

BRIEF OF APPELLEE SENATOR DAVID ADELMAN

Senator David Adelman urges the Court to strictly apply the Georgia Constitution. Senator Adelman participates in this case because he knows he has constituents who oppose same sex marriage but support civil unions and domestic partner benefits. Although he adopts the arguments in the Brief of the other Plaintiff-Appellees, he files a separate brief solely for the purpose of addressing the *remedial issues* that have not been fully addressed in the briefs filed by Governor Perdue or by the other Appellees.

Summary Of Argument

The trial court was correct in holding Amendment One unconstitutional on the ground that it encompasses two distinct and mutually exclusive subjects and therefore violated the single-subject rule in Article X, § 1, ¶ 2 of the Georgia Constitution. Under Amendment One, “marriage” is by definition limited to “a union of man and woman.” The purpose of Amendment One is to establish a clear and constitutional dividing line between two subjects – “marriage” between people of the opposite sex on the one hand -- and same sex relationships (“civil unions,” “domestic partnerships” or by whatever name they may be called), on the other.

By providing that “No *union* between persons of the same sex shall be recognized in Georgia nor shall it be recognized by this state as entitled to the benefits of marriage,” Amendment One strays into an entirely different, and far

more controversial subject – future legal recognition or enforcement of legal rights arising out of same sex relationships that are not, and by definition cannot be, a “marriage” under Georgia law. The first sentence of subparagraph (b) can be interpreted as precluding any future legal recognition and protection to same sex relationships other than marriages.¹

The Court should consider whether the conflict between Amendment One and the single-subject rule in Article X, § 1, ¶ 2 can be remedied by severing the offending sentence that is the source of the conflict, from the remaining provisions of Amendment One. This approach would be consistent with a long line of Georgia cases which have held that "If a construction can be placed upon a statute which will save it from being declared unconstitutional, it is the duty of the courts to adopt such a construction and thus save the act from collision with ongoing law. If sections, provisions or phrases can be stricken therefrom without destroying the general legislative scheme, courts should strike them and leave the remainder thereof intact." *Bennett v. Wheatley*, 154 Ga. 591, 594 (1922).

¹ Subparagraph (b) also can be interpreted as depriving the courts of the jurisdiction to enforce contracts between same sex couples (such as mutual wills) or contracts between an employer, public or private, and its employees that extend health coverage, retirement or other benefits to the employees’ domestic partners, if similar benefits are extended to the “spouses” of married employees and are considered a “benefit of marriage.” Since the purpose of the single-subject rule is to protect the right of the electorate to vote on each subject in an Amendment separately (*See* Ga. Const. Art. X, ¶ 1, § 2), these two distinct subjects should not have been combined and submitted for ratification as a single constitutional Amendment.

Thus, Senator Adelman respectfully submits that the proper remedy is to *sever* the offending sentence, rather than invalidating Amendment One in its entirety. *See, e.g., City Council of Augusta v. Mangelly*, 243 Ga. 358, 363 (1979) (stating the general rule that “when a statute cannot be sustained as a whole, the courts will uphold it in part; when it is reasonably certain that to do so will correspond with the main purpose which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose” (citing cases)) (internal quotations omitted); *Bennett v. Wheatley*, 154 Ga. at 595. Since a constitutional amendment is a legislative act that has been adopted by a super majority, and ratified by the people, the policies that justify the severance of policies of statutes apply with even greater force to constitutional amendments than to statutes that can be corrected by a simple majority vote at the next session of the Legislature.

Statement of Facts

Traditionally, the term “marriage” has had a single meaning that was universally recognized and accepted by both civil authorities and religious denominations. “Marriage” is defined in *Webster*, for example, as “a: the state of being united to a person of the *opposite sex as husband and wife*; b: *the mutual relation of husband and wife in wedlock*; c: *the institution whereby men and women are joined in a special kind of social and legal dependence* for the

purpose of founding a family.” *Webster's Third New International Dictionary*, 1384 (1976).

In response to the perception that actions and decisions in other states might have an impact on the definition of marriage in Georgia, in 1996 the Georgia Legislature adopted a statutory definition of marriage that limited “marriage” for purposes of Georgia law to “the union only of man and woman” and expressly prohibited “*marriages* between persons of the same sex.” O.C.G.A. § 19-3-3.1(a).²

In 2004, the General Assembly proposed that the statutory definition of marriage in O.C.G.A. § 14-3-31 be elevated to constitutional status to both prevent a future legislature or the judiciary from expanding the definition of “marriage” to

² **19-3-3.1. Marriages between persons of same sex prohibited; marriages not recognized.**

(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such marriage.

include same sex couples. The primary and dominant purpose of Amendment One is to limit the definition of the institution of “marriage” to the union between a man and a woman and to prohibit the Georgia courts from giving legal recognition to “marriages between persons of the same sex.” Amendment One, ¶ (a). The major purpose of the Amendment is apparent (i) from the Resolution that was adopted by members of the General Assembly, (ii) the description of Amendment One on the ballot when the explanation of the Amendment to the people when it was submitted to them for ratification , and (iii) from the language of Amendment One itself.

The Resolution

Proposing an amendment to the Constitution *so as to provide that this state shall recognize as marriage only the union of man and woman*; to provide for submission of this amendment for ratification or rejection; and for other purposes.

The Ballot

Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?

() YES
() NO

The Amendment

MARRIAGE

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 a 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* [i.e., marriage] or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.”

Amendment One was copied almost verbatim from O.C.G.A. § 19-3-3.1.

For reasons that are far from clear, however, in drafting the first sentence of subparagraph (b), the drafters of Amendment One elected to change the language of the first sentence of O.C.G.A. § 19-3-3.1(b), by substituting the word “union” in Amendment One for the word “marriage” in the statute.

O.C.G.A. § 19-3-3.1

(b) No *marriage* between persons of the same sex shall be recognized as entitled to the *benefits of marriage*.

Amendment One

(b) No *union* between persons of the same sex shall be recognized in this state as entitled to the *benefits of marriage*.

The substitution of the single word “union” in the first sentence of subparagraph (b) for the word “marriage” in O.C.G.A. § 19-3-3.1 changed the meaning of the sentence as it appeared in the statute and expanded the reach of the Amendment beyond merely defining and confining “marriage” in Georgia to the “union of man and woman,” by precluding private parties from extending any

rights, and the Courts from enforcing any contracts that conferred any benefit that is also a “benefit of marriage” to people in same sex relationships.

The Superior Court held that the substitution of the word “union” for “marriage” in the first sentence of subparagraph (b) caused Amendment One to violate the single-subject rule in Article X, § 1, ¶ 2.³ Judge Russell explained:

The remaining sentence of *Paragraph I(b)* states that “[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.” Unlike the other sentences in the Paragraph it contains no limiting or qualifying language. Its reach is not confined to legal unions or same sex relationships treated as marriages by other states or jurisdictions.

Defendant acknowledges that the provision could preclude future legislature from recognizing civil unions; at the same time he also asserts that the word “union” is interchangeable with marriage. The two propositions are, however, incompatible. If “union” as used in the sentence is synonymous with marriage then the provision does not relate to civil unions and there is no reason to conclude that future legislatures would be barred from creating or recognizing such unions.

Defendant’s argument that “union” and marriage as they appear in Amendment One are interchangeable is unpersuasive.

³ The possible overbreadth of the first sentence is much worse than the trial court thought. The first sentence of subparagraph (b) can be read as prohibiting the courts of this state from “recognizing” and enforcing any contract – whether between a same sex couple themselves, or between public and private employers and their employees that extend health insurance or retirement benefits to one or both members of a civil union or domestic partnership if the benefits are similar to or a type that have previously been routinely available to spouses of married employees. Such an interpretation could require the overruling of cases like *City of Atlanta v. Morgan*, 266 Ga. 586, 492 S.E.2d 193 (1997) which upheld that power of the City to provide insurance coverage for both “spouses” and the “dependents” of domestic partners of city employees.

O.C.G.A. 19-3-3.1, enacted in 1996, contains the sentence “[n]o marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage.” It cannot be credibly argued that the General Assembly, when it drafted Amendment One and included a virtually identical sentence, was oblivious to the intense debate in this state and country about civil unions; and, somehow *fortuitously chose to substitute the politically charged word union for marriage. If the Legislature had intended for the provision to address same sex marriages it knew how to say so.* The Court finds that the General Assembly meant exactly what it said. “No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.”

The next area of inquiry is the meaning and intent of the phrase “benefits of marriage.” The word “benefit” is a noun meaning “advantage; useful aid; material aid . . . provided or due as a right.” (The Merriam-Webster Dictionary Home & Office Edition, p. 47 (1998)). The advantages and aid associated with marriage are both personal and public in nature. The personal advantages of marriage come from the companionship, caring, intimacy and commitment associated with sharing one’s life with another. They are unique to each individual and not susceptible to government regulation. Those “benefits of marriage” are clearly not the intended subject of Amendment One.

Many of the public advantage of marriage, on the other hand, are directly attributable to laws and policies adopted and enforced by government. It is only those benefits of marriage which are amenable to government control. One must conclude, therefore, that it is that *panoply of rights and entitlements which is the subject of Amendment One. Viewed in context, then, the phrase “benefits of marriage” is properly understood as a euphemism for the array of government created advantages, rights and privileges which our laws afford people based upon marriage.* Those benefits exist in areas as diverse as housing, taxation, inheritance, healthcare, child custody and medical decision-making. For example, because some zoning laws prohibit cohabitation by unmarried adults, there are places where only married couples may reside. Being married can also confer automatic pension and inheritance rights. And, of course,

the greatest benefit of marriage is that it creates a web of connection between unrelated individuals which is recognized and protected by law.

Based upon its operative phrases “union between persons of the same sex” and “benefits of marriage” the objective of the first sentence of *Paragraph I(b) is evident. Its objective is to ensure that unions between persons of the same sex – without restriction – are not afforded any of the advantages, rights or privileges afforded to married same sex couples under state law.* The first sentence of Paragraph I(b), unlike the Paragraph’s sentences addressing same sex marriages, does not limit its reach to same sex unions created or recognized by other states or jurisdictions. Consequently, *it bars the state of Georgia from granting same sex unions between Georgia residents any of the advantages given to marriages under state law.* As stated previously, having one’s relationship recognized by the government is one of the principal public benefits of civil marriage. Creating or recognizing civil unions in this state would confer on same sex couples a legal status and such recognition might be considered a benefit of marriage. In this Court’s judgment, therefore, *Amendment One could be read to preclude future legislatures from creating or recognizing civil union as a valid legal status.*

Order of May 16, 2006, pp. 8-9 (emphasis added).

Argument

I. Amendment One Violates the Single-subject Rule in Article X, § 1, ¶ 2 of the Georgia Constitution

The clear purpose of Amendment One is to limit the definition of “marriage” in Georgia to a “union of man and woman,” and to place the definition of “marriage” beyond the reach of the courts by elevating the definition from statutory (O.C.G.A. § 19-3-3.1) to constitutional status. “Marriage” is defined both affirmatively and negatively by exclusion in the first paragraph of the Amendment.

“Marriage” is *affirmatively* defined in subparagraph (a) as a “union of man and woman.” “Marriage” is also *negatively* defined by the exclusion of “marriages between persons of the same sex” which are expressly prohibited. *Id.*

In contrast to the word “marriage,” same sex relationships (“civil unions” or “domestic partnerships”) by whatever name they may be called now or in the future, are neither mentioned in or defined in Amendment One other than by exclusion of same sex relationships from the definition of “marriage.” There can be no doubt that the language of Amendment One shows that the framers of the Amendment did not consider same sex relationships and “marriage” to be the same subjects. To the contrary, same sex relationships treated as “marriage” are mutually exclusive and are polar opposites. Defining “marriage” and denying of legal rights and benefits to people in same sex relationships are qualitatively different subjects and cannot be combined in one Amendment under Article X, § 1, ¶ 2 of the Georgia Constitution.

If, as a result of the use of the word “union” in the first sentence of subparagraph (b), Amendment One is interpreted to mean that (i) future legislatures cannot, for example, amend the state tax code to allow two unmarried people of the same sex living together in the same household to file joint state income tax returns, or (ii) Georgia courts are deprived of jurisdiction to enforce, for example, employee benefit contracts between private companies and their

employees that extend health, life and accident coverage or retirement benefits to the domestic partners of their unmarried employees, as well as to spouses (*see, e.g., City of Atlanta v. Morgan*) because such benefits are a “benefit of marriage,” then there can be no doubt that Amendment One encompasses more than a single-subject. The Superior Court was therefore correct in holding that Amendment One violates the single-subject rule in Article X, § 1, ¶ 2 of the Georgia Constitution.

II. The court can preserve the constitutionality of the Amendment by severing the first sentence in subparagraph (b).

Instead of declaring Amendment One invalid in its entirety, as did the trial court, the constitutional defect in Amendment One can be cured simply by striking the first sentence in subparagraph (b), which is the source of the violation of the single-subject rule.⁴

Although the power of a court to sever the provisions of a proposed constitutional Amendment is a question of first impression that has never been decided in Georgia, the question has been decided affirmatively in several other states. *Ray v. Martin*, 742 S.2d 1276, 1280-81 (Fla. 1999); *U.S. Term Limits Inc. v. Hall*, 572 S.W.3d 349, 357-58 (Ark. 1994); *Legislature of the State of California v. Eu*, 816 P.2d 1309 (Cal. 1991). In principle, the arguments in favor of the power to sever invalid portions of legislative acts apply with greater force to proposed constitutional amendments than to statutes. Proposed constitutional amendments

⁴ Other variations of severance could also remedy the constitutional defect.

are legislative acts that have been adopted by a super majority of votes in the legislature and ratified by the people. Having been adopted by a super majority in the legislature and ratified by the people, the obligation of the Court to preserve the constitutionality of an Amendment by severing the offending provisions should be greater than in the case of a statute which can be easily corrected at the next session of the legislature by a simple majority vote.

The standards which should govern the Court in deciding whether to sever a portion of a legislative act are well settled and have been discussed in a plethora of Georgia cases. This Court has adopted what might be called a “main purpose” rule. As the Court said in 1922:

It is now the well settled principle of constitutional construction in this State that *unless the main purpose of the statute . . . is affected by the unconstitutionality of a particular part, the whole act . . . is not thereby defeated* [W]here an act cannot be sustained as a whole, *the courts will uphold it in part, when it is reasonably certain that to do so would correspond with the main intent and purpose* which the legislature sought to accomplish . . . if after the unconstitutional part is stricken, there remains enough to accomplish that purpose.

Bennett v. Wheatley, 154 Ga. at 595 (emphasis added). See *City Council of Augusta v. Mangelly*, 243 Ga. 358, 362-63 (1979) to the same effect.⁵

⁵ "The presence or absence of a severability clause does not change the test, but merely creates presumptions in favor of severability." *City of August*, 243 Ga. at 363 (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13 (1936)).

There is no doubt that the main purpose of Amendment One was to adopt a constitutional definition of “marriage” to mean a “union of man and woman,” and to both prohibit same sex “marriages” in Georgia and to deny legal recognition by the Georgia courts of same sex “marriages” performed under the laws of other states.

That purpose is evident from the Resolution, the Ballot, and the language of the Amendment itself.

The Resolution

Proposing an amendment to the Constitution *so as to provide that this state shall recognize as marriage only the union of man and woman*; to provide for submission of this amendment for ratification or rejection; and for other purposes.

The Ballot

YES *Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?*
 NO

Because severability is essentially a question of legislative intent – *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) – or in the case of a constitutional amendment, the intent of the electorate – the United States Supreme Court has suggested that the fair way to decide whether to sever is to ask whether the legislature would have adopted or the people of Georgia would have ratified Amendment One without the first sentence of subparagraph (b). *See*

Carter v. Carter Coal Co., 298 U.S. 238, 312-13 (1936); *Alaska Air Lines, Inc. v. Brock*, 480 U.S. 678 (1987). In that case, the Amendment would have read as follows:

The Amendment

MARRIAGE

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) This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a 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*** [*i.e.*, marriage] or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.”

Given the overwhelming majority by which the Amendment was approved based upon a ballot question that reflected only this single question, the answer to the question of whether the voters would have approved the Amendment without the first sentence of subparagraph (b) is and must be a resounding “yes.” The main purpose of the Amendment would not be frustrated if the first sentence of subparagraph (b) were severed and deleted from the Amendment, nor can there be any doubt that the General Assembly would have passed and the voters would have

ratified Amendment One if the first sentence in subparagraph (b) had not been included. Thus, under *Carter*, severance is proper.

Conclusion

Senator David Adelman respectfully urges the Court to affirm the ruling of Judge Russell insofar as the Court held that Amendment One encompasses more than one subject in violation of the single-subject rule in Article X, § 1, ¶ 2 of the Georgia Constitution. Senator Adelman respectfully urges the Court to apply a “main purpose rule” and sever the first sentence in subparagraph (b) and uphold the validity of the remaining portions of Amendment One.

Respectfully submitted, this ____ day of June, 2006.

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused a true and correct copy of the foregoing **BRIEF OF APPELLEE SENATOR DAVID ADELMAN** to be served on all counsel of record by United States Mail in a properly addressed envelope with adequate postage affixed thereto as follows:

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This 19th day of June, 2006.

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