signa is incapacitated. There have been times that Dee had difficulty getting in to see Signa during hospitalizations. Last year, when Signa's condition took a frightening downturn

and the doctors at the hospital were questioning her "do not resuscitate" request, they turned to Signa's daughter, who was 19 at the time and overwhelmed by the responsibility of such a decision, even though Signa had papers designating Dee as her medical surrogate. *Id.*

As Signa's condition deteriorates, she and Dee worry that Dee won't be able to be by her side in the hospital or make decisions for her when she is unable to do so. If the proposed constitutional amendment is adopted, it would limit the government's ability to provide the protections that Signa and Dee and other same-sex couples desperately need. *Id.*

Richard Rogers and Bill Mullins

Richard Rogers and Bill Mullins live in Ft. Lauderdale and have lived together in a committed relationship for 42 years. Both are Army veterans. Bill worked for the Southern Pacific Railroad for 32 years, which frequently transferred him to different cities. Richard sacrificed developing his own career to move around with Bill. As a result, Richard does not receive very much from Social Security. Bill receives enough from his railroad retirement for the couple to live on. But if Bill should die before Richard, Richard will face serious financial difficulty because unlike a surviving spouse, he will not be entitled to his partner's railroad retirement income. Affidavit of Richard Rogers (Exhibit 6).

Richard and Bill are registered domestic partners in Broward County. When Bill had to be hospitalized for back pain, Richard had to show their domestic partnership registration in order to find out about his condition. They depend on such protections guaranteed by their domestic partnership registry, especially now that they are getting older and facing additional health issues. *Id.*

If the proposed amendment is adopted, the protections afforded Richard and Bill under the domestic partner registry could be at risk, and it would limit lawmakers' ability to remedy the financial vulnerability that surviving lesbian and gay partners experience because their relationships are not legally recognized.

Teresa Ardines and Melissa Bruck

Teresa Ardines and Melissa Bruck live in Miami and have been in a committed relationship for ten years. After 24 years with the Miami Police Department, Teresa retired and eventually took a job with another governmental agency. Melissa is now a stay-at-home mom looking after the couple's three-year-old twins. The lack of recognition for their relationship has meant that Teresa cannot provide quality health care for Melissa and their boys. While Teresa has good health insurance coverage as a governmental employee, Melissa and the boys had to rely on Medicaid. Teresa's health care plan does not cover employees' domestic partners, and the state does not recognize the twins as Teresa's children,

making it impossible for Teresa to provide coverage for them as well. Teresa is also eligible to receive a pension because of her long service with the police department, but because her relationship with Melissa is not recognized in any form by the state, neither Melissa nor the twins would receive any portion of that benefit should Teresa die. Affidavit of Teresa Ardines (Exhibit 19).

Juan Talavera and Jeffrey Ronci

Juan and Jeffrey live in Miami. Juan, who is 37, is a case manager at Jackson Memorial Hospital in the mental health department. Jeffrey, 44, is the Director of Marketing and Public Relations for the Miami-Dade County Public Schools, where he's worked for 22 years. Affidavit of Juan Talavera (Exhibit 7).

Juan and Jeffrey have been together for over five years and hope to start a family together. They want their family to have the protections other families count on. And they worry about the ways couples whose relationships are not legally recognized are vulnerable during times of crisis and when one partner dies. They have signed legal documents to protect their relationship as much as possible, including a living will and power of attorney. But those documents cannot provide most of the protections of marriage, civil union or domestic partnership. One specific concern they have involves their pension benefits. Jeffrey has devoted his entire career to the Miami-Dade County Public Schools, and Juan has worked for

years for a public hospital, which entitles each of them to a pension when they retire. Those pensions will provide their only source of income in their old-age. But because their relationship is not legally recognized, Jeffrey will not be able to collect any portion of Juan's pension benefits if Juan dies first, and Juan will not be able to collect any portion of Jeffrey's pension benefits if Jeffrey dies first. *Id.*

Juan and Jeffery believe that the government will eventually come to see how unfair it is for same-sex couples to be denied the many protections heterosexual couples depend on. But if the proposed constitutional amendment is enacted, the government will be barred from providing the full range of protections for committed lesbian and gay couples. *Id.*

American Federation of State, County & Municipal Employees-AFL-CIO

The American Federation of State, County & Municipal Employees-AFL-CIO ("AFSCME") is a union of state, county and municipal workers across the country. Its membership includes lesbians and gay men, as well as unmarried heterosexual partners, who are currently receiving a range of domestic partner benefits from their government employers such as health insurance for their partners, family leave to take care of a sick partner, and bereavement leave if their partner passes away. AFSCME is an interested party in this case because its Florida members who receive domestic partner benefits depend and rely on having

those benefits, and if the proposed constitutional amendment is enacted, those benefits will be at risk.

The American Civil Liberties Union of Florida

The American Civil Liberties Union of Florida is a statewide organization with 16 chapters and 28,000 members and supporters. Its membership includes lesbian and gay Floridians who would be denied important protections for their relationships if the amendment becomes part of the Florida Constitution.

Equality Florida

Equality Florida is a statewide civil rights organization working to end discrimination based on sexual orientation and gender identity. It represents the interests of lesbian and gay Floridians who would be denied important protections for their relationships if the amendment becomes part of the Florida Constitution.

ARGUMENT

I. The Proposed Amendment Violates the Single-Subject Rule

Art. XI, § 3 of the Florida Constitution provides:

> [T]he power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment, except for those limiting the power of government to raise revenue, *shall embrace but one subject and matter directly connected therewith*.

(Emphasis added).

The Florida Supreme Court requires "strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions." *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984). "This requirement is a rule of restraint that protects against unbridled cataclysmic changes in Florida's organic law." *Advisory Op. to the Att'y Gen. Re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1307 (Fla. 1997). "The single-subject limitation exists because the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing amendments." *Advisory Op. to the Att'y Gen. re Amendment to Bar Government From Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 891 (2001); *see also Fine*, 448 So. 2d at 988.

A primary objective of the single-subject rule is to prevent "logrolling." *Advisory Op. to the Att'y Gen.- Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993). Logrolling occurs when "separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." *In re Advisory Op. to Att'y Gen.- Save Our Everglades*, 636 So. 2d 1336,

1339 (Fla. 1994). The single-subject rule protects voters from "having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." *Fine*, 448 So. 2d at 988; *Limited Marine Net Fishing*, 620 So. 2d at 999 ("The purpose of the single-subject restriction is to prevent the proposal of an amendment which contains two unrelated provisions, one which electors might wish to support and one which they might disfavor."). This rule "prevent[s] voters from being trapped in such a predicament." *Advisory Op. to the Att'y Gen.- Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994).

For example, in *Save Our Everglades*, 636 So. 2d 1336, the Court invalidated a proposed amendment to create a trust funded by the sugar industry to restore the Everglades. The Court held that the initiative covered two subjects: restoring the Everglades, which was "politically fashionable"; and compelling the sugar industry to fund it, which was "more problematic." *Id.*, at 1341. "[V]oters would be compelled to choose all or nothing." *Id.* Similarly, in *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019, the Court invalidated a proposed amendment to bar the state government from enacting any laws against discrimination that offer protection for characteristics other than race, color,

religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. The Court reasoned:

> [A] voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation.

Id.

The proposed Florida Marriage Protection Amendment violates the single-subject rule because it rolls two separate subjects into a single amendment. First, it defines marriage as being limited to different-sex couples. Second, it addresses the validity of other forms of legal recognition of same-sex (and different-sex) relationships, providing that "no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."[4]

People have diverse views about what sort of legal recognition ought to be afforded to the committed relationships of same-sex couples. Some people support

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[4] Although it is not clear just how far this prohibition extends because the proposed amendment does not say what it means to be "the substantial equivalent" of marriage (*see* Point II, below), what is clear is that it goes beyond marriage and bars legal unions such as civil unions, which provide all or most of the benefits and obligations of marriage under a different name, and potentially other forms of legal recognition for same-sex relationships.

the right to marry for lesbian and gay couples. Some oppose any government recognition of same-sex relationships no matter how limited. And many people fall in between, opposing marriage for same-sex couples but favoring civil unions or some other form of legal protection for committed same-sex relationships. This includes our president, who has publicly stated his opposition to marriage for same-sex couples but has also stated his support for state-created civil unions for lesbian and gay couples. *See* Elisabeth Bumiller, Same-Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage, New York Times, February 25, 2004, at A1; Elisabeth Bumiller, The 2004 Campaign: Same-Sex Marriage; Bush Says His Party is Wrong to Oppose Gay Civil Unions, New York Times, October 26, 2004, at A21 (Exhibit 8).

Polls consistently show the disparate views people hold on marriage versus civil unions or other forms of relationship recognition for lesbian and gay couples, with many sharing the President's view, opposing the former but supporting the latter. *See, e.g.*:

> St. Petersburg Times poll conducted in March 3-4, 2004: Of the 800 Florida adults surveyed, 65% opposed marriage for gay and lesbian couples but a majority- 53% - supported civil unions. *See* Tamara Lush, Floridians Oppose Gay Marriage Series: St. Petersburg Times Poll, St. Petersburg Times, March 8, 2004, at A1 (Exhibit 9).

Tampa Tribune and WFLA Television poll conducted April 7-8 and 12, 2004: Of the 625 likely voters in Hillsborough, Pinellas, Pasco and Polk Counties, 59% opposed "legalizing gay marriage" but a majority - 57% - supported "legalizing civil unions which would grant certain legal rights and responsibilities to gay couples but not be recognized the same as a legal marriage." *See* William March, On Major Issues, Tampa Area Voters Sharply Disagree; Division in Florida Mirrors Trend in U.S., Tampa Tribune, April 18, 2004, at 1 (Exhibit 10).

UNH Survey Center poll conducted May 4-9, 2005: Of 760 U.S. adults surveyed, a majority disapproved of same-sex couples being allowed to marry but more people supported than opposed civil unions for same-sex couples (46% vs. 41%). University of New Hampshire Survey Center, *The Boston Globe Poll* (May 4-9, 2005), p. 5, available at http://www.unh.edu/survey-center/bg505.pdf (Exhibit 11).

ABC News/Washington Post poll conducted April 21-24, 2005: Of 1082 U.S. adults surveyed, while only 27% said same-sex couples should be allowed to legally marry, 29% said same-sex couples should be allowed to legally form civil unions but not marry. Thus, 56% supported some form of relationship recognition for same-sex couples. Only 40% said there should be no legal recognition for lesbian and gay couples. *ABC News/Washington Post Poll* (April 21-24, 2005), *available at* http://www.pollingreport.com/civil (Exhibit 12).

Gallup poll conducted November 19-21, 2004: Of 1000 adults surveyed nationwide, while only 21% supported marriage for same-sex couples, 32% favored civil unions but not marriage for same-sex couples. Thus, 53% supported some form of relationship recognition for same sex couples. Gallup Organization, *November Wave 1 Questionnaire Profile*, *Question qn32* (November 19-21, 2004), *available at* http://brain.gallup.com/documents/questionnaire.aspx?STUDY=P041044 (Exhibit 13).

> Gallup poll conducted May 2-4, 2004: Of 1000 adults nationwide, 59% opined that marriages between homosexuals should not be recognized as valid, but when asked if they favored or opposed civil unions for same-sex couples, giving them some of the legal rights of married couples, 52% were in favor and 43% opposed. Gallup Organization, *Gallup Poll Social Series: Values and Beliefs Questionnaire Profile*, *Questions qn35-37* (May 2-4, 2004), available at http://brain.gallup.com/documents/questionnaire.aspx?STUDY=P0405016 (Exhibit 14).

See also Gregory M. Herek, *Gender Gaps in Public Opinion About Lesbians and Gay Men*, PUB. OPINION Q., Spring 2002, at 40, 49-50 (significant percentage of respondents in national survey supported domestic partnership but not marriage for same-sex couples); Stephen C. Craig et al, *Core Values, Value Conflict, and Citizens' Ambivalence about Gay Rights*, POL. RES. Q., March 2005, at 5, 6-8 (Florida survey respondents expressed less support for marriage for same-sex couples than for same-sex couples having equal access to family health insurance coverage).

Thus, in Florida and nationally the polling data demonstrates that while a majority of the population does not favor the right to marry for lesbian and gay couples, a majority does support alternative forms of legal recognition of and protections for the committed relationships of same-sex couples. If people were asked to vote on the proposed Florida Marriage Protection Amendment, many

voters would support the first clause – defining marriage as limited to different-sex couples, but oppose the second clause – barring other legal unions that are "the substantial equivalent" of marriage. Indeed, based on the polling data, if the two clauses were presented as separate proposed amendments, the first would have a chance of passing[5] but the second would clearly be defeated.

Combining the two subjects – the popular bar on marriage for same-sex couples and the unpopular prohibition against other forms of legal recognition for same-sex relationships – is classic logrolling. It is an attempt to roll separate issues into a single initiative "in order to aggregate votes or secure approval of an otherwise unpopular issue." *Save Our Everglades*, 636 So. 2d at 1339. It creates precisely the dilemma for voters that the single-subject rule is meant to prevent.

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[5] The fact that an individual does not support the right to marry for same-sex couples does not mean that he or she necessarily supports a constitutional amendment to permanently enshrine that policy. The Tampa Tribune and WFLA Television poll conducted April 7-8 and 12, 2004, of 625 likely voters in Hillsborough, Pinellas, Pasco and Polk Counties illustrates this point. While 59% of the respondents opposed "legalizing gay marriage," only 33% supported amending the U.S. Constitution to ban "gay marriage." *See* Exh. 10; s*ee also* UNH Survey Center poll conducted May 4-9, 2005 (Exh. 11), pp. 10-11 (while significantly more people surveyed opposed marriage for same-sex couples than favor it (50% oppose and 37% favor), respondents narrowly opposed an amendment to the U.S. Constitution that would prohibit marriages between gay or lesbian couples (47% vs. 45%), and the respondents were evenly divided on the

(footnote continued …)

See Restricts Laws Related to Discrimination, 632 So. 2d at 1020 (The single subject rule protects voters from "having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support"; it "prevent[s] voters from being trapped in such a predicament."); *see also*: *Fine*, 448 So. 2d at 988; *Limited Marine Net Fishing*, 620 So. 2d at 999.

The fact that two subjects can be linked together in some way does not rescue an amendment. "[E]nfolding disparate subjects within the cloak of a broad generality does not satisfy the single subject requirement." *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984). The Court has invalidated as single-subject violations numerous petitions that included two or more subjects that are far more related than those here. For example, in *Advisory Op. to Att'y Gen re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 565 (Fla. 1998), a proposed amendment provided that the right to choice in the selection of health care providers "shall not be denied or limited by law or contract." The Court held that this violated the single-subject rule because it "combines two distinct subjects by banning limitations on health care provider choices imposed by law and by prohibiting private parties from entering into contracts that would limit health care

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question of legislation in their state that would prohibit marriages between gay or

(footnote continued …)

provider choice." *Id.*, at 566. Similarly, in *Advisory Op. to the Att'y Gen. Re Tax Limitation*, 644 So. 2d 486, 491 (Fla. 1994), the Court invalidated a proposed amendment requiring a two-thirds vote for new constitutionally imposed state taxes and fees because taxes and user fees are not naturally connected and thus, are separate subjects. *See also*: *Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d at 890, 893 (proposed amendment to "bar government from treating people differently based on race, sex, color, ethnicity, or national origin in public education, employment, or contracting violated the single-subject rule because it combined three distinct subjects - public education, public employment, and public contracting); *Save Our Everglades*, 636 So. 2d 1336 (proposed amendment to create a trust funded by the sugar industry to restore the Everglades violated single subject rule because it encompassed two subjects – restoring the Everglades and requiring the sugar industry to pay for it).

The fact that the two subjects of the Florida Marriage Protection Amendment both bar same-sex couples from receiving certain protections for their relationships does not mean they satisfy the single-subject rule. By this logic, if the proposed amendment barred same-sex couples from accessing a list of specific

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lesbian couples (46% favored vs. 46% opposed)).

benefits, *e.g*. domestic partner health insurance benefits, bereavement leave for a domestic partner, family medical leave to take care of a sick domestic partner (some of which a particular voter might agree with and some which he might oppose), it would still satisfy the single subject rule. But the Court has made it clear that this is not so; voters cannot be made to "choose all or nothing." *Save Our Everglades*, 636 So. 2d at 1341. And the Court has specifically held that diverse forms of discrimination against a group involve different subjects and cannot be lumped together in a single amendment. *Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d at 893 (proposed amendment to bar government discrimination and preferences in public education, employment, or contracting was deemed to violate the single-subject rule because it combined three distinct subjects - public education, public employment, and public contracting).

The Court looks to "the functional effect" of the proposed amendment to determine whether it satisfies the single subject requirement. *Evans*, 457 So. 2d at 1354. Here, for lesbian and gay couples, the functional effect of an amendment that only excludes them from marriage is very different from that of a prohibition against other forms of legal recognition of their relationships. The effect of the latter prohibition is much broader, threatening to take away existing protections

that such couples depend on, and preventing them from accessing a range of important protections for their families that the legislature might otherwise make available, entirely apart from marriage. And the polling data shows that the public recognizes the very different functional effects of these two provisions.

The Florida Marriage Protection Amendment combines two separate subjects that have very different functional effects, and about which many people hold very different views. It would require voters who support civil unions, domestic partnerships or some other form of legal recognition for same-sex couples, but who do not support marriage for these couples to "choose all or nothing," (*see Save Our Everglades*, 636 So. 2d at 1341). This is precisely what the single-subject rule is meant to prevent. The amendment therefore violates Art. XI, § 3 of the Florida Constitution.

II. The Ballot Title and Summary Are Not Written In "Clear and Unambiguous Language."

Section 101.161, Fla. Stats. requires that the ballot title and summary for a proposed amendment be written in "clear and unambiguous language." The Court has interpreted this to require an "accurate, objective, and neutral" summary of the proposed amendment. *Advisory Op. to the Att'y Gen re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653-54 (2004). The purpose of this provision is to

ensure "fair notice of the contents of a proposed initiative so that the voter will not be misled as to its purpose and can cast an intelligent and informed ballot." *People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d at 1307; *see also Additional Homestead Tax Exemption*, 880 So. 2d at 651.

A. The ballot summary's reference to "legal union[s] that [are] treated as marriage or the substantial equivalent thereof" is not "clear and unambiguous."

The Court does not hesitate to invalidate proposed amendments where the ballot title or summary includes ambiguous or undefined terms. For example, in *People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d at 1308-09, this Court held that using the term "common law nuisance" in a ballot summary without a definition was not sufficiently clear and unambiguous. *See also id.*, at 1311 (invalidating ballot summary of a different amendment that required voter approval for tax increases because the phrase "increase in tax rates" was misleading for failing to distinguish between an increase in amount of payments on taxable property and an increase in the actual rate at which property was being taxed). In *Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d at 899, the Court evaluated a proposed amendment to

bar affirmative action preferences that exempted "bona fide qualifications based on sex." The Court held that the summary failed the fair notice rule because the term "bona fide qualifications based on sex" was "not defined, leaving voters to guess at its meaning." *Id.*

The ballot summary of the Florida Marriage Protection Amendment also uses ambiguous and undefined terms that prevent voters from being able to "cast an intelligent and informed ballot." *See People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d at 1307. The ballot summary provides:

> This amendment protects marriage and the legal union of only one man and one woman as husband and wife and provides that *no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized*.

(Emphasis added). The phrase "no other legal union that is treated as marriage or the substantial equivalent thereof," which appears in both the amendment text and the summary[6], is extraordinarily ambiguous and confusing. What legal unions are treated as the "substantial equivalent" of marriage is anyone's guess. Do they

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[6] The fact that the misleading language also appears in the text of the proposed amendment does not save a summary from being ambiguous in violation of Fla. Stats. § 101.161. *See, e.g., Save our Everglades*, 636 So. 2d at 1338, 1341;
(footnote continued …)

include only legal unions that provide all or most of the rights and obligations of marriage under another name such as Vermont and Connecticut Civil Unions and California Domestic Partnership?[7] Do they also include state law recognition of committed same-sex relationships for some lesser but still substantial set of the rights and benefits afforded to married couples such as New Jersey's domestic partnership law?[8] Do they include local domestic partner registries like those enacted by Broward County, Miami Beach, West Palm Beach, and Key West, which provide only a few of the benefits traditionally associated with marriage?[9] Do they include a government's provision of domestic partner health insurance

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People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So. 2d at 1307-09.

[7] 15 Vt. Stat. Ann. tit. 15 § 1201 *et seq*. (2004); 2005 Conn. Pub. Acts 05-10, § 1 *et seq.*; Cal. Fam. Code § 297 *et seq*. (West 2004)

[8] N.J. Stat. Ann. § 26:8A-1 *et seq*.(2005)

[9] *See* Broward County, FL, Code, Ch. 16 1/2 Human Rights, Art. VIII (2005); Miami Beach, FL, Code, Ch. 62, Human Relations, Art. III (2005); West Palm Beach, FL, Code, Ch. 42, Human Relations, Art. III (2005); Key West, FL, Code, Ch.38, Art. V (2005). For example, West Palm Beach's domestic partner registry provides for health care facility visitation, correctional facility visitation, the ability to make health care decisions on behalf of one's domestic partner, the ability to make funeral/burial decisions for one's domestic partner, notification of domestic partner as a family member in an emergency, and domestic partners designated as pre-need guardians. West Palm Beach, FL, Code, Ch. 42, Human Relations, Art. III (2005).

benefits to its employees as a number of Florida cities and counties do?[10] Do they include state laws such as Hawaii's Reciprocal Beneficiaries law that allow any two persons who are unable to marry to register to obtain certain rights?[11] Does the amendment require private employers who provide domestic partner benefits to their lesbian and gay employees[12] to cut off those benefits?

In other states in which similar constitutional amendments were passed in November 2004, there is already significant confusion and disagreement over the meaning of such language. For example in Michigan, after a similarly worded

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[10] *See, e.g.,* Tampa (Bill Varian, Tampa Offers Benefits to Same-Sex Couples, St. Petersburg Times, March 12, 2004); Wilton Manors (Wilton Manors, FL, Code, Ch. 13.5 Personnel, Art. II, Div. 2 (2005)); Broward County (Broward County, FL, Code, , Ch. 16 1/2 Human Rights, Art. VIII (2005)); Miami Beach (Miami Beach, FL, Code, Ch. 62, Human Relations, Art. III (2005); West Palm Beach (West Palm Beach, FL, Code, Ch. 42, Human Relations, Art. III (2005); Key West (Key West, FL, Code, Ch.38, Art. V (2005).

[11] Haw. Rev. Stat. §§ 572C-1, *et seq.*

[12] Dozens of private employers in Florida provide domestic partner benefits. They include Universal Orlando, Walt Disney Co., the St. Petersburg Times, the Miami Herald and the law firm Holland & Knight. *See* Human Rights Campaign listing of employers that provide domestic partner benefits, available at http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=1&searchSubTypeID=1.

amendment[13] was enacted, the governor revoked health benefits for state employees' domestic partners from their employment contract pending a court ruling on their legality in light of the amendment. *See* Kathy Barks Hoffman, Same-Sex Benefit Plans Halted; Granholm Wants Court to Rule on Legality After Approval of Proposal 2, Grand Rapids Press, December 3, 2004 (Exhibit 15). Later, when citizens in Michigan filed a lawsuit seeking a construction of the amendment, the governor took the position that the amendment does not reach so far so as to preclude domestic partner benefits for State employees (*see* Jennifer M. Granholm's Brief in Response to Plaintiffs Motion for Summary Disposition, in *National Pride at Work, Inc. v. Granholm*, Circuit Court, County of Ingham, Michigan, Case No. 05-368-CZ (Exhibit 16), but Michigan's attorney general took the opposite position, arguing that such employment benefits were barred by the new amendment. *See* Motion of Attorney General to Intervene as Party Defendant in *National Pride at Work, Inc.* , at ¶¶ 4-5, 12 (Exh. 2); *see also* Associated Press, Granholm, Cox Differ on Same-Sex Benefits, Grand Rapids Press, July 22, 2005 (Exhibit 17). In Ohio, the courts are in disagreement over whether similarly vague

[13] Mich. Const., Art. 1, § 25 ("the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union.").

language in the Ohio Constitution[14] barred application of the state's domestic violence law in cases where the victim and the defendant are an unmarried heterosexual couple. *See* Associated Press, Rulings Differ on Domestic Violence, The Cincinnati Post, March 28, 2005 (Exhibit 18).

The ambiguous language of the proposed amendment here leaves voters in the dark about the ramifications of the amendment. And voters who favor restricting marriage to heterosexual couples but also favor other forms of legal recognition for committed same-sex relationships have to guess whether this language will preclude or allow the policy they support. *See People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d at 1312 (language that "provides uncertainty in interpreting the petition" is misleading). The ballot title and summary therefore violate the fair notice requirement.

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[14] Ohio Const. Art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.").

B. The ballot title and summary do not disclose the effects of the proposed amendment.

The Court has said that a ballot title and summary "should tell the voter the legal effect of the amendment." *Evans*, 457 So. 2d at 1355. The fair notice requirement ensures that "the electorate is advised of the true meaning and ramifications of an amendment." *Tax Limitations*, 644 So. 2d at 490. A ballot summary "must not involve undisclosed collateral effects." *Amendment to Bar Government From Treating People Differently Based on Race in Public Education*, 778 So. 2d at 900, *quoting Restricts Laws Related to Discrimination*, 632 So. 2d at 1024 (Kogan, J., concurring); *see also Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d at 898 (amendment may not have "unstated effects"). Thus, a ballot title and summary can be misleading not only because of what it says but also because of "what it does not say." *Id.*

As discussed above, the ambiguity of the proposed amendment makes it impossible to know all of the effects of the proposed amendment.

When the effects of an amendment include eliminating existing laws or protections, the Court is even more insistent that those effects be disclosed to voters in the ballot summary. In *Restricts Laws Related to Discrimination*, 632 So.

2d at 1021, this Court held that a proposed amendment that limited state and local civil rights protections to ten enumerated classifications and repealed any existing laws "inconsistent with this amendment" violated the fair notice requirement. The Court reasoned that the summary and text of the amendment "omit any mention of the myriad of laws, rules, and regulations that may be affected by the repeal of 'all laws inconsistent with this amendment.'" *Id.* In *Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, the Court considered the validity of a ballot summary stating that the proposed amendment "amends the Declaration of Rights of the Florida Constitution to bar government bodies from treating people differently based on race, color, ethnicity or national origin in the operation of public education whether the program is called 'preferential treatment,' 'affirmative action,' or anything else." The Court deemed this misleading because affirmative action laws and programs have been used as remedies for violations of rights, and the proposed amendment took away these existing protections without making that clear. *See also Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) (invalidating ballot summary representing amendment as granting citizens greater protection against conflicts of interest in government without revealing that it also removed an established protection).

As discussed above, a number of local governments in Florida have laws or policies that recognize unions between same-sex couples for some purposes. Many Floridians, including interested parties Richard Nolan, Robert Pingpank, Richard Rogers, and Bill Mullins, depend on the protections these domestic partner registries and employment benefits provide. The ambiguous language of the amendment does not specifically address government domestic partner registries or employment benefits. But the language is vague, and in other states with similar amendments, they have been used to challenge even limited domestic partner benefits. *See, e.g.,* Exhibits 2 & 3. Thus, the amendment threatens existing domestic partner laws and policies, which many families rely on. Yet the ballot summary says nothing about this. This is impermissible, and accordingly, the ballot title and summary must be invalidated.

C. The ballot title and summary are misleading because "marriage protection" is political rhetoric, not an accurate and neutral description of the proposed amendment.

The ballot title and summary must provide an "accurate, objective, and neutral summary of the proposed amendment." *Additional Homestead Tax Exemption*, 880 So. 2d at 653-54. "[P]olitical rhetoric that invites an emotional response from the voter" as opposed to providing an "accurate and informative synopsis" is misleading. *Id.*, at 653; *Tax Limitation*, 644 So. 2d at 490 (ballot

summary must be accurate and informative and "objective and free from political rhetoric."); *Save Our Everglades*, 636 So. 2d at 1341-42 ("emotional language" misleading because it resembled "political rhetoric" more than "accurate and informative synopsis."); *Advisory Op. to Att'y Gen. re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 902 So. 2d 763, 771 (Fla. 2005) (rejecting "impermissible emotional rhetoric"). "Editorial comment[s]" in ballot titles and summaries are improper. *Id.*; *Evans*, 457 So. 2d at 1355. The Court recently said

> [A]n accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.

Additional Homestead Tax Exemption, 880 So. 2d at 653-54.

The ballot title and summary at issue here fail this important requirement. The ballot title is "Florida Marriage Protection Amendment." The ballot summary provides: "This amendment *protects marriage* as the legal union of only one man and one woman as husband and wife. . . ." (emphasis added.)

"Marriage protection" is not a neutral or accurate description of what the amendment would do. The first clause of the amendment does nothing more than limit marriage to different-sex couples. The ballot summary does not explain how

this exclusion would protect marriage, or how recognizing same-sex couples' marriages would endanger the institution of marriage or the marriages of heterosexual couples.[15] And it is difficult to see how "protection" is the issue. The proposed amendment would not affect any of the legal protections of marriage for any couple. Indeed, by excluding some citizens from the institution of marriage, the amendment could be said to limit or diminish, not protect, marriage. *See Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (rejecting amendment that purported to provide equal protection of the law when in fact, it took away certain protection from victims of discrimination); *Additional Homestead Tax Exemption*, 880 So. 2d at 652 (rejecting amendment said to provide property tax relief when it did not necessarily have that effect); *Evans*, 457 So. 2d at 1353, 1355 (ballot summary, which stated that the amendment "establishes citizens' rights in civil actions," was misleading because limiting damages awards – which protects defendants – was

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[15] *See, e.g., Evans*, 457 So. 2d at 1355 (in considering proposed amendment aimed at limiting damages awards in civil suits, Court held that the summary's statement that the amendment requires courts to dismiss lawsuits when there is no dispute over material facts "thus avoiding unnecessary costs" was misleading editorial comment because no logical explanation was given of how a constitutional summary judgment rule would be more effective in avoiding costs than the existing rule).

clearly the chief purpose of the amendment, yet the summary suggests that there is constitutional protection afforded to plaintiffs as well).

The ballot title and summary's reference to the "protection" of marriage is precisely the kind of "political rhetoric" inviting an "emotional response" that the Court has repeatedly rejected as misleading. *See Additional Homestead Tax Exemption*, 880 So. 2d at 653; *Save our Everglades*, 636 So. 2d at 1341-42. It conveys the emotional message that allowing same-sex marriages to be recognized would hurt marriage and that this amendment is needed to protect marriage from such harm.

In *Save Our Everglades*, 636 So. 2d 1336, the Court rejected a proposed amendment for precisely this reason. The proposed amendment was entitled "Save our Everglades" and the ballot summary included the following: "Creates the Save Our Everglades Trust to restore the everglades for future generations. Directs the sugarcane industry, which polluted the Everglades, to help pay to clean up pollution and restore clean water supply." *Id.* at 1338. The Court held that the word "save" is "emotional language" that could mislead the voter. *Id.,* at 1341. And the Court deemed the title misleading because it "implies that the Everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be 'saved' via the proposed amendment. Yet nothing in the amendment hints at this

peril." *Id*. The Court invalidated the ballot summary because it "more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." *Id.*, at 1342.

The ballot title and summary of the Florida Marriage Protection Act suffer from an identical flaw. They "impl[y] that [marriage is] in danger" and "needs to be ["protected"] via the proposed amendment." *See id.*, at 1341. But "nothing in the amendment hints at this peril." *See id*. The word "protect" is emotional language that would mislead the voter; and the ballot summary "more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." *See id.*, at 1342.

Moreover, the text of the proposed amendment here reads "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Yet the ballot summary, rather than use the neutral language found in the text (which is even shorter than the ballot summary), interjects the emotional concept of "marriage protection." The Court has condemned such substitutions as misleading and deceptive and rejected it as a violation of the fair notice requirement. *See Save our Everglades*, 636 So. 2d at 1341 (rejecting initiative where neutral language of amendment text is replaced

with emotional or political language in the ballot summary); *Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 421 (Fla. 2002). In a recent discussion of the *Save our Everglades* case, the Court criticized that proposed amendment as involving the "legerdemain of employing an emotional term ('save') in the ballot title or summary while substituting a more docile term ('restore') in the amendment text." *Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d at 421. The Florida Marriage Amendment involves the "legerdemain of employing an emotional term [("marriage protection")] in the ballot title or summary while substituting a more docile term [(a definition of marriage)] in the amendment text." *See Id.*

The problem of political and emotional ballot language is particularly troublesome when a proposed amendment concerns a particularly charged or politically controversial topic or topics, which is clearly the case here. We are in the middle of an historic national debate about whether same-sex couples should be allowed to marry, provided with some other form of legal recognition, or entirely excluded from any form of legal protection. These are issues about which people have strong emotional reactions connected to deeply held values. Thus, the language used in the debate is not accidental. Advocates on both sides frame the issue to tap into those values and move public opinion. A ballot summary is not

the place for such political rhetoric. *Additional Homestead Tax Exemption*, 880 So. 2d at 653-54; *Tax Limitation*, 644 So. 2d at 490; *Save Our Everglades*, 636 So. 2d at 1341-42.

Of course the words "protect" and "protection" are not inherently political or emotional. It depends on the context. *See Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415; *Advisory Op. to the Att'y Gen. re Public Protection from Repeated Medical Malpractice*, 880 So. 2d 667, 672 (Fla. 2004) ("the term 'protection' *in the instant case* does not constitute impermissible political rhetoric.") (emphasis added). A word might be neutral in some contexts but emotional in others. The term "marriage protection," as used in the Florida Marriage Protection Amendment, is far from neutral. It is a term widely used in the political discourse by advocates against marriage for same-sex couples and chosen precisely for its emotional effect.

CONCLUSION

The purpose of both the single-subject rule and the requirement that ballot summaries be written in "clear and unambiguous language" is to ensure fairness to voters who are being asked to make a weighty decision – whether or not to change our constitution, the "basic document that controls our governmental functions." *Fine*, 448 So. 2d at 988-89. The single-subject rule ensures that voters have a fair

chance to cast a simple vote for or against a proposal, and that unpopular measures are not logrolled in by attaching them to proposals that have popular support. The demand for "clear and unambiguous" ballot summary language makes sure voters are given fair notice of the measure they're being asked to endorse, and are not misled by vague language or political rhetoric.

Allowing the Florida Marriage Protection Amendment to be placed on the ballot would deny voters a fair election process. It attempts to logroll passage of the unpopular prohibition against protections such as civil unions for same-sex couples by joining it with the more popular marriage ban. And the ballot summary attempts to hide the ball and slip the unpopular provision past voters. It uses vague language that does not give them notice that other forms of relationship protection (and which ones) would be barred. And rather than using the neutral language of the amendment text, it uses the emotional language of a political campaign, conveying to voters that a vote in favor of the amendment is a vote to "protect" marriage. All of this denies voters the opportunity to cast an intelligent and informed ballot.

This Court requires strict compliance with these requirements to ensure fairness in the election process. It has not hesitated to invalidate proposed amendments for far less serious violations than those at issue here. The Florida

Marriage Protection Amendment blatantly disregards these important requirements. The integrity of the process requires that it be kept off the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and a copy of all Exhibits were served by First Class U.S. Mail on September 21, 2005, upon:

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CERTIFICATION OF TYPE STYLE AND FONT SIZE

I certify that this brief is printed in a 14 point Times New Roman font.

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Randall C. Marshall