

**IN THE SUPREME COURT
STATE OF GEORGIA**

Sonny Perdue, in his official)	
capacity as Governor of the)	
State of Georgia,)	
)	
Appellant,)	
)	
v.)	CASE NO.
)	506 A 1574
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 Brooks,)	
)	
Appellees.)	

BRIEF OF AMICI CURIAE

The following professors from Emory University School of Law: Frank S. Alexander, Interim Dean of Emory University School of Law; and professors Thomas C. Arthur; Mary M. Asbill; William W. Buzbee; Karen Cooper; A. James Elliott; Martha A. Fineman; Michael Kang; Kay L. Levine; Robin Nash; Michael J. Perry; Janette Pratt; Anne M. Rector; Robert Schapiro; Charles A. Shanor and Frank J. Vandall. The following professors from Georgia State University College of Law: Andrea A. Curcio; Anne S. Emanuel, Associate Dean of Georgia State University College of Law; and professors Marjorie L. Girth; Bernadette Hartfield; Neil J. Kinkopf; Myron N. Kramer; Mary F. Radford; Eric J. Segall; B. Ellen Taylor; and Renata D. Turner. The following professors from Mercer University Law School: Theodore Y. Blumoff; Suzanne L. Cassidy; Richard W. Creswell; Deryl Dantzler; Linda H. Edwards; Sarah L. Gerwig-Moore; David Hricik; and David G. Oedel. The following professors from the University of Georgia School of Law: Peter A. Appel; Milner S. Ball; Carolina Colin-Antonini; Russell C. Gabriell; Paul J. Heald; Sarajane Love; Julian McDonnell; Margaret V. Sachs; Alex Scherr; Camilla E. Watson; William A.J. Watson and Donald E. Wilkes. The following professors from John Marshall Law School: Heather R. Scribner, Lisa Durham Taylor, and Melanie D. Wilson.

Scott C. Titshaw
Georgia Bar No. 713453
Attorney for Amici Curiae
Arnall Golden Gregory LLP
171 17th Street
Suite 2100
Atlanta, Georgia 30363
(404) 873-8592 (telephone)

BRIEF OF AMICI 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, Mercer University School of Law, and John Marshall Law School, we are actively concerned with the integrity of both our state Constitution and the orderly democratic political processes that Constitution has provided for its own amendment.

We file this brief of Amici Curiae pursuant to Supreme Court Rule 23 to respectfully request that this Court affirm the decision of the Superior Court and the declaratory relief ordered in this case *in toto* or, if severance is appropriate, sever Subsection (b) of the amendment to the Georgia Constitution initiated by the General Assembly's adoption of Senate Resolution 595 ("Amendment One"). The Superior Court correctly found that Amendment One pursued more than one different objective in violation of Article X, § 1, Para. 2 of the Georgia Constitution. This deprived voters of their right to cast an honest vote, free of the coercive effects of the unconstitutional tying arrangement amongst several different subjects within this single amendment. Not only does Amendment One represent precisely the type of "logrolling" that Article X, § 1, Para. 2 of the Georgia Constitution was intended to avoid, but this clear procedural violation was exacerbated by the misleading ballot language that

only identifies one of the multiple subjects in the amendment. As shown below, Amendment One and the misleading way it was presented to Georgia voters combine to create a textbook example of the reasons why our Constitution includes safeguards with regard to its amendment.

Identity and Interest of Amici

The following professors from Emory University School of Law: The following professors from Emory University School of Law: Frank S. Alexander, Interim Dean of Emory University School of Law; and professors Thomas C. Arthur; Mary M. Asbill; William W. Buzbee; Karen Cooper; A. James Elliott; Martha A. Fineman; Michael Kang; Kay L. Levine; Robin Nash; Michael J. Perry; Janette Pratt; Anne M. Rector; Robert Schapiro; Charles A. Shanor and Frank J. Vandall. The following professors from Georgia State University College of Law: Andrea A. Curcio; Anne S. Emanuel, Associate Dean of Georgia State University College of Law; and professors Marjorie L. Girth; Bernadette Hartfield; Neil J. Kinkopf; Myron N. Kramer; Mary F. Radford; Eric J. Segall; B. Ellen Taylor; and Renata D. Turner. The following professors from Mercer University Law School: Theodore Y. Blumoff; Suzanne L. Cassidy; Richard W. Creswell; Deryl Dantzler; Linda H. Edwards; Sarah L. Gerwig-Moore; David Hricik; and David G. Oedel. The following professors from the University of Georgia School of Law: Peter A. Appel; Milner S.

Ball; Carolina Colin-Antonini; Russell C. Gabriell; Paul J. Heald; Sarajane Love; Julian McDonnell; Margaret V. Sachs; Alex Scherr; Camilla E. Watson; William A.J. Watson and Donald E. Wilkes. The following professors from John Marshall Law School: Heather R. Scribner, Lisa Durham Taylor, and Melanie D. Wilson.

We all agree that this is a critically important case, given the fundamental democratic 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 a coerced 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 multiple-subject amendments and legislation in the United States, Georgia should continue to lead in ensuring the implementation of the important democratic guarantees underlying this ancient rule.

I. The History and Purposes of the Single-Subject Requirement Mandate Rigorous Review by this Court.

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. X, § 1, Para. 2. This Court has analogized this constitutional requirement to the constitutional requirement of single-subject legislative enactments since at least 1911. 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).

It is essential that our State's courts enforce Georgia's 125-year old guarantee of democratic legitimacy with regard to the amendment of the Constitution itself. 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

¹ In Federalist No. 49, Alexander Hamilton encapsulated some of the fears of his fellow framers when he wrote that "[t]he danger of ... interesting too strongly the public passions, is a still more serious objection against a frequent reference of

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 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 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 in 1795, Georgia became the first American state to constitutionally recognize the importance

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 the balance of power between the three branches is concerned. As Hamilton 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.

of not misleading voters when posing a ballot 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 inserting into Georgia's constitution 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. In order to further ensure the integrity of the democratic process, the single-subject requirement for legislation was added to the Georgia Constitution in 1861; the analogous single amendment 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. 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 single amendment requirement in order to ensure that the constitution would only be amended in a careful, honest and informed manner.

² In 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.

³ Not 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>.

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 X, § 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 single-subject requirements. As this Court declared unequivocally 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.

II. This Court Should Reject the Unprecedented Test Advanced by Appellant that Would Eliminate Meaningful Review Under the Single Amendment Requirement.

As described above, Georgia’s single-subject constitutional requirement has a long and illustrious history. More significantly, it provides an essential safeguard to our democratic process for amending the constitution itself. Its principles are well settled, yet Appellant advances a new test that would interpret this important constitutional mandate out of meaningful existence.

While Appellant makes much less of this argument now than he did before the lower court, he still asserts the novel proposition that Article X is merely a technical requirement related to amendments, not requiring the careful single subject analysis traditionally applied by Georgia courts. Appellant argues that “[s]ince this case involves enactment of an entirely new section of the Constitution, a section that is unique in and of itself, arguably it was proper *per se* to submit the section to the voters as a single amendment.” Brief of Appellant at p. 10.

Fortunately, Georgia courts have never adopted the unprecedented theory proposed by the Appellant in this case. On the contrary, this Court has analogized the single amendment constitutional requirement to the constitutional requirement of single-subject legislative enactments for almost 100 years. 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).

Appellant bases his contention that “[i]f anything, the ‘single subject’ rule regarding statutes is stricter” than that relating to constitutional amendments, solely on the fact that the language regarding legislative actions “contains no express provision allowing ‘related changes’ to be submitted together.” Brief of Appellant at p. 21. Of course, the relevance of this “related changes” provision is difficult to discern in light of

this Court's single subject rule test, i.e., germaneness to a single objective.

Contrary to Appellant's assertion, if anything, the purpose underlying single subject rules mandates greater scrutiny regarding popular referenda than regarding normal legislation. In fact, more and more courts and commentators have recognized that the need for careful judicial scrutiny is 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 for a number of reasons, including the fact that members of the public normally have less time or expectation of understanding every aspect of a complex law or amendment than professional legislators.⁵

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

⁵ K. Kastorf, Comment, Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule, 54 Emory L.J. 1633 (2005) (arguing for a more searching standard of review with regard to single-subject challenges to popular referenda - pointing to the facts in the present case as an illustration; this Comment lists 4 additional factors favoring more careful review of multiple-subject laws when they are presented directly to voters: (1) while compromise, bargaining and omnibus legislation sometimes play a beneficial roll in the legislative process, logrolling and voter confusion are consistently harmful in direct democracy; (2) voter confusion is

We urge this court not to follow the Governor's apparent invitation to overturn almost a century of Supreme Court precedent in order to carve out a new and infinitely deferential standard for interpreting Article X. If anything, it should apply a higher level of scrutiny to single subject challenges in the context of referendum questions placed before the general public.

III. Amendment One Violates both the Letter and Spirit of the Single Subject Rule, Because It Seeks To Accomplish Multiple Objectives and Subjects Georgia Voters to Unconstitutionally Coercive Choices.

The Superior Court correctly recognized the primary objective of Amendment One as the desire to "provide that the state shall recognize as marriage only the union of a man and woman," the purpose expressly defined in the text of S.R. 595. The court was also correct when it held that Amendment One violates the single subject rule because it clearly pursues more than one different objective.

more likely in ballot measures; (3) ballot measures tend towards opportunistic extremism pushed by interest groups who do not have to build continuing working relationships as do legislators; and (4) state courts generally recognize a coercive harm to individual voters facing the type of Hobson's choice presented by Amendment One); M. Minger, Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California, 24 U.C. Davis L. Rev. 879 (1991) (arguing that courts must apply the single-subject requirement more strictly in the California initiative process); D. Michael, Pre-election Judicial Review: Taking the Initiative in Voter Projection, 71 Cal. L. Rev. 1216, 1224 n. 56 (1983); Schmitz v. Younger, 21 Cal. 3d 90, 100, 577 P.2d 652, 657 (1978) (Manuel, J., dissenting) (explaining that the single-subject rule is particularly important for voters who cannot examine proposals as closely as legislators).

A. The Superior Court Correctly Recognized the Clearly Stated Objective of Amendment One, the Recognition as Marriage of Only the Union of Man and Woman.

The Superior Court was correct in concluding that the primary intended objective of Amendment One was the limitation of marriage recognition in Georgia as defined in Subsection (a) of the amendment.

The express language of S.R. 595 declares that it was "[p]roposing 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." (Emphasis added). Based on this language, it is clear that the legislators voting to submit Amendment One to Georgia voters had a clear primary purpose in mind, providing that Georgia "shall recognize as marriage only the union of man and woman."

A creative attorney might attempt to argue that the legislature's reasons for adding Subsection (b) may have been hidden in the phrase "for other purposes." However, one plus one equals two: those other, secondary purposes can not logically be combined with the amendment's primary purpose to form one "single objective" that meets the single-subject requirement for amending our state constitution.

If the express legislative statement of purpose is not enough, the text of S.R. 595 supplies additional, unambiguous

evidence of its purpose. The legislature mandated that Amendment One be presented to Georgia voters as the following "yes" or "no" question: "Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?" The Superior Court correctly recognized the highly deferential standard Georgia courts have applied when addressing a direct challenge on the sole basis of whether ballot language like that above is unconstitutionally misleading. See e.g., Sears v. State of Georgia, 232 Ga. 547 (1974)). However, it is entirely appropriate that this Court consider that ballot language in determining the **primary purpose** of Amendment One for purposes of single subject analysis.

B. Appellant Fails in his Attempt to Discover a Post-Hoc Unifying Theory to Cover All of Amendment One's Subjects.

In light of the court's persuasive rationale, Appellant now seems to have recalibrated his primary theory about the amendment's objective. Before the Superior Court, and before this Court in O'Kelley v. Cox, the state emphasized that the single unifying purpose of Amendment One was recognition of marriage between a man and a woman, as opposed to other types of unions, arguing that the words "union" and "marriage" are used interchangeably throughout. However, Appellant now focuses largely on his alternative explanations of the single "common purpose" underlying Amendment One.

According to Appellant, the single unifying objective of Amendment One, as reflected in the first sentence of Section (b), now "explicitly relates to the purpose of [1] not recognizing same sex conjugal relationships **and** [2] limiting in Georgia the rights and benefits of marriage only to a union between a man and a woman..." Appellant's Brief at p. 12 (emphasis added.)

Appellant's need to express the single unifying purpose of Amendment One with a sentence joined by the conjunction "and" is telling. As the Superior Court recognized, one cannot logically explain all aspects of Amendment One in relation to only one of its multiple purposes.

While Appellant repeatedly joins two different purposes into one "common purpose" in his attempts to explain the object of Amendment One,⁶ he appears to pare down his theory at points to "the non-recognition of conjugal relationships between persons of the same sex." However, this creative post hoc explanation of Amendment One is also contrary to the clear language of S.R. 595.

⁶ Appellant repeatedly uses the conjunction "and" to connect the two most obvious purposes explaining the divergent provisions in both subsections of Amendment One, i.e., limiting the relationships that Georgia will recognize as marriages and prohibiting recognition of any benefits to same-sex couples. See e.g., Brief of Appellant at pp. 10-11, 12, and 15.

This simplified theory regarding the "common purpose" of Amendment One is clearly different from both the legislature's express definition of the purpose of Amendment One and its communication of that purpose to the voters of this state in the form of mandatory ballot language. Appellant's proposed interpretation of legislative intent suggests that the legislature either misunderstood the purpose of its own legislation or that it intentionally misled voters as to the nature of the constitutional amendment when it formulated the simple ballot question in S.R. 595. There is simply no reason that this Court must accept such a cynical interpretation of either the Georgia Senate's legislative drafting abilities or its intent to mislead voters.

This Court should also refuse Appellant's invitation to find that the unstated primary purpose of Amendment One was "the non-recognition of conjugal relationships between persons of the same sex" for another reason. The Court should not accept this argument because such a "unifying purpose" would imply broad animus against those with an orientation toward same-sex conjugal relationships, animus that would raise serious substantive federal and state constitutional concerns. See e.g., Romer v. Evans, 517 U.S. 113 (1996).

C. Rules of Construction Favoring Legislative Constitutionality do not Support Appellant's Creative Proposal for Interpreting the Purpose of Amendment One in Contradiction to its own Clear Language.

Appellants make much of a rule of construction which appropriately guides courts to read unclear laws in a manner that renders them constitutional when their validity is in dispute. Appellant's Brief at p. 18 (citing Board of Pub. Educ. Of the City of Savannah v. Hair, 176 Ga. 575 (2003)). Of course, this rule of interpretation does not apply with regard to an aspect of a law that is clear on its face, such as the expressly stated primary objective of Amendment One. In fact, in the Hair case, which Appellant relies on in his brief, this Court followed its recitation of the above-referenced rule of construction with an admonition that courts construing statutes "shall look diligently for the intention of the General Assembly." Id. at 576. That is, of course, precisely what the Superior Court did in this case.

This Court should resist Appellant's invitation to convert a mere rule for construing ambiguous legislation into a blanket license for creativity. Appellant's proposed "common purpose" of Amendment One is clearly at odds with the language of S.R. 595. See Section II-A supra.⁷

⁷ Of course, even if the purpose of Amendment One were not clear from the text of S.R. 595 itself, a desire to construct vague legislation as constitutional would not point unambiguously to

D. Subsection (b) Addresses the Subjects of Civil Unions and other Benefits beyond the Definition of Marriage.

Too many lengthy and painful political and judicial battles have been fought over the differentiation between civil "marriage" and "civil unions" to dismiss their difference as mere "parsing."⁸ Many American politicians, including both candidates for President in 2004, have found this distinction important enough to stake out different positions on the different subjects of civil unions and for same-sex couples.⁹ Moreover, the American public also

Appellant's creative theory that the unifying purpose of the amendment is "the non-recognition of conjugal relationships between persons of the same sex." Accepting this argument could actually imply broad animus against those with an orientation toward same-sex conjugal relationships, raising more troubling constitutional questions than those it answers. See p. 16 supra.

⁸ See 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).

⁹ President George W. Bush offered support for civil unions while strongly supporting the Federal Marriage Amendment because he "view[ed] the definition of marriage different [sic] from legal arrangements that enable people to have rights," E. Bumiller, The 2004 Campaign: Same-Sex Marriage, N.Y. Times, October 26, 2004, a distinction he still appears to make, President Discusses Marriage Protection Amendment, <http://www.whitehouse.gov/news/releases/2006/06/print/20060605-2.html> (June 5, 2006 Presidential Press Release announcing support for "[t]he constitutional amendment that the Senate will consider this week [that] would fully protect marriage from being redefined ... [while] leav[ing] state legislatures free to make their own choices in defining legal arrangements other than marriage"). His 2004 Democratic challenger, Senator John Kerry,

recognizes this distinction: a majority of voters in recent surveys oppose the recognition of marriage for same-sex couples while approving of civil unions or the extension of other legal recognition to same-sex relationships.¹⁰

In this context, neither Appellees nor the Superior Court are “parsing” the Amendment. Rather it seems apparent that those who drafted Amendment One were attempting to blur the real distinctions among marriage, civil unions and other legal recognition of same-sex relationships in order to gain popular support while avoiding a more difficult political battle. This is

“would [have] support[ed] a proposed amendment to the [Massachusetts] state Constitution that would prohibit gay marriage” as long as it also ensured civil unions. P. Healy & F. Phillips, Kerry Backs State Ban on Gay Marriage Says Amendment Must Provide for Civil Unions, The Boston Globe, February 26, 2004.

¹⁰ See 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 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, Poll 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); Abortion and Rights of Terror Suspects Top Court Issues, <http://pewforum.org/print.php?DocID=91> (reporting an August 3, 2005 national survey by the Pew Research Group that found 36% public support for same-sex marriage and 53% support for Civil Unions).

just the type of logrolling that the single subject provisions in our constitution were meant to avoid.

The real difference between marriage and civil unions or other forms of recognition of non-marital relationships has been clearly recognized by lawmakers and courts in many jurisdictions, including Georgia. A number of states¹¹ and countries¹² clearly

¹¹ For instance, Hawaii (whose constitution defines marriage as an opposite-sex-only institution) has recognized "Reciprocal Beneficiaries" since 1999, Haw. Rev. Stat. Ann. § 572C-1 to 7; Vermont has recognized civil unions since July 1, 2000, 15 Vt. Code Ann. § 1201(2); California (which also defines marriage as opposite-sex-only) has recognized "Domestic Partnerships" since 2003, Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Stat. 2586; New Jersey has recognized "Domestic Partnerships" since 2003, Domestic Partnership Act, 2003 N.J. Laws ch. 246; Maine has recognized "Domestic Partnerships" since 2004, Me.Rev.Stat.Ann.tit.19 § 701.; the District of Columbia (with the acquiescence of the U.S. Congress) has recognized limited "Domestic Partnership" for purposes of home deed and title transfer taxation since 2004, Deed Recordation Tax and Related Amendment Act of 2004, D.C. Law 15-176; and Connecticut recognized "Civil Unions" in 2005 in the same legislation in which it defined "marriage" as "the union of one man and one woman", An Act Concerning Civil Unions, Public Act No. 05-10. While Appellant's counsel refers only to Vermont's version of civil union, see e.g., Defendant's Response to Plaintiff's Motion for Judgment on the Pleadings at p. 8, the examples above illustrate the vast array of non-marital unions that currently confer some of "the benefits of marriage" on same-sex couples in various U.S. states.

¹² While Belgium, the Netherlands, Spain, and Canada recognize marriage for same-sex couples (South Africa will this year, and several other countries are currently 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. Croatia, Denmark, Finland, France, Germany, Greenland, Hungary, Israel, Iceland, New Zealand,

grant legal recognition to civil unions or other non-marital relationships between persons of the same sex, while simultaneously reserving the status of marriage for different-sex couples. In fact, many jurisdictions with constitutional amendments and other laws defining "marriage" in terms similar to those used in Subsection (a) of Amendment One recognize some other type of union for same-sex couples. See e.g. Note 12, supra.

Although Appellant refers to "civil unions" at various points in his Brief, the only example he refers to is that of Vermont "civil unions," which he contends creates "a legal status equivalent to marriage." Appellant's Brief at pp. 14 & 16. Vermont's form of "civil unions" may come the closest to marriage of all the various forms of "civil unions" and other recognition of non-marital relationships in the U.S., since it creates a set

Norway, Portugal, Sweden, Switzerland, the United Kingdom and parts of Argentina, Australia, Brazil and Italy all recognize such partnerships. 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); E. Kukura, Finding Family: Considering the Recognition of Same-Sex Families in International Human Rights Law and the European Court of Human Rights, 13 No. 2 Hum. Rts. Brief 17. A number of these non-marital forms of recognition are available to opposite-sex couples who choose not to marry as well as to same-sex couples, clearly demonstrating the widely recognized distinction between marriage and other forms of legally recognized civil union. In France, for example, these PACS (or pactes civil de solidarité) are more popular among opposite-sex couples than among same-sex couples.

of state rights and benefits substantially identical to those of marriage.¹³ However, Georgia law clearly recognizes a critical distinction between marriage and even this most marriage-like form

¹³ Of course, other states recognize many widely varying bundles of less inclusive rights than Vermont. See Note 11 *supra*. The breadth of Amendment One on this point clearly distinguishes it from the Louisiana state amendment at issue in *Forum for Equal PAC v. McKeithen*, 893 So. 2d 715 (La. 2005), which has no persuasive value in this case. In *McKeithen*, the Louisiana Supreme Court upheld a Louisiana constitutional amendment prohibiting recognition of marriage or a "legal status identical or substantially similar" to that of marriage for same-sex couples. First, Louisiana's *McKeithen* decision is based on a different body of state constitutional law, (Louisiana's "single object requirement"). As construed by the Louisiana Supreme Court, Louisiana's "single object requirement" does not appear to vindicate the central purpose underlying Georgia's single-subject rule - the prevention of coerced Hobson's choices. Indeed, the *McKeithen* decision is devoid of any discussion of how the Louisiana amendment at issue could be reconciled with that policy objective. Second, the language and scope of the Louisiana amendment at issue was far narrower than that of Amendment One. Specifically, the Louisiana amendment prohibits recognition only of "marriages" or of a "legal status identical or substantially similar to that of marriage" between same-sex couples. See e.g., *McKeithen* at note 31 (observing that the Louisiana amendment does "not impair any property rights, which are **not identical or substantially similar to the package of unique property rights necessary to marriage**") (emphasis added). Thus, unlike Amendment One, Louisiana's amendment does not purport to interfere with the conferral on same-sex couples of lesser bundles of rights not "identical or substantially similar to the package" of rights that comes with marriage and certainly does not purport to interfere with the recognition of judgments arising from marriages between same-sex couples in other states. Finally, the ballot language through which the Louisiana amendment was presented to Louisiana voters was not affirmatively misleading like that in Georgia, since it reflected all aspects of the Louisiana amendment. For all of these reasons, Louisiana's *McKeithen* decision can offer no guidance to this Court in resolving the unique Georgia Constitutional issues that are now before it.

of civil union. See Burns v. Burns, 253 Ga. App. 600, 560 S.E.2d 47 (2000).

The proponents of Amendment One 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 Amendment One which simply defines marriage as exclusively between "man and woman", were specifically rejected three times in the General Assembly. See Verified Complaint, ¶ 13.

As the Superior Court recognized, the intent of the drafters of Amendment One to prohibit some things in addition to marriage becomes even more clear when one compares the text of Georgia's pre-existing Defense of Marriage Act, O.C.G.A. § 19-3-3.1, with that of Amendment One. The first sentence of Subsection (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 Amendment One must have been made for a reason, namely to add some rights or institutions other than marriage as beyond the reach of same-sex couples in Georgia.

E. Subsection (b) Addresses Additional Subjects including 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.

In addition to prohibiting marriage and denying recognition of any of the "benefits of marriage" to same-sex couples in civil unions, Amendment One 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 in certain cases. 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). Second, it 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.

To the extent the State might contend that the recognition of judgments related to or arising from out-of-state marriages between same-sex persons would defeat the State's asserted purpose for the amendment (i.e., limiting the types of marriage recognized in Georgia), this contention is not consistent with previously settled Georgia law. The State of Georgia has long recognized

foreign judgments even when they were based on underlying legal rights that Georgia does not recognize, or even those it strictly prohibits. See e.g., Cannon v. Cannon (recognizing North Carolina alimony judgment despite contractual clause that would have otherwise been void as against the public policy of Georgia), 244 Ga. 299 (1979); Hargreaves v. Greate Bay Hotel & Casino, 182 Ga.App. 852 (1987) (enforcing a New Jersey judgment based on a gambling debt that conflicted with the clear Georgia public policy embodied in OCGA § 13-8-2(a)(4)); Boyer v. Krosunsky, Frank, Erickson Architects, Inc., 191 Ga.App. 549 (recognizing Michigan consent judgment even if it were a penalty in clear violation of Georgia public policy). Amendment One, were it held constitutional, would make Georgia a sanctuary for certain divorced people who are unhappy with the final judgments entered in their cases. There is a fundamental difference between recognizing a particular marriage and recognizing a foreign court's judgment with respect to property allocation following the dissolution of that relationship.

These provisions raise entirely different questions from those raised by subsection (a) of Amendment One. In fact, this amendment represents an awkward attempt to alter the balance of power among competing branches of state government and even to affect our reciprocal recognition of state sovereignty vis-à-vis other states. Of course, this is the sort of popular shift in the

balance of power that Alexander Hamilton warned about in Federalist No. 49. See Note 1 supra.

Such novel measures for altering the traditional balance between Georgia's three branches of government, and for defining new subject-matter-specific limitations to longstanding rules for recognizing foreign judgments, set a ground-breaking precedent. Should they be considered separately, these changes would undoubtedly give rise to a very different public debate than that surrounding the state ballot question of whether "the state shall recognize as marriage only the union of man and woman." This is another excellent example of the type of logrolling that the single amendment requirement 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 and their corresponding plural objectives in a single amendment.

As discussed above, a voter who did not agree or disagree with all subjects contained in Amendment One was forced to 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 submit that Amendment One is unconstitutional.

IV. The Ballot Language by Which Amendment One Was Presented to Voters Was Affirmatively Misleading.

As discussed above, we submit that Amendment One is unconstitutional because of its violation of the multiple-subject prohibition in our state constitution. This violation of the constitutionally mandated democratic amendment process was exacerbated because the question was presented to voters in a misleading fashion. In contrast to the multiple subjects addressed by Amendment One, the ballot language chosen by the Amendment's proponents in the state legislature posed only one simple question to the state's voters, namely, "Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of a man and a woman?"

Many voters entering the voting booth were not only confronted with a coercive dilemma between measures they opposed (banning civil unions, for example), and measures they favored (for example, the definition of "marriage"), but with ballot language disguising this very dilemma. Like those who voted for the Yazoo Act over 200 years ago, Georgia voters in 2004 were faced with a ballot question that hid most of the changes it would make.

The Superior Court recognized that Georgia courts apply a lenient standard when determining a direct challenge as to whether ballot language like that above is unconstitutionally

misleading. However, it is entirely appropriate that this Court consider that ballot language as it determines the primary purpose of Amendment One. It is also appropriate that the Court examine the question presented to the voters on the ballot if it chooses to structure a remedy other than simply upholding the Superior Court's opinion invalidating Amendment One *in toto*

V. Severance as an Alternative Remedy for Amendment One's Violation of the Single Subject Rule.

Appellees in this case have argued forcefully that this Court should consider the alternative remedy of severing and striking down as unconstitutional only Subsection (b) of Amendment One. While this Court has recognized severance as an appropriate remedy with regard to other legislation,¹⁴ we are unaware of any decision by this Court with respect to the appropriateness of severability analysis relating to state constitutional amendments. However, such analysis would not constitute an entirely novel approach. High courts in several other states do already employ severability analysis with regard to constitutional amendments.¹⁵

¹⁴ Holmes v. Traweek, 276 Ga. 296, 297, 577 S.E.2d 777, 779 (2003) (setting forth Georgia's statutory severability analysis).

¹⁵ See Ray v. Mortham, 742 So.2d 1276, 1280-1281 (Fla. 1999) (applying Florida's statutory severability analysis to constitutional amendment); State ex rel. Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 587 (Ohio 1994) (severing statute to cure single-subject rule violation); But see, e.g., Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 832 (Mo. 1990) (declining to sever a constitutional amendment

If this Court does find that severability analysis is appropriate in the context of constitutional amendments, it is hard to imagine a more appropriate case for its employment than that of Amendment One. This amendment clearly violates the constitutional single-subject requirement because of the provisions in subsection (b) which fall outside the purpose of Amendment One (the definition of marriage). In addition, severance of Subsection (b) would leave in our constitution the parts of Amendment One that voters saw described on the ballot, while striking down the provisions that were not noted on the ballot.

Conclusion

Amendment One posed a multiple-choice question, but only allowed voters to respond "all of the above" or "none of the above." This is the very evil against which the single-subject requirement in the Georgia Constitution was designed to protect. Additionally, the misleading way in which only the first subject of this multiple-subject amendment was selected for inclusion in the language on the ballot accentuates how Amendment One as drafted and presented to voters ran afoul of not only the language but also the purpose of Article X, § 1, Para. 2.

The issue of marriage recognition for lesbians and gay men is currently the subject of a very heated popular debate both in

that violated Missouri's single-subject requirement).

Georgia and throughout the nation. Legislators, the public, and possibly even some judges have strong personal feelings about this subject. As shown in recent polls of likely Georgia voters, see Note 13 supra, many of these same people have different opinions about marriage, civil unions, domestic partnerships, hospital visitation rights and other concerns of same-sex couples. Many others would have second thoughts about Georgia's serving as a sanctuary for divorced people from Massachusetts to escape final court orders regarding monetary judgments or settlements.

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 proscribed processes and procedures. The Superior Court courageously recognized that 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 is precisely what makes our system worth fighting for.

Respectfully submitted this ___th day of June, 2006.

Scott C. Titshaw
Georgia Bar No. 713453
Attorney for Amicus Curiae
Arnall Golden Gregory LLP
171-17th Street NW, Suite 2100
Atlanta, Georgia 30363
Telephone: 404-873-8592
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

This is to certify that the foregoing "Brief of Amici Curiae" has been served this day by facsimile transmission and by electronic mail to the following counsel of record via the facsimile and electronic mail addresses indicated below:

Stefan Ritter, Esq.
Senior Assistant Attorney
General
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
Telephone: 404-656-7298
Facsimile: 404-657-9932
Email:
Stefan.Ritter@LAW.State.GA.US

John E. Stephenson, Jr.
Georgia Bar No. 679825
Jeffrey J. Swart
Georgia Bar No. 697310
ALSTON & BIRD LLP
1201 West Peachtree Street, NE
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777
Email: jstephenson@alston.com

Jack H. Senterfitt
Georgia Bar No. 635850
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
730 Peachtree Street, NE
Suite 1070
Atlanta, Georgia 30308-1210
Telephone: 404-897-1880
Facsimile: 404-897-1884
Email:
jsenterfitt@lambdalegal.org

Gerald Weber
Georgia Bar No. 744878
Beth Littrell
Georgia Bar No. 454949
AMERICAN CIVIL LIBERTIES
UNION OF GEORGIA
70 Fairlie Street, Suite 340
Atlanta, Georgia 30303
Telephone: 404-523-6201
Facsimile: 404-577-0181
Email: gweber@acluga.org

This ___ day of June, 2006.

SCOTT C. TITSHAW
Georgia Bar No. 713453