

**IN THE SUPREME COURT
STATE OF GEORGIA**

Judith R.T. O'Kelley,)	
Charles R.T. O'Kelley, St.)	
John's Missionary Baptist)	
Church, Rabbi Scott Saulson,)	
Reverend Timothy McDonald)	
III, Senator David Adelman,)	
Representative Tyronne)	CASE NO.
Brooks,)	S05A0236
)	
)	
Plaintiffs-Appellants,)	
)	
v.)	
)	
Cathy Cox, in her official)	
capacity as Secretary of)	
State of Georgia,)	
)	
Defendant-Appellee.)	

AMENDED BRIEF OF AMICUS CURIAE

The following professors from Emory University School of Law: Thomas C. Arthur, Dean of Emory University School of Law; and professors Robert Schapiro; Martha A. Fineman; Michael J. Perry; Marc Miller; Kay L. Levine; Anne M. Rector; Frank Alexander; Bill Buzbee; Beth Edmondson; Jannette Pratt; William Kitchens and Michael Kang. The following professors from Mercer University Law School: Richard Creswell; David G. Oedel; Donal C. Wells; John O. Cole; David Brennan; David Hricik; Daryl Dantzler; Suzanne Cassidy; Linda Jellum; Linda Edwards; and Jack Sammons. The following professors from Georgia State University College of Law: Anne Emmanuel, Associate Dean of Georgia State University College of Law; and professors Marjorie Girth; Colin Crawford; Andrea Curcio; Neil Kinkopf; B. Ellen Taylor; Eric J. Segall; Mary F. Radford; Ellen S. Podgor; and Patrick Wiseman. The following professors from the University of Georgia School of Law: Paul Kurtz; Peter J. Spiro; Peter A. Appel; Russell C. Gabriel; Alexander W. Scherr; Sarajane N. Love; Margaret V. Sachs; Kevin Jon Heller; Erica J. Hashimoto; Gabriel Wilner; Julian McDonnell; Donald E. Wilkes, Jr.; Robert D. Brussack; Camilla E. Watson; Alan Watson; E. Ann Puckett; Milner S. Ball; and Paul J. Heald.

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AMENDED BRIEF OF AMICUS CURIAE OF GEORGIA LAW PROFESSORS

As Professors of Law at the University of Georgia School of Law, Emory University School of Law, Georgia State University School of Law, and Mercer University School of Law, we are actively concerned with the integrity of our state constitution and the integrity of the orderly democratic political processes that constitution has provided for its own amendment. With the exception of the amended list of law professors joining in this amicus brief, all remaining portions of the brief are identical to the Brief of Amicus Curiae of Georgia Law Professors.

We file this brief of Amicus Curiae pursuant to Supreme Court Rule 23, and respectfully request that this Court reverse the Superior Court's dismissal of Appellants' Complaint, because Gaskins v. Dorsey does not deprive Georgia courts of authority to grant pre-election relief in the case of a procedurally unconstitutional, multiple-subject proposed amendment to the Georgia Constitution, such as the one called for by the General Assembly's adoption of Senate Resolution 595 (the "Proposed Amendment"). See Gaskins, 150 Ga. 638, 104 S.E. 422 (1920). We further request that the Court remand this case to the Superior Court, directing that court to grant appropriate equitable relief to avoid imminent harm to voters who would otherwise be deprived of their right to cast an honest vote, free of the coercive affects of the unconstitutional tying arrangement amongst several different subjects within this single Proposed Amendment.

Identity and Interest of Amicae

The following professors from Emory University School of Law: Thomas C. Arthur, Dean of Emory University School of Law; and professors Robert Schapiro; Martha A. Fineman; Michael J. Perry; Marc Miller; Kay L. Levine; Anne M. Rector; Frank Alexander; Bill Buzbee; Beth Edmondson; Jannette Pratt; William Kitchens and Michael Kang. The following professors from Mercer University Law School: Richard Creswell; David G. Oedel; Donal C. Wells; John O. Cole; David Brennan; David Hricik; Daryl Dantzler; Suzanne Cassidy; Linda Jellum; Linda Edwards; and Jack Sammons. The following professors from Georgia State University College of Law: Anne Emmanuel, Associate Dean of Georgia State University College of Law; and professors Marjorie Girth; Colin Crawford; Andrea Curcio; Neil Kinkopf; B. Ellen Taylor; Eric J. Segall; Mary F. Radford; Ellen S. Podgor; and Patrick Wiseman. The following professors from the University of Georgia School of Law: Paul Kurtz; Peter J. Spiro; Peter A. Appel; Russell C. Gabriel; Alexander W. Scherr; Sarajane N. Love; Margaret V. Sachs; Kevin Jon Heller; Erica J. Hashimoto; Gabriel Wilner; Julian McDonnell; Donald E. Wilkes, Jr.; Robert D. Brussack; Camilla E. Watson; Alan Watson; E. Ann Puckett; Milner S. Ball; and Paul J. Heald.

We all agree that this is an important case, given the electoral and constitutional concerns raised.

Argument

As Professors of Law at Georgia Schools of Law, we are all deeply concerned with the integrity of the Georgia State Constitution, the integrity of the democratic political process by which the constitution is amended, and the ability of Georgia voters to cast an honest ballot, free of the obligation to make an unconscionable choice between several different subjects about which they may have strongly-held but opposing points of view. As a pioneer and leader in the recognition of constitutional limitations on single-subject amendments and legislation in the United States, Georgia should continue to lead in insuring the implementation of the important democratic guarantees underlying this ancient rule. Pre-electoral equitable remedies, such as enjoining the inclusion of an unconstitutional plural question on the ballot, are appropriate and necessary in cases where the harm will occur to voters in the voting booth itself. The Proposed Amendment would force voters to make an unconscionable choice among their views regarding various subjects based on the legislature's completed act of ordering that an unconstitutional multiple-subject amendment be placed on Georgia ballots. This equitable argument is particularly strong in a case like the one at bar, where the language on the ballot misleadingly refers to only one of these multiple-subjects.

I. The History and Purposes of the Single-Subject Requirement and the Importance of The Judiciary's Role in Providing a Meaningful Review of Whether Proposed Amendments Will Adhere to the Constitution's Single-Subject Rule.

The Georgia Constitution provides that "[w]hen more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately, provided that one or more new articles or related changes in one or more articles may be submitted as a single amendment." Ga. Const. art. 10, § 1, Para. 2. This Court analogizes this constitutional requirement to the constitutional requirement of single-subject legislative enactments. See e.g. Hammond v. Clark, 136 Ga. 313, 327, 71 S.E. 479 (1911); Carter v. Burson, 230 Ga. 511, 519, 198 S.E.2d 151 (1973).

Georgia's 125-year old guarantee of democratic legitimacy with regard to the amendment of the constitution itself should not be taken lightly by the judiciary. As Chief Justice Marshall of the United States Supreme Court wrote in Marbury v. Madison, "[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law ..., and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void ..." Marbury, 1 Cranch 352, 5 U.S. 137, 177 (1803). As Chief Justice Marshall and our state's and nation's founding fathers realized over 200 years ago, the point of a written constitution is lost if the judiciary does not guard it carefully against legislative overreaching or even

against the passions of the public.¹ With this warning in mind, the judiciary should apply real and meaningful scrutiny to legislative attempts to permanently amend our constitution itself in violation of the clear, long-standing single-subject requirement established within that document.

The importance of posing clear, single-subject questions for decision to legislatures and other voters has been known for almost as long as democracy itself. Since the Roman enactment of *Lex Caecilia Didia* in 98 B.C. prohibited *omnibus lex satuta*, or laws containing unrelated provisions, democracies and republics have recognized the danger of “logrolling”, conflicting choices and

¹In Federalist No. 49, Alexander Hamilton encapsulated some of the fears of his fellow framers of the United States Constitution regarding the recurrent danger posed to fundamental constitutional elements of executive and judicial power by the rash and emotional judgment of the public and the legislature. There, he wrote that “[t]he danger of ... interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions to the decisions of the whole society.” The Federalist No. 49 (Alexander Hamilton). Since this consideration was one of the bases for both our republican form of government and the balance of power within the three branches recognized within both our state and federal constitutions, it is clear that courts have reason to be particularly vigilant with regard to passionate efforts to amend our constitution in a misleading manner without adhering to proper constitutionally guaranteed procedures. This is particularly true where a realignment of aspects of the balance of power between these three branches is concerned. As Hamilton also recognized, “the greatest objection of all is, that the decisions which would probably result from such appeals would not answer the purpose of maintaining the constitutional equilibrium of the government. We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.” Id.

misleading questions in the enactment of laws, amendments, referenda and-more recently-ballot initiatives. See Luce, Legislative Procedure 548 (1922).

Following the notorious Yazoo Act of our state legislature in 1795, Georgia became the first American state to constitutionally recognize how important it is not to mislead voters when posing a question.² See M.Ruud, No Law Shall Embrace More than One Subject, 42 Minn. L. Rev. 389, 391-392 (1957-1958). In 1798, public reaction to the Yazoo Act scandal led Revolutionary War General James Jackson to insist on insertion into Georgia's constitution of a requirement that every bill contain a title adequately expressing the actual subject matter of the bill.³ Id. at 392; Mayor of Macon v. Hughes, 100 Ga. 795, 797-798, 36 S.E. 247. Pursuing the same purpose of insuring the integrity of the democratic process, the single-subject requirement for legislation was added to the Georgia constitution in 1861, and the single-subject requirement for constitutional amendments now found in Article X, §1, Para.2 was added to our state constitution by 1877. See Mayor of Macon, 100 Ga.

²In passing the Yazoo Act, legislators were duped by the misleading title of an act that directed the sale of a considerable portion of the public domain of the state to a group of private companies.

³Not only was a county named after General Jackson during this period, but he is still sometimes referred to as the Yazoo Affair "hero," a rare honorific for the 200-year old legislative act of a state senator. See <http://www.visitnortheastgeorgia.com/countiescitiestowns.htm>

at 800, 36 S.E. 247. Although the state of Georgia has seen several new constitutions since then, the framers of each new constitution have seen fit to maintain the important single amendment requirement in order to insure that it would only be amended in a careful, honest and informed manner.

The purpose of the "single subject" constitutional and legislative requirements is similar to that of the title requirement recognized in the Georgia constitution after the Yazoo Act, namely prevention of "the perversion of the majority vote rule." State Statutes: The One-Subject Rule Under the 1970 Constitution, 6 J. Marshall J. Prac. & Proc. 359 (1973). More specifically, these requirements are meant "to prevent an imposition upon or deceit of the public, to afford voters freedom of choice, and to prevent 'logrolling', 'hodge-podge legislation', or 'jockeying' – that is, to prevent voters from being required to vote for something of which they disapprove in order to register approval of other propositions tied up therewith." D. Kramer, Amendments Embracing More than One Subject, 16 Am.Jur.2d Constitutional Law §34; see also Carter v. Burson, 230 Ga. 511, 519 (1973); Am. Booksellers Ass'n v. Webb, 254 Ga. 399 (1985).

Georgia courts look to the purpose of a proposed amendment in order to determine whether it violates the single-subject requirement of Article 10, § 1, requiring that all parts of the amendment must be germane to the accomplishment of a single objective. Carter, 230 Ga.

at 519. They apply this test in light of the anti-logrolling, democratic purpose of the single-subject requirement. As this Court noted in Carter,

Each proposition submitted to the voters should stand or fall upon its own merits... No voter should be compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves, or, in order to vote against the proposition which he desires to defeat, to vote also against the one which commends itself to the approval of his judgment. When he is thus compelled, if he votes at all, there is something closely akin to coercion when his ballot is cast.

Id. at 519 (quoting from Rea v. City of LaFayette, 130 Ga.771 (1908)).

One commentator explains in the context of the legislative single-subject rule that “[t]he fact that [the single-subject requirement] is in the constitution instead of the [legislature’s] rules is significant... [I]f the rule is in the constitution, then it can be invoked in the courts.” M.Ruud, No Law Shall Embrace More than One Subject, 42 Minn. L. Rev. at 351. As more and more courts and commentators have recognized, the need for careful judicial scrutiny is even greater with regard to the form of questions posed directly to the public, K. Miller, Symposium: The Initiative Process in Washington: Implications and Effects: Introduction-Courts as Watchdogs of the Washington State Initiative Process, 24 Seattle

Univ. L. R. 1053 (2001),⁴ which normally has less time or expectation of understanding every aspect of a complex law or amendment than professional legislators.⁵ Surely, despite the deference rightly due to legislators in posing questions to the body politic, the courts must exercise some real and meaningful review over the manner in which the legislature poses questions to the public, where our written Constitution specifically requires. On that score, this proposed amendment fails.

II. The Proposed Amendment Violates both the Letter and Spirit of the Georgia Constitution's Single Amendment Rule Because It Seeks To Accomplish More Than One Separate Objective, Thereby Subjecting Georgia Voters to an Unconstitutionally Coercive Choice.

Appellee in this case argues that "subsection (b) [of the Proposed Amendment] is implied by subsection (a)..." It argues that subsection (b) "might have been omitted; however, this elaboration does not make the reference invalid." (Brief of Appellee, p. 19).

We disagree. Subsection (b) is far more than a relatively meaningless "elaboration" of Subsection (a).

⁴This article describes the growing trend of state courts to "put teeth" into their state's single subject initiative referendum rules, including those in Florida, Oregon, Montana, California, Washington and Colorado.

⁵This article describes the growing trend of state courts to "put teeth" into their state's single subject initiative referendum rules, including those in Florida, Oregon, Montana, California, Washington and Colorado.

A. Subsection (b) of the Proposed Amendment Addresses the Subjects of Civil Unions and other Benefits in Addition to the Definition of Marriage in Subsection (a) in Violation of the Single Amendment Requirement of the Georgia Constitution.

A number of states⁶ and countries⁷ clearly grant legal recognition to civil unions or other non-marital relationships, but not same-sex marriage. Moreover, the American public also recognizes this distinction: in fact, a majority of voters in recent surveys

⁶For instance, Hawaii has recognized "Reciprocal Beneficiaries" since 1999, Haw. Rev. Stat. Ann. §572C-1 to 7; Vermont has recognized civil unions since 2000, 15 Vt. Code Ann. § 1201(2) ; California has recognized "Domestic Partnerships" since 2003, Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Stat. 2586; and New Jersey has recognized "Domestic Partnerships" since 2003, Domestic Partnership Act, 2003 N.J. Laws ch. 246.

⁷While Belgium, the Netherlands, and most Canadian provinces recognize marriage for same-sex couples (Sweden, Taiwan, Spain and the United Kingdom are also seriously considering such recognition), a number of other countries consciously chose not to recognize such marriages at the same time they adopted legal recognition of same-sex couples through some form of civil union or domestic partnership. Denmark, Iceland, Greenland, Finland, Germany, and Switzerland all recognize such partnerships only for same-sex couples. Other countries, including France, Canada, Croatia, Hungary, parts of Australia, Israel, Norway, New Zealand, and Portugal recognize some form of non-marital civil union for both same-sex and opposite-sex couples. G. Blumberg, Legal Recognition of Same-Sex Conjugal Relationships: the 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective , Symposium: Integration, Difference, & Citizenship: Celebrating 40 Years of the UCLA Law Review, 51 UCLA L.Rev. 1555, 1571-75 (2004). The latter examples are particularly demonstrative of the widely recognized distinction between marriage and other forms of legally recognized civil union, since they are available to opposite-sex couples who choose not to marry as well as to same-sex couples. At least in France, these PACS (or *pacte civil de solidarité*) are more popular among opposite sex couples than same-sex couples.

oppose the recognition of same-sex marriage while approving of civil unions or the extension of other legal recognition to same-sex couples.⁸ More importantly to the matter at hand, there is a recognized legal distinction under Georgia law between marriage and civil unions. Burns v. Burns, 253 Ga. App. 600, 560 S.E.2d 47 (2000).

Despite assertions in Appellee's brief to the contrary, it appears that the proponents of the Proposed Amendment in the state legislature themselves recognized the significant distinction between marriage and civil union. To illustrate this point, one need look no further than the record of this case, which shows that amendments to delete subsection (b), leaving only subsection (a) of the Proposed Amendment which simply defines marriage as exclusively between "man and woman", were specifically rejected three times in the General

⁸See J. Galloway, Election 2004: 'Marriage' Matters to Voters Amendment Support Drops When It's Called Gay 'Union', The Atlanta Journal-Constitution, October 17, 2004 (citing a new Zogby International poll of likely Georgia voters, showing that 60% support a ban on same-sex marriage, but also showing that the same percentage of people (47%) support recognition of legal status "other than marriage" for same-sex couples as the number who oppose such recognition (also 47%)); E. Mehren, Homosexuals finding More Acceptance, Poss Says, But Most Still Oppose Gay Marriage, Los Angeles Times, April 11, 2004 (citing March, 2004 Los Angeles Times national poll, indicating that only 24% of respondents favored same-sex marriage, 34% opposed both same-sex marriage and civil unions, and -most significantly here- 38% opposed marriage rights but favored legal recognition of same-sex civil unions).The unconstitutional voting booth quandary faced by citizens who must choose which of these subjects they care more about in casting their ballot is precisely why injunctive relief is necessary in this case. See Section III infra.

Assembly. See Verified Complaint, ¶ 13.

The intent of the drafter's of the Proposed Amendment to prohibit some things in addition to marriage becomes even more clear when one compares the text of Georgia's existing Defense of Marriage Act, O.C.G.A. § 19-3-3.1, with that of the proposed amendment. The first sentence of Paragraph (b) of the amendment is an exact copy of the First sentence of Paragraph (b) of our state Defense of Marriage Act, except that the Act began "No **marriage** between two persons of the same sex shall be recognized by this state as entitled to the benefits of marriage." The substitution of the word "union" for "marriage" in this sentence of the Proposed Amendment must have been made for a reason, namely to add some institution or institutions other than marriage as beyond the reach of same-sex relationships in Georgia.

Appellee contends that Appellants "creatively parse [the Proposed Amendment] ...into multiple subsets of relations and degrees of status." However, in light of the significant distinctions between marriage, civil unions and other benefits, we find far more lawyerly creativity in Appellee's description of the State's unifying purpose behind the Proposed Amendment as "the State's potential refusal to accept, as legally binding, formalized conjugal relationships between persons other than a man and woman." In fact, the Court should avoid acceptance of the State's lawyers' creative new interpretation of the "unifying purpose" of this amendment, since

it implies broad animus against those with an orientation toward same-sex conjugal relationships that may raise substantive federal and state constitutional concerns.

B. Subsection (b) of the Proposed Amendment Addresses the Additional Issues of Altering the Jurisdiction of the Courts and Georgia's Recognition of the Judgments, Acts and Records of Other States to Exempt Certain Specific Subject Matter, Both of which are Clearly Different from Defining Marriage in Subsection (a) in Violation of the Single Amendment Requirement of the Georgia Constitution.

In addition to prohibiting marriage and recognition of any of the "benefits of marriage" to those in civil unions, the Proposed Amendment addresses two different additional subjects. First, it appears to restrict Georgia courts from following their long-standing precedent of recognizing the judgments, acts and records of other states. See O.G.G.A. 9-12-130 *et seq*; Davis v. Smith, 5 Ga. 274 (1848); Johnson v. Equicredit Corp., 238 Ga. App. 380 (1999), with regard to specific subject matter. Second, it also purports to carve out an amorphous subject matter exception to the jurisdiction of all Georgia courts.

These provisions are novel **attempts** to exempt specific subject matter from the jurisdiction of this and other courts in our state and to carve out a subject-matter specific area in which the judgments, acts and records of other states will not be recognized in Georgia. This single amendment therefore represents an awkward attempt to affect the balance of power among competing branches of state government and even to affect our relationship and our

reciprocal recognition of state sovereignty with other states.

Such novel measures for precedent-setting, subject-matter-specific limitations on centuries-old mechanisms of state and interstate government, should they be considered separately, would undoubtedly instigate a very different public debate than that surrounding the current state ballot question of whether “the state shall recognize as marriage only the union of man and woman.” This is precisely the type of logrolling that the single-subject requirement in Georgia’s constitution is meant to prevent. The purpose of protecting the democratic legitimacy of the amendment process through the prohibition of multiple-subject amendments is undermined by the inclusion of these plural subjects in a single amendment.

As discussed above, a voter who does not agree or disagree with all subjects contained in the Proposed Amendment must decide whether to vote for a disfavored measure in order to support another she favors or to vote against a measure she supports in order to also defeat another of which she disapproves. “No voter should be compelled” to make this choice. See Carter, 250 Ga. at 519 (quoting from Rea v. City of LaFayette). For this reason, we believe the Proposed Amendment is both unconstitutional and, as explained below, also ripe for adjudication prior to the election.

III. The Proposed Multiple-Subject Amendment Should be Enjoined as it Harms Voters By Presenting Them With an Unconstitutional Hobson's Choice.

If the Proposed Amendment were approved, then the resulting multi-subject amendment would be unconstitutional due to its violation of the single amendment requirement of Article X, §1, Para.2 of the Georgia Constitution. However, as described above, another harm will already result if this multi-subject amendment appears on the ballot this November. Whether the amendment is approved or not, those Georgia voters who are torn between their divergent opinions regarding the various subjects contained in the amendment, would suffer the unconstitutionally coercive dilemma of having to choose between their deeply held opinions regarding one subject and their equally sincere views with regard to one or more of the other subjects contained in the Proposed Amendment. This is one of the very evils against which the single amendment requirement was aimed.

As both Appellants and Appellees recognize, Georgia courts will generally not enjoin a constitutional amendment prior to approval by the state's voters due to ripeness concerns. Gaskins v. Dorsey held that courts generally have no jurisdiction to consider the validity of proposed amendments between the time of the legislature's vote and the Secretary of State's proclamation of the result of a popular vote. See Gaskins, 150 Ga. 638 (1920). During that period, the Gaskins Court reasoned that the amendment is still in a formative

state, analogous to legislation that the Governor has not yet signed or vetoed. Id. at 639-40. However, the logic underlying Gaskins does not apply in the case at bar, where the problem is a procedural one located within the voting process itself and ripe as to the formulation of the question which **must be posed to voters, absent judicial relief.**

Our State's constitutional guarantee of a fair democratic method for its amendment (and particularly the single-subject rule), is peculiarly addressed to process, ensuring that the path from legislative consideration to the people's vote is open, honest and just. If the amendment is still in a "formative state" during this process, that is precisely when the Constitution's rules have moment. These rules are an appeal from the Constitution to the Court to keep this mandated procedural path clear and correct.

For over 100 years, this Court has recognized with respect to pre-election review of ballot questions, both the general rule "that courts of equity will not interfere in matters of elections" and the fact that there are exceptions to this rule. Mayor of Macon v. Hughes, 110 Ga. 795, 804 (1900). Cases like the present one, where the harm will occur at the time of an election due to the legislature's adoption of a procedurally unconstitutional ballot question, are one such exception.

Mayor of Macon v. Hughes is an early example of this exception regarding procedural problems already manifested by the time citizens

vote (in that case, the fact that the City of Macon had lost its power to call an election based on a change in the Georgia Constitution). A long line of other cases have confirmed this exception over the last century. See Marbut v. Hollingshead, 172 Ga. 531, 158 S.E. 28 (1931) (affirming grant of an injunction against an election held pursuant to unconstitutional statute); Cheney v. Ragan, 151 Ga. 735, 108 S.E. 30 (1921) (when an election on change or removal of county seat was invalid, equity will enjoin the results of the election); Tolbert v. Long, 134 Ga. 292, 67 S.E. 826 (1910) (injunction against declaring results of an election was appropriate remedy when the election itself was illegal); DeKalb County v. City of Atlanta, 132 Ga. 727, 65 S.E. 72 (1909) (injunctive relief was appropriate when city had no authority to change the county line).

Due perhaps to the relative paucity of legislative attempts to place unconstitutional multiple-subject amendments before voters, there is little scholarly literature specifically addressing this issue. However, numerous scholars have recently argued in favor of courts performing pre-election review of procedural single-subject challenges to initiatives and referenda because "The case is concrete and specific, and the record will not be improved by waiting until after the election to see how the law is applied in a specific case. For . . . procedural requirements, the factual controversy – whether these requirements are met – exist before the election." James D. Gordon III & David B. Magleby, Pre-election Judicial Review of

Initiatives and Referendums, 64 Notre Dame L. Rev. 298, 314 (1989); See K. Miller supra note 4; See M. Minger, supra note 5). While the present case does not involve a citizen initiated referendum, here too the record will not be improved by waiting until after the election to see how the law is applied in a specific case, and the procedural subject of the factual controversy—whether these requirements are met—exists before the election.

Most importantly, if the election is permitted, the very injury complained of will occur, and such an injury is incapable of post-election remedy.

In the present case, the harms at issue are not dependent upon ratification of the proposed amendment. Rather, the electorate will be injured regardless of the outcome of the election since the harm that Appellants seek to prevent is the harm resulting from holding an unconstitutional election.

Upon entering the voting booth, many voters will immediately be confronted with an unconscionable dilemma: voting for a measure to which he or she is opposed (banning civil unions, for example), in order to vote for a measure that he or she favors (for example, defining marriage as an institution between a man and a woman). Regardless of how the voter decides, such a voter remains disenfranchised. The voter cannot vote his or her conscience. As this Court so eloquently expressed in Rea v. City of La Fayette, “[n]o voter should be compelled, in order to support a measure which

he favors, to vote also for a wholly different one which his judgment disapproves." 130 Ga. 771, 772 (1908).

Indeed, this unconstitutional result is one of the very evils against which the single-subject rule embodied in the Georgia Constitution was designed to protect, and the legislature's disregard for constitutionally mandated procedure makes pre-election review appropriate. Additionally, a court of equity should also consider the misleading way in which only the first subject of this multiple-subject amendment has been selected for inclusion in the language on the ballot in light of the purpose of Article 10 and the admonitions of Alexander Hamilton and Chief Justice Marshall.

No adequate post-election remedy exists in this case. While a post-election remedy may redress any substantive constitutional issues, it could not redress the injury suffered by the voter who cannot vote his conscience due to the unconstitutionally compound form of the flawed Proposed Amendment.

Conclusion

The issue of marriage recognition for lesbians and gay men is currently the subject of a very heated popular debate both in Georgia and nationally. Legislators, the public, and possibly even judges have strong personal feelings about this subject. As shown in last weeks poll of likely Georgia voters,⁹ many of these same people have different opinions about marriage, civil unions, domestic

⁹ See supra Note 6.

partnerships, hospital visitation rights and other concerns of same-sex couples. As Alexander Hamilton warned in Federalist No. 49, see Note 1 *supra*, it is in precisely these times of passionate debate on subjects about which people feel emotional that the steadying hand of the judiciary is most needed to require adherence to constitutionally prescribed processes and procedures. This is particularly true of our state's time-honored constitutional protections against log-rolling and misleading amendments. As retired Revolutionary War General James Jackson and other citizens of our state realized in 1795, the integrity of our democratic and republican processes are precisely what make our system worth fighting for.

Respectfully submitted this __th day of October, 2004.

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This is to certify that the foregoing "Brief of Amicus Curiae" has been served this day by facsimile transmission and by electronic mail to the following counsel of record for Appellee via hand delivery, facsimile and electronic mail address indicated below:

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