

IN THE SUPREME COURT
STATE OF GEORGIA

Judith R.T. O'Kelley, Charles)
R.T. O'Kelley, St. Johns)
Missionary Baptist Church,)
Rabbi Scott Saulson, Reverend)
Timothy McDonald III, Senator)
David Adelman, Representative)
Tyronne Brooks,)

CASE NO.

Plaintiffs-Appellants,)

v.)

Cathy Cox, in her official)
capacity as Secretary of)
State of Georgia,)

Defendant-Appellee.)

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INTRODUCTION

At issue in this case is a November 2, 2004 vote scheduled on ratification of a proposed amendment to the Georgia Constitution (the "Proposed Amendment"), as called for by General Assembly's adoption of Senate Resolution 595 ("SR 595"). The Proposed Amendment is unconstitutional because it covers multiple subjects in violation of the well-established single-subject rule set forth in the Georgia Constitution, see Ga. Const. art. 10, § 1, ¶ 2, and because the ballot language designated by the General Assembly is affirmatively misleading in violation of Due Process, see Ga. Const. art. 1, § 1, ¶ 1.

Through its unconstitutional combination of multiple subject matters, the Proposed Amendment will present many voters in this State with a constitutionally impermissible Hobson's Choice if submitted for a vote. These voters will be forced to vote for something they disfavor (e.g., banning civil unions) in order to vote for something they support (defining marriage as the union of man and woman). The Georgia Constitution specifically protects the Georgia electorate from being put to this unconstitutional dilemma. Precisely because this harm would occur *at the moment of voting and regardless of the result of the vote*, it is essential that a court of equity intervene before the ratification vote is held.

STATEMENT OF FACTS

I. THE PROPOSED AMENDMENT.

The operative facts of this case are not in dispute. On March 31, 2004, the Georgia House of Representatives approved SR 595, previously adopted by the Senate. As discussed more fully below, the Proposed Amendment would accomplish at least four separate objectives:

1. It would exclude same-sex couples from marriage;
2. It would prohibit recognition or creation of legal "unions between persons of the same sex";
3. It would bar Georgia courts from recognizing certain judgments, acts and records from other states and jurisdictions; and
4. It would divest Georgia courts of jurisdiction to "rule on . . . rights arising out of such relationship."¹

¹ The Proposed Amendment would add a new Section IV to Article I of the Georgia Constitution, as follows:

Paragraph I. *Recognition of marriage.*

- (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.
- (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties'

Despite the multiple subjects the Proposed Amendment covers, the ballot language to be supplied to Georgia voters calls only for a vote on a single question: "Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?" Contrary to the actual facts, this ballot language suggests to voters that the Proposed Amendment covers only one subject, the creation of a constitutional definition of marriage.

II. PROCEDURAL HISTORY.

Appellants 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, and Representative Tyronne Brooks ("Appellants") filed suit against Cathy Cox, in her official capacity as Secretary of State ("Defendant") on September 16, 2004, requesting equitable relief from a vote on the Proposed Amendment. On September 23, 2004, Defendant filed a Motion to Dismiss. The Superior Court expedited the case and heard oral arguments on September 24, 2004, thereafter requesting supplemental briefs on the applicability of *Gaskins v. Dorsey*, 150 Ga. 638, 104 S.E. 433 (1920).

On September 29, 2004, following the submission of supplemental briefs, the Court entered a Final Order dismissing

respective rights arising as a result of or in connection with such relationship.

Appellants' Complaint, on the sole ground that this Court's holding in *Gaskins* deprived the court of authority to grant any relief until after the electorate votes on ratification of the Proposed Amendment. The Superior Court did not address the merits of the constitutional violations raised in Appellants' complaint, instead holding erroneously that the Proposed Amendment "can have no detrimental effect until ratified." [Final Order at 4.] Appellants filed a Notice of Appeal on September 30, 2004.

ENUMERATION OF ERRORS, JURISDICTION, AND STANDARD OF REVIEW

The Superior Court erred in holding that this Court's holding in *Gaskins* deprived it of authority to grant any relief until after a vote on ratification has taken place, because the constitutional harm sought to be redressed by Appellants' Complaint will flow from the election itself and does not depend upon the results of the election.

This Court has appellate jurisdiction in this case, because the constitutionality of a law or constitutional provision is drawn into question. Ga. Const. art. 6, § 6, ¶ 2. As with all questions of law, this Court reviews constitutional questions *de novo*, without deference to the trial court. *See, e.g., Suarez v. Halbert*, 246 Ga. App. 822, 543 S.E.2d 733 (2000).

SUMMARY OF ARGUMENT

The general rule of *Gaskins* that courts of equity should not enjoin the electorate's vote on a constitutional amendment that presents a substantive problem *if ratified* does not (or should not) apply to the injunctive relief Appellants seek. The relief requested here instead falls within an exception to that general rule, because *the constitutional harms at issue in this case do not depend in any way upon whether the electorate ratifies the Proposed Amendment.*² Instead, the constitutional harms at issue in this case are *suffered in the voting booth.*

In order to address the question of whether this case properly falls within the general rule of *Gaskins* or an exception thereto, it is first necessary to consider the constitutional harms at issue here. By combining multiple subjects in one amendment and using misleading ballot language, an election on the Proposed Amendment would violate the rights of voters *at the ballot box.* Precisely because this harm would occur at the moment of voting, it is essential that a court of equity intervene *prior to the election* to safeguard the right of Georgia voters not to be confronted with the unconstitutional

² For example, Appellants are not currently challenging the Proposed Amendment on the grounds the Proposed Amendment, if enacted, will violate Equal Protection principles or the Full Faith and Credit Clause of the United States Constitution. Under *Gaskins*, a review of whether these constitutional harms would flow from enactment of the Proposed Amendment rightly is deferred until when (if ever) the Proposed Amendment is ratified. By contrast, Appellants are seeking now to prevent harms that would flow *from the election itself*, regardless of whether the Proposed Amendment passes or fails.

dilemma that flows from the Proposed Amendment's impermissible combination of multiple subject matters.³

ARGUMENT AND CITATION OF AUTHORITIES

I. THE PROPOSED AMENDMENT VIOLATES THE SINGLE-SUBJECT RULE.

A. The Proposed Amendment Impermissibly Combines Four Separate Objectives.

As embodied in the Georgia Constitution, the single-subject rule 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. . . ." Ga. Const. art. 10, § 1, Para. 2.⁴ The language used is mandatory. See *Mead v. Sheffield*, No. S04A1982, 2004 WL 1944824, at *1 (Ga. Sept. 2, 2004) ("'Shall' is generally construed as a word of command."). Accordingly, adherence to the single-subject rule is an absolute constitutional prerequisite to the presentation of any proposed amendment to the electorate.

"The obvious purpose of this constitutional provision is to prevent combinations by which different and distinct matters of proposed legislation are presented as one measure, whereby each of them gains strength and support which it would not have if it were presented solely upon its own merits and voted upon

³ This is especially so when, as here, the proposition is to be presented to the electorate through affirmatively misleading ballot language.

⁴ Georgia courts have "analogized the provisions of the Constitution respecting the inhibition against submitting more than one question at a time to the vote of the people to the constitutional inhibition against multiple subject matter legislation." *Carter v. Burson*, 230 Ga. 511, 518, 198 S.E. 2d 151, 156 (1973).

separately." *Carter v. Burson*, 230 Ga. 511, 519-20, 198 S.E.2d 151, 156 (1973); see also *Rea v. City of La Fayette*, 130 Ga. 771, 61 S.E. 707, 708 (1908) (holding that resolution to issue bonds for water, electricity and education purposes unconstitutionally combined multiple subject matters); *Brown v. State*, 79 Ga. 324, 4 S.E. 861, 862 (1887) (holding act unconstitutional when it contained two different subject matters).

Parts of a proposed constitutional amendment are considered a "single subject" only when they are germane to the accomplishment of a single objective "and nothing more." *Carter v. Burson*, 230 Ga. 511, 520, 198 S.E. 2d 151, 156 (1973); *Goldrush II v. City of Marietta*, 267 Ga. 683, 685, 482 S.E.2d 347, 352 (1997) (holding that regulation of a particular subset of alcoholic beverage sales is germane to regulation of alcoholic beverage sales generally); *Wall v. Bd. of Elections of Chatham County*, 242 Ga. 566, 570 250 S.E.2d 408, 412 (1978) (upholding proposed amendment "where the initial question was whether something should be done and the additional questions were merely incidental to the accomplishment of it"); *Clark v. State*, 240 Ga. 188, 240 S.E.2d 5 (1977); *Sears v. State*, 232 Ga. 527, 208 S.E.2d 93 (1974); *Crews v. Cook*, 220 Ga. 479, 480, 139 S.E.2d 490, 492 (1964).

1. Prohibiting Recognition of Other Unions Between Same-Sex Couples is a Different Subject than Defining Marriage.

Subsection (a) of the Proposed Amendment accomplishes a single objective; it defines marriage as the union of man and woman. Subsection (b), however, accomplishes several different objectives. First, it prevents the state from recognizing any "union between persons of the same sex . . . as entitled to the benefits of marriage." This sweeping language addresses civil unions, reaching a separate subject from the definition of marriage.

Under established Georgia case law, "marriages" and "civil unions" are not the same. The Georgia Court of Appeals has held expressly that a civil union is different from marriage. In *Burns v. Burns*, 253 Ga. App. 600, 560 S.E.2d 47 (2002), a divorced man and woman entered into a consent visitation order that denied visitation rights to any party cohabiting with another adult outside of marriage. When Ms. Burns and her female partner entered into a civil union in Vermont, her former husband filed a contempt motion alleging that she was not married to her partner and thus was in violation of the visitation restriction. Ms. Burns denied the contempt, contending that she was in fact married by virtue of her Vermont civil union.

Expressly recognizing a legal distinction between a Vermont civil union and marriage, the Court of Appeals rejected this argument, accepting the Vermont legislature's finding that "'a system of civil unions does not bestow the status of civil marriage.'" *Id.* at 601, 560 S.E.2d at 49. Reviewing the statutory prohibition against same-sex marriage in Georgia, the Court of Appeals affirmed the trial court's finding that "a 'civil union' is not a marriage." *Id.* at 601, 560 S.E.2d at 48.

Because the Georgia Court of Appeals has ruled as a matter of law that a civil union is different from a marriage under Georgia law, subsections (a) and (b) of the Proposed Amendment do not address the same subject matter. Subsection (a) prohibits marriage between persons of the same sex. Subsection (b), however, purports to bars civil unions and the legal consequences that might flow from such unions. Accordingly, the Proposed Amendment encompasses multiple subjects and accomplishes multiple objectives in violation of the single-subject rule.

2. Stripping Georgia Courts of Jurisdiction is a Different Subject than Defining Marriage.

Civil unions are not the only additional subject addressed by the Proposed Amendment. Subsection (b) also purports to modify the jurisdiction of the courts of this State. This jurisdictional modification is conceptually distinct from, and

extends far beyond, creating a constitutional definition of marriage.

The Georgia Constitution grants to the Superior Courts of this State subject matter jurisdiction over "all cases, except as otherwise provided in this Constitution" and otherwise defines the jurisdiction of Georgia courts. Ga. Const. art. 6, § 4, ¶ 1; see also, e.g., Ga. Const. art. 6, § 1, ¶ 4. (providing grant of power to order specific types of relief); Ga. Const. art. 6, § 5, ¶ 3 (providing for jurisdiction of the Court of Appeals).

Subsection (b) of the Proposed Amendment purports to modify the foregoing constitutional provisions by stripping Georgia courts of subject matter jurisdiction to "rule on any of the parties' respective rights arising as a result of or in connection with" certain same-sex relationships. Altering the constitutionally established jurisdiction of the courts is not only a serious matter, but is also an unequivocally different subject from creating a constitutional definition of marriage.

While the Georgia Constitution certainly permits the jurisdiction of the Georgia courts to be modified through the amendment process, this modification still must comply with the single-subject rule. Because the Proposed Amendment links jurisdictional modification with the distinct topic of the

definition of marriage, it is an unconstitutional violation of the single-subject rule.

3. Barring the State from Giving Effect to Acts and Judgments of Other States is a Different Subject than Defining Marriage.

Subsection (b) of the Proposed Amendment also provides that the State must ignore "any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex." Again, this provision is wholly distinct from creating a constitutional definition of marriage.

Georgia courts recognize foreign judgments absent fraud or lack of personal jurisdiction. *See Davis v. Smith*, 5 Ga. 274 (1848); *Johnson v. Equicredit Corp.*, 238 Ga. App. 380, 517 S.E.2d 353 (1999); O.C.G.A. § 9-12-130 *et seq.* Indeed, "such a judgment is *res judicata* between the parties." *Sundman v. Faris*, 254 Ga. App. 185, 186, 561 S.E.2d 442, 444 (2002).

Even when based on an act or transaction not permissible in Georgia, a foreign "judgment is nevertheless entitled to full faith and credit" in Georgia courts. *Cannon v. Cannon*, 244 Ga. 299, 260 S.E.2d 19, 20 (1979) (holding that a judgment based on North Carolina contract was entitled to full faith and credit even though the underlying contract contravened Georgia public policy); *see also Hargreaves v. Greate Bay Hotel & Casino*, 182 Ga. App. 852, 852, 357 S.E.2d 305, 305 (1987) (holding that an

out-of-state judgment based on a gambling debt is entitled to full faith and credit even though "it is against the public policy of the State of Georgia to enforce such a debt").

Subsection (b) of the Proposed Amendment seeks to enact a constitutional repeal of the longstanding principle that all valid judgments from other states must be given credit by Georgia courts. This is a wholly different proposition from defining marriage in this State. Therefore, the Proposed Amendment violates the single-subject rule.

B. The Proposed Amendment Confronts Voters With an Unconstitutional Dilemma at the Voting Booth.

Through its disregard of the single-subject rule, the Proposed Amendment presents an unconstitutional dilemma to Georgia voters who favor restricting marriage to opposite-sex couples, but who nevertheless disfavor the other effects of subsection (b). Due to the unconstitutional linkage of these separate topics, Georgia voters are forced either to vote to support all of the subjects or to oppose them entirely.

This Court has consistently reaffirmed that the single-subject rule's fundamental purpose is to prevent "log-rolling," or compelling voters to endorse a proposition they oppose in order to enact another proposition which they support. See *Carter*, 230 Ga. at 519, 198 S.E.2d at 156; *Am. Booksellers Ass'n v. Webb*, 254 Ga. 399, 329 S.E.2d 495 (1985) (discussing

constitutional prohibition against omnibus or "log-rolling" bills that secure passage of several measures no one of which could succeed upon its own merits). As this Court has made plain:

Each proposition submitted to the voters should stand or fall upon its own merits, without, on the one hand, receiving any adventitious aid from another and perhaps more popular one **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** When he is thus compelled, if he votes at all, there is something closely akin to coercion when his ballot is cast.

Rea, 130 Ga. at 772, 61 S.E. at 708 (emphasis added).

The coercion that results from such a legislative "tying arrangement" is inappropriate even when the two linked propositions might at first appear to be tangentially related. *Id.* For example, in *Rea*, a municipality could not ask its voters in a single resolution to approve bonds both for improving public schools and for investing in infrastructure. *Id.* at 777-78, 61 S.E. at 710. While both parts of the resolution related at some level to the subject of incurring public debt, providing adequate accommodations for public schools might have been so popular as to force voters to accept other infrastructural improvements that they disapproved. *Id.*

Without doubt, the General Assembly has the authority to present more than one question to the voters, if it does so properly. As this Court has recognized:

[T]wo or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together to stand or fall upon a single vote.⁵

Id. at 776, 61 S.E. at 709 (citation omitted).

Here, the Proposed Amendment presents precisely the same problem condemned by this Court in *Rea*. Allowing the Proposed Amendment to go forward would force many voters to endorse a result they oppose (e.g., barring same-sex couples from civil unions), in order to enact another proposition they support (limiting marriage to opposite-sex couples).⁶ By voting "yes" on the Amendment, such a voter is being "compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves." *Rea*, 130 Ga. at 772, 61 S.E. at 708. Alternatively, by voting "no" the voter is compelled, "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." *Id.*; see also Verified Complaint at ¶ 12.

⁵ Indeed, the General Assembly was presented with, but rejected, the opportunity to correct the single-subject rule infirmity of the Proposed Amendment by deleting subsection (b). See Verified Complaint at ¶ 13.

⁶ While the sanctity of the constitutional rights at stake in this case do not depend upon the number of people affected by their invasion, statistical data suggests that between 15% and 55% of voters oppose marriage by same-sex couples but are in favor of civil unions. See, e.g., <http://www.pollingreport.com/civil.htm> (compiling recent polling data revealing that Americans view marriage differently from legal unions which provide economic and social benefits for same-sex couples).

The Proposed Amendment thus strikes at the very core of the ability of a citizen to vote his or her conscience, completely, freely and without contradiction. The single-subject rule is expressly designed to protect the Georgia electorate from being forced to navigate Scylla and Charybdis at the ballot box.

II. THE BALLOT LANGUAGE BY WHICH THE PROPOSED AMENDMENT IS TO BE PRESENTED TO THE VOTERS CANNOT WITHSTAND EVEN MINIMAL JUDICIAL SCRUTINY AND VIOLATES DUE PROCESS.

The language selected for the November 2 ballot affirmatively disguises the sweeping impact of the Proposed Amendment and thus will deny Georgia voters the due process right to a fair and meaningful vote. Because the ballot language selected by the General Assembly alerts the voter only to the amendment creating a constitutional definition of marriage, it does not reflect that the Proposed Amendment actually incorporates *four distinct changes* to the Georgia Constitution.

The integrity of the ballot is of the utmost importance to the validity of an election. "[Nothing] could possibly constitute a more vitally essential element in an election than the contents of the official ballot furnished to the voters.'" *Mead v. Sheffield*, No. S04A1982, 2004 WL 1944824, at *1 (Ga. Sept. 2, 2004) (quoting *Alexander v. Ryan*, 202 Ga. 578, 582, 43 S.E.2d 654, 659 (1947)); see also *Reynolds v. Sims*, 377 U.S.

533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

When a proposed constitutional amendment is presented for a vote, Georgia law generally grants the General Assembly authority to choose the language that appears on the ballot. See Ga. Const. art. 10, § 1, ¶ 2. Courts reviewing ballot language will defer to the General Assembly's designated language so long as the language comports with basic constitutional requirements. See, e.g., *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997); *Donaldson v. Dep't of Transp.*, 262 Ga. 49, 414 S.E.2d 638 (1992); *McLennan v. Aldredge*, 223 Ga. 879, 159 S.E.2d 682 (1968). Georgia courts review ballot language to ensure that it meets "the requirement that the language be adequate to enable the voters to ascertain on which amendment they are voting." *Sears v. State*, 232 Ga. 547, 555, 208 S.E.2d 93, 99 (1974); see also *Carter*, 230 Ga. at 522, 198 S.E.2d at 157 (finding ballot language sufficient to identify the amendment at issue); *Donaldson*, 262 Ga. at 51-52, 414 S.E.2d at 640 (holding that amendment at issue was sufficiently identified after observing that "a careful comparison of the amendment and the ballot language reveals that the ballot language . . . is not inaccurate or 'affirmatively misleading'").

In *Sears v. State*, although conducting only minimal judicial review, this Court suggested the General Assembly's discretion in drafting ballot language should not be unfettered. While ultimately upholding the ballot language at issue, this Court decried the use of the ballot as a tool of propaganda. *Sears*, 232 Ga. at 555-56, 208 S.E.2d at 100 (recognizing that, when choosing ballot language " the legislature . . . exposes itself to the temptation . . . to interject its own value judgments . . . and thus [can] propagandize the voters in the very voting booth, in denigration of the integrity of the ballot").

More recently, in the 1992 case of *Donaldson v. Department of Transportation*, this Court went further in emphasizing the importance of sufficient ballot language: "[W]e believe that the legislature should in every instance strive to draft ballot language that leaves no doubt in the minds of the voters as to the purpose and effect of each proposed constitutional amendment" *Donaldson*, 262 Ga. at 51, 414 S.E.2d at 640 (emphasis added). Although the majority found the challenged ballot language in *Donaldson* sufficient to identify the amendment at issue, this Court's decision in *Donaldson* nevertheless underscores the basic principle that the General Assembly should avoid choosing language likely to mislead voters about the purpose and effect of a proposed amendment.

Even under the applicable minimal judicial review, the ballot language at issue in this case warrants judicial intervention. The General Assembly has gone too far. While it is true enough that the ballot language allows the voters to ascertain that they are voting on an amendment concerning the definition of marriage, the ballot language is manifestly insufficient to indicate that voters are also voting on an amendment that (i) affects the recognition of civil unions; (ii) modifies the jurisdiction of the Georgia courts; and (iii) denies full faith and credit to certain judgments and acts of other states.

Moreover, the ballot language chosen by the General Assembly enhances the probability of ratification by minimizing and disguising the Proposed Amendment's true consequences. While *Sears* and *Donaldson* call for highly deferential review concerning the "ascertainment" or "identity" of a given amendment, this Court has never endorsed the proposition that the General Assembly may abuse the amendment process through ballot language comprised of half truths (or in this case, quarter truths). The General Assembly's power to select ballot language is not and cannot be absolute. The affirmatively misleading ballot language selected for presentation of the Proposed Amendment to the electorate cannot survive even deferential review.

III. BECAUSE THE PROPOSED AMENDMENT VIOLATES THE SINGLE-SUBJECT RULE AND IS TO BE PRESENTED THROUGH AFFIRMATIVELY MISLEADING BALLOT LANGUAGE, A COURT OF EQUITY HAS THE AUTHORITY TO ENJOIN THE ELECTION ON RATIFICATION.

The court below was correct in recognizing the general rule that courts of equity should not enjoin the electorate's vote on a constitutional amendment that may present a substantive constitutional problem *if ratified*. The trial court erred, however, in failing to recognize that *this* challenge to the Proposed Amendment falls within an exception to the general rule, because the constitutional harm at issue here flows *not from ratification (if it occurs), but from the vote itself*. Because the harm to voters from being confronted with an unconstitutional dilemma and misleading ballot language will occur at the moment of voting, the judiciary is authorized to take *pre-election* action to protect the rights of Georgia voters.

Under an exception to the general rule that courts will not enjoin an election, it is appropriate for a court to grant pre-election equitable relief when a constitutional harm would flow from the election itself (regardless of the results), when there is no legal authority for the vote, or when legitimate legislative process concerns are not implicated. See *Cheney v. Ragan*, 151 Ga. 735, 740, 108 S.E. 30, 32 (1921). These exceptions are directly applicable here.

A. This Case Presents No Legislative Process Concerns Because the Legislative Process is Complete with Respect to the Harms Appellants Seek to Redress.

The Superior Court based its decision to refrain from reaching the merits of this case on *Gaskins v. Dorsey*, 150 Ga. 638, 104 S.E. 433 (1920). In *Gaskins*, this Court affirmed the refusal of an injunction against an election to ratify a proposed constitutional amendment based upon notions of deference to the legislative process:

The judicial power will not be exerted . . . to stay the course of legislation while it is in process of enactment. This applies both to ordinary legislation and the analogous course of an amendment to the Constitution from the time of the introduction of the act proposing the amendment until the electors have acted.

Id. at 639, 150 S.E. at 433.

In contrast to the rationale underpinning this Court's decision in *Gaskins*, concerns about interference with the legislative process have no place here. With respect to the constitutional harms that Appellants seek to redress, the legislation at issue is not "in its formative stages" in any sense. To the contrary, the General Assembly *has already and finally decided* on the multiple subject matters to be presented to the voters in the Proposed Amendment and the language to be used on the ballot.

Because the legislative process is complete with respect to the constitutional harms at issue in this case, those harms are

not dependent upon ratification of the Proposed Amendment. Instead, the constitutional harms sought to be prevented here would flow from the election itself, regardless of the results. See *Rea v. City of La Fayette*, 130 Ga. 771, 772, 61 S.E. 707, 708 (1908) ("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").

The harm of presenting the electorate with an unconstitutional dilemma will be accomplished at the moment of voting, and this constitutional harm will be the same regardless of whether the Proposed Amendment is or is not passed (and regardless of whether the Proposed Amendment is later declared invalid). Accordingly, the legislative process rationale upon which *Gaskins* is founded has no application here.

B. This Case is Governed by Exceptions to the General Principle that Equity Will Not Enjoin an Election.

As other cases from this Court reveal, Georgia has long recognized that there are important exceptions to the general rule that elections are reserved to the political process. See *Cheney*, 151 Ga. at 740, 108 S.E. at 32. Those exceptions are implicated here.

In *Cheney v. Ragan*, 151 Ga. at 740, 108 S.E. at 32, this Court distinguished *Gaskins* and held that a Superior Court erred by failing to grant an injunction against an election that put

an improper and illegal choice to the electorate. See *id.* at 740, 743, 108 S.E. at 32, 34. In *Cheney*, the General Assembly had prescribed a specific methodology pursuant to which an election could be held. This methodology required the election to allow voters who favored changing the county seat the option of specifying the city to which they wanted the county seat moved. See *id.* at 737, 108 S.E. at 31. Contrary to this prescribed methodology, the "ordinary" of Calhoun county called for an election pursuant to which voters were permitted to vote either "'Against removal'" or "'For removal . . . to Edison, Georgia.'" See *id.* at 737, 108 S.E. at 31.

This Court held: "The present case under its facts should be excepted from the general rule . . . [because] [t]he city authorities ha[d] no power to call the election, their ordinance attempting to do so is absolutely void, and any election held thereunder would be likewise void." *Id.* at 741-42, 108 S.E. at 33; see also *Mayor of Macon v. Hughes*, 110 Ga. 795, 797, 36 S.E. 247, 248 (1900) (affirming grant of injunction against election concerning whether additional territory should be annexed to the City of Macon because statute purportedly authorizing the election had been repealed); *Tolbert v. Long*, 134 Ga. 292, 67 S.E. 826 (1910) (holding that injunction against declaring the results of an election was the appropriate remedy when the election itself was illegal due to disregard of suffrage

requirements); *DeKalb County v. City of Atlanta*, 132 Ga. 727, 743-44, 65 S.E. 72, 79 (1909) (holding that injunctive relief was required when City had no lawful authority to hold election to change county line); *Marbut v. Hollingshead*, 172 Ga. 531, 158 S.E. 28 (1931) (affirming the grant of an injunction against an election held pursuant to unconstitutional statute).

Most importantly, this Court has specifically endorsed *pre-election* relief "where the constitutional rights of a citizen and taxpayer are sought to be invaded by an attempt to make an unconstitutional or inapplicable law operative through the means of popular election." *Tolbert v. Long*, 134 Ga. 292, 294-95, 67 S.E. 826, 827 (1910). In such circumstances, this Court rightly has recognized that equity can better protect constitutional rights "by restraining any attempts upon their encroachment through the medium of an election, than by waiting until the election has been held." *Id.*; see also *Marbut*, 172 Ga. at 538, 158 S.E. at 32 (applying *Tolbert*).

Here, the General Assembly has no constitutional authority to call for an election on a single amendment concerning multiple subject matters. Under the Georgia Constitution, such an election is plainly impermissible and the unconstitutional burden placed on the electorate must not be tolerated.

Appellants' claims in this case are not predicated on a contention that the Proposed Amendment would accomplish a

substantively unconstitutional objective *if enacted and put into effect*. Rather, Appellants seek to prevent the infliction of an unconstitutional harm that otherwise will occur at the moment of voting. Through violation of the single-subject rule, the constitutional right of Georgia citizens to be free from coercion at the ballot box is sought to be invaded. "[I]t is inconceivable that [Georgia voters] have no standing in a court of equity to enjoin an ultra vires act which will result in imposing upon them this unlawful burden." *Hughes*, 110 Ga. at 805, 36 S.E. at 251. Under these circumstances, pre-ballot injunctive relief is appropriate and necessary.

C. Even if This Court Finds that *Gaskins* Otherwise Applies Here, the Court Should Recognize a Narrowly Tailored Exception Sufficient to Safeguard Georgia Voters.

1. A Proper Application of Separation of Powers Principles Requires This Court to Act to Prevent the Infliction of Unconstitutional Choices on Georgia Voters.

The court below reasoned that that the rule of *Gaskins* should apply here under separation of powers principles. A proper application of those principles, however, commands the opposite result.

It is well established that the judiciary's role among the coordinate branches of government is to provide relief to claimants who have suffered, or imminently will suffer, actual harm. See *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174,

2179 (1996); see also, e.g., *Davis v. Passman*, 442 U.S. 228, 241-242, 99 S.Ct. 2264, 2275 (1979) (quoting 1 Annals of Cong. 439 (1789)) (anticipating that the "'tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive [and] will be naturally led to resist every encroachment upon rights'"). Indeed, "The very essence of civil liberty," wrote Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163. For this reason, "it is established practice for this Court to sustain the jurisdiction of federal courts to *issue injunctions to protect rights*" *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1946) (emphasis added).

Appellants respectfully submit that the recognized duty of this Court to protect the constitutional rights of Georgia citizens similarly and fully supports an immediate judicial response to the facts presented here. As this Court has held, "Manifestly a department of the State government vested with the power to declare void laws enacted by the Legislature has a power broad enough to declare void *other actions* of that department . . . if they are found to have violated the Constitution and to be an infringement of right." *Thompson v.*

Talmadge, 201 Ga. 867, 873, 41 S.E.2d 883, 891 (1947) (emphasis added) (voiding the General Assembly's election of a governor). The call for a vote on a proposed constitutional amendment that impermissibly combines multiple subject matters is just such an "other action" of the legislature, and that "other action" violates the Georgia Constitution by directly infringing on the right of the electorate to be free of unconstitutional dilemmas at the ballot box. See *Rea*, 130 Ga. at 772, 61 S.E. at 708. In this circumstance, this Court should not hesitate to protect the constitutional rights of Georgia voters by declaring that action void and requiring the grant of appropriate injunctive relief.⁷

Although a court should not interfere with the legislative process, it can, should, and must police the completed actions of the General Assembly insofar as those actions infringe on the rights of Georgia citizens. See *Thompson*, 201 Ga. at 873, 41 S.E.2d at 891. Here, the Georgia General Assembly has overstepped its constitutional boundaries by the act of *calling for an election* on a multiple-subject amendment in direct contravention of its constitutional authority, an *ultra vires*

⁷ As the United States Supreme Court recently observed, the proper conduct of an election requires "orderly judicial review of any disputed matters that might arise." *Bush v. Gore*, 531 U.S. 98, 110, 121 S. Ct. 525, 532 (2000) (per curiam). Stated another way, "[c]ount first, and rule on legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." *Bush v. Gore*, 531 U.S. 1046, 1047, 121 S. Ct. 512 (2000) (Scalia, J. concurring).

act that it has compounded through the employment of affirmatively misleading ballot language.

Moreover, as discussed above, this case implicates no legitimate concerns about overstepping the judiciary's proper role by premature interference with the role of the legislature. The General Assembly *has already and finally decided* on the multiple subject matters to be presented to the voters, but it has no constitutional authority to call for a vote that puts the electorate to an unconstitutional dilemma through inclusion of multiple subjects in a single proposed amendment.

It bears emphasis that the harms at issue here are *not* dependent upon ratification of the Proposed Amendment. Instead, the constitutional harms sought to be prevented here would flow from *holding a constitutionally impermissible election*. Those harms to the electorate will occur at the moment of voting, when the voter is confronted with both misleading ballot language and an unconstitutional dilemma - forced to vote for something she disfavors (e.g., banning civil unions) in order to vote for something she supports (defining marriage as the union of man and woman), *or vice versa*. Importantly, these harms will be realized *regardless of whether the Proposed Amendment passes or fails*.

Based on a proper application of separation of powers principles, the judiciary is the appropriate branch of

government to act to protect the rights of the electorate from legislative overreaching when, as here, pre-election relief is necessary to prevent a constitutional harm.

2. If SR 595 Is Not Enjoined, the Georgia Electorate Will Suffer Irreparable Harm that Cannot Be Remedied Post-Election.

Unless this Court acts, there will be a constitutional violation for which there is no adequate post-election remedy. In light of the patently unconstitutional choice to which the Proposed Amendment would put the Georgia electorate, *pre-ballot* injunctive relief is both necessary and appropriate.

To the extent that *Gaskins* might otherwise appear to foreclose pre-election relief, Appellants request that this Court recognize a narrowly tailored exception to the general rule. Few constitutional harms are directly linked to an election itself and will be realized at the very moment of voting. However, violations of the single-subject rule (particularly when compounded by misleading ballot language) present just such harms. The manifest need for injunctive relief sufficient to prevent such harms from occurring in the voting booth calls for recognition of an appropriate, narrowly tailored, exception to the general rule applied in *Gaskins*.

If this Court does not act, Georgia voters will suffer an irreparable harm, the disenfranchisement of their constitutional right to vote their conscience, that cannot be addressed

adequately by a post-election remedy. A post-ratification remedy would only address one component of the harms that might be wrought by the Proposed Amendment, those flowing from ratification and enforcement, but the constitutional harm to Georgia voters inflicted by from putting the electorate to an unconstitutional choice would remain forever unaddressed. The fact that post-ratification injuries can be redressed by those affected by the Proposed Amendment if it is enacted does not mean that this Court should ignore constitutional injuries flowing from the election itself. As the Superior Court observed in its Final Order, "[T]he Court's power to act to enjoin invalid or unlawful elections derives from the right of the electorate to be protected from the government engaging in acts which exceed its authority under the law." [Final Order at 4.] Contrary to the Superior Court's ruling, however, this fundamental right of the electorate is precisely the right at issue here.

Unless this Court reverses the lower court, the General Assembly rationally must conclude that it has judicial license to disregard with impunity the Georgia electorate's constitutional right under the single-subject rule to be free from unconstitutional dilemmas at the ballot box. A right without a remedy is no right at all.

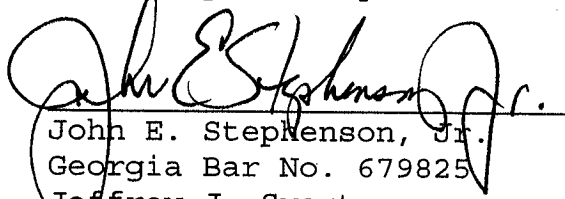
CONCLUSION

The Proposed Amendment is constitutionally defective because it violates both the single-subject rule and due process. This Court has not yet been confronted with a circumstance in which the General Assembly *both* violated the single-subject rule *and* described only one component of an omnibus amendment. This perfect storm of electoral unconstitutionality cannot be indulged.

Georgia voters will suffer irreparable harm if the vote on the Proposed Amendment occurs as presently proposed, because they will be forced to vote on an unlawful combination of multiple subject matters *and* be faced with ballot language that affirmatively disguises that combination. Precisely because of these constitutional deficiencies, Appellants respectfully submit that it is this Court's duty to act to prevent a violation of the voters' constitutional rights. Because the constitutional harm to the electorate will be accomplished at the moment of voting, waiting to resolve these issues will not provide adequate relief to the voters. In fact, a post-election remedy would leave the Georgia electorate without relief for the unconstitutional harm accomplished at the voting booth.

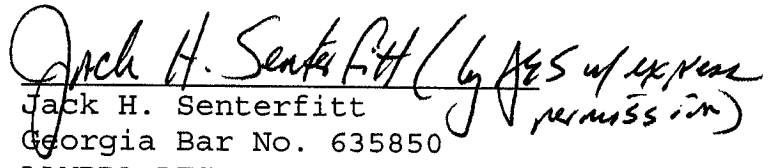
For all those reasons set forth above, this Court should reverse the Superior Court's decision and direct the Superior Court to grant appropriate equitable relief.

Respectfully submitted this 5THth day of October, 2004.



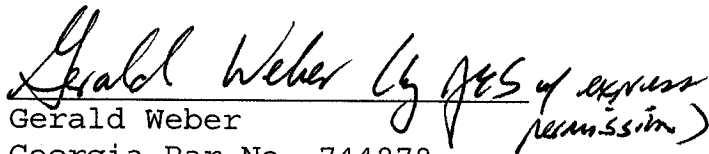
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CERTIFICATE OF SERVICE

This is to certify that the foregoing "Brief of Appellants" has been served this day by facsimile transmission and by electronic mail to the following counsel of record for Defendant via the facsimile number and electronic mail address indicated below:

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