

**IN THE SUPERIOR COURT OF FULTON COUNTY  
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 Tyrone Brooks,** )

**CASE NO. 2004 CV 93494**

**Plaintiffs,** )

**vs.** )

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

**Defendant.** )

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ MOTION FOR  
JUDGMENT ON THE PLEADINGS**

Plaintiffs hereby move this Court for judgment on the pleadings declaring that Amendment One (1) unconstitutionally covers multiple subjects and (2) was unconstitutionally presented through misleading ballot language that described only one of the multiple subjects addressed by the amendment.

**INTRODUCTION**

At issue in this case is the constitutionality of the amendment to the Georgia Constitution contained in Senate Resolution (“SR 595”), which appeared on the November 2, 2004 ballot as Amendment One to the Georgia Constitution (“Amendment One”). Amendment One 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. X, Sec. I, Par. II, and because the ballot language designated by the

General Assembly is affirmatively misleading in violation of Due Process, *see* Ga. Const. Art. I, Sec. 1, Para. I.

### **FACTUAL AND PROCEDURAL HISTORY**

The operative facts are not in dispute. On March 31, 2004, the Georgia House of Representatives approved SR 595, previously adopted by the Senate, which proposed an amendment to the Georgia Constitution that appeared on the November 2, 2004 ballot as Amendment One. Amendment One accomplishes at least four independent objectives:

- (1) It excludes same-sex couples from marriage;
- (2) It prohibits recognition or creation of legal “unions between persons of the same sex”;
- (3) It bars courts from recognizing certain judgments, acts and records from other states and jurisdictions, and;
- (4) It divests courts of jurisdiction to “rule on . . . rights arising out of such relationship.”<sup>1</sup>

Despite the multiple subjects covered by Amendment One, the ballot language through which Amendment One was presented to the voters called for a vote on the following single question: Shall the Constitution be amended so as to provide that this

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<sup>1</sup> The actual language of Amendment One provides:

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

state shall recognize as marriage only the union of man and woman? As such, the language through which Amendment One was presented to the voters suggested that the only subject of the amendment was the definition of marriage as the union of only opposite-sex couples.

In *O'Kelley, et. al. v. Cathy Cox, in her official capacity as Secretary of State of Georgia*, Civil Action File No. CV-04-91122 ("*O'Kelley I*"), Plaintiffs 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 Tyrone Brooks ("Plaintiffs"), the same named Plaintiffs as in this case, filed suit against Cathy Cox, in her official capacity as Secretary of State on September 16, 2004, seeking to enjoin her from placing SR 595 on the November 2, 2004 ballot.

After hearing oral arguments on the merits on September 24, 2004, Judge Constance C. Russell of the Fulton County Superior Court asked the parties for supplemental briefing on the applicability of *Gaskins v. Dorsey*, 150 Ga. 638, 104 S.E. 433 (1920). On September 29, 2004, the Court entered a Final Order dismissing Plaintiffs' Complaint without prejudice on the sole ground that the *Gaskins* case deprives a court of authority to grant any relief until after an election to ratify a proposed constitutional amendment has taken place. The Superior Court did not address the merits of the constitutional violations raised in Plaintiffs' Complaint.

Plaintiffs filed a Notice of Appeal on September 30, 2004 and appealed to the Supreme Court of Georgia. The Supreme Court expedited the case and heard oral argument on October 19, 2004. On October 26, 2004, the Supreme Court affirmed the Superior Court's dismissal of Plaintiffs' Complaint.

SR 595 appeared on the November 2, 2004 ballot as Amendment One. Cathy Cox, the Secretary of State of Georgia, certified the results ratifying Amendment One on November 9, 2004. Consistent with the Supreme Court's ruling in *O'Kelley I*, Plaintiffs have refiled their case in this Court post-election, raising essentially the same legal issues as in *O'Kelley I*.

## **ARGUMENT AND AUTHORITY**

### **I. JUDGMENT ON THE PLEADINGS STANDARD**

In deciding a motion for judgment on the pleadings, the court must determine whether the undisputed facts appearing from the pleadings entitle the movant to judgment as a matter of law. *Rolling Pin Kitchen Emporium, Inc. v. Kaas*, 241 Ga. App. 577, 578, 527 S.E.2d 248, 249 (1999). Judgment on the pleadings may be granted only if, on the facts admitted, the moving party is clearly entitled to judgment. *Cotton v. Med-Cor Health Information Solutions, Inc.*, 221 Ga. App. 609, 610, 472 S.E.2d 92, 95 (1996). A motion for judgment on the pleadings is properly granted if the moving party is clearly entitled to judgment. *Robinson Explosives, Inc. v. Dalon Contracting Co., Inc.*, 132 Ga. App. 849, 853, 209 S.E.2d 264, 268 (1974).

Plaintiffs respectfully request that the Court grant their Motion for Judgment on the Pleadings because there are no disputed issues of fact and because Plaintiffs are entitled to judgment as a matter of law for the reasons stated herein.

## II. AMENDMENT ONE VIOLATES THE SINGLE-SUBJECT RULE.

Georgia was the first state in the nation to adopt a “single-subject rule.” *See Cady v. Jadine*, 185 Ga. 9, 10, 193 S.E. 869 (1937).<sup>2</sup> 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 submitted as to enable the electors to vote on each amendment separately. . . .” Ga. Const. Art. X, § I, ¶ II.<sup>3</sup> The language used is mandatory. *See Mead v. Sheffield*, 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 separately.” *Carter v. Burson*, 230 Ga. 511, 519-20, 198 S.E.2d 151, 156 (1973); *see also Rea v. City of LaFayette*, 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).

As is discussed in more detail below, Amendment One violates the single-subject rule by including at least four separate subjects. The inclusion of these multiple subjects

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<sup>2</sup> Recognizing the wisdom of this rule, at least 41 states have followed Georgia’s lead. *See Lutz v. Foran* 262 Ga. 819, 826 n.2, 427 S.E.2d 248 (1993).

<sup>3</sup> 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).

forced some voters to cast a vote contrary to their views on some subjects in order to cast a vote that was consistent with their views on other subjects. For example, a voter who supported Amendment One’s definition of marriage, but opposed the prohibition against recognition of civil unions was left in a quandary, because a vote to support the restrictive definition of marriage necessarily requires a vote to prohibit recognition of civil unions. Due to this impermissible combination of subject matters, it was impossible for such a voter to cast a vote fully consistent with his or her beliefs. Instead, the voter was required to sacrifice one belief in favor of the other. The Georgia Constitution’s single-subject rule is designed to protect voters from this Hobson’s choice.

**A. Amendment One Impermissibly Combines Four Separate Objectives.**

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, 567, 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).<sup>4</sup>

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<sup>4</sup> While Georgia law alone supplies the answer to the question before this Court, it is worth noting that the single-subject rule has an impressive history and that Georgia is no outlier in requiring adherence to the rule. In *Rea*, the Supreme Court based its holding on similar bans against multiple issues in a single question from other states, including Illinois, Iowa, Missouri, Washington, Ohio and Kansas. *See id* at 772,

The Supreme Court has made plain the policy behind the single-subject rule:

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).

Because of its strong commitment to preventing legislative “log-rolling,” even when the Georgia Supreme Court has rejected single-subject challenges, it has done so only after carefully concluding that the amendment did not violate the purpose of the rule. *See, e.g. Carter*, 230 Ga. at 518-19, 198 S.E.2d at 155-56. In *Carter v. Burson*, 230 Ga. 511, 520, 198 S.E. 2d 151, 156 (1973), the Court rejected a single-subject challenge to an amendment that asked whether to abolish the name and office of State Treasurer on the grounds that there was no reason to believe that a voter who supported the abolition

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61 S.E. at 708; *see also Solomon v. N. Shore Sanitary Dist.*, 269 N.E.2d 457, 462-63 (Ill. 1971) (noting that attempts to obtain the approval of several distinct and separate projects by one proposition on a ballot are void); *City of Leavenworth v. Wilson*, 76 P. 400, 401-02 (Kan. 1904) (holding that the purchase of waterworks or the erection of new ones were two distinct measures that could not be voted upon as a single issue without depriving voters of “the liberty of choice”); *Hensly v. City of Hamilton*, 2 Ohio Cir. Dec. 114 (1888) (stating that voters were improperly denied the option to vote for or against the purchase and construction of gas facilities separately, forcing a vote for both measures or against both measures); *Board of Supervisors v. Miss. & Wabash R.R. Co.*, 21 Ill. 339, 373 (1859) (holding that “log-rolling” a vote on two separate roads by combining them on the ballot as a single issue did not allow for each road to be voted on separately and was inherently unfair to voters); *accord Blaine v. City of Seattle*, 114 P. 164, 166-67 (Wash. 1911); *State ex rel. City of Bethany v. Allen*, 85 S.W. 531, 531-32 (Mo. 1905); *Gray v. Mount*, 45 Iowa 591, 596 (1877). Many other states have followed the lead of the *Rea* Court and its predecessors, creating a substantial body of law that prohibit multiple subject referenda that force voters to answer two questions with only one answer. *See, e.g., Regner v. Bayless*, 16 P.3d 209, 210 (Ariz. 2001) (citing requirement of the Arizona Constitution that if more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately); *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984) (holding that the Florida Supreme Court would require strict compliance with the single-subject rule in the initiative process for constitutional change, because the constitution is the basic document that controls the most important and sensitive governmental functions); *Solomon*, 269 N.E.2d at 462 (1971) (noting that attempts to obtain the approval of several distinct and separate projects by one proposition on a ballot are void).

of the State Treasurer position would nonetheless support leaving the term “State Treasurer” in some clauses of the Constitution. While it did not find a violation under those particular circumstances, the *Carter* Court quoted 343 words from, and expressly reaffirmed its holding in *Rea. Id.* at 519-20, 198 S.E.2d at 156 (quoted *supra*).

By linking separate topics about which many Georgia voters have conflicting views, Amendment One frustrates the “obvious purpose” of the single-subject rule. *Rea*, 130 Ga. at 773, 61 S.E. at 708.

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

Subsection (a) of Amendment One accomplishes a single objective; it defines marriage as the union between a man and a 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 48-49. 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.

Likewise, the text of Amendment One makes clear that the legislature was addressing separate subjects. One of the legal effects of subsection (a) is to establish that the only couples of the opposite sex can call themselves married. The label 'married' carries with it certain legal information and conveys a host of information that is not conveyed equally by the word 'union' in subsection (b). Another legal effect of subsection (a) is to prevent a couple of the same sex from utilizing the bundle of rights and obligations that come with being married. For example, under Georgia law, a spouse is entitled to make health care placement decisions on behalf of the other spouse, O.C.G.A. § 31-36A-6, and the spouse of an intestate decedent is entitled to a portion of the decedent's estate, O.C.G.A. § 53-2-8. Likewise, Georgia law provides that married couples cannot be compelled to testify against each other. O.C.G.A. § 53-2-8. Under subsection (a), *all* of these benefits that are extended to married couples are denied to couples of the same sex because by definition, couples of the same sex cannot be married. The legal effect of subsection (b), however, is to prohibit the legislature from extending even *one* of these rights to couples of the same sex. Therefore, subsection (a) and subsection (b) address separate subjects.

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 and because the text of Amendment One treats marriage and civil union differently, subsections (a) and (b) of Amendment One 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, Amendment One encompasses multiple subjects and accomplishes multiple objectives in violation of the single-subject rule of the Georgia Constitution.

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

Civil unions are not the only additional subject addressed by Amendment One. subsection (b) of Amendment One 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. VI, § IV, ¶ 1; *see also, e.g.*, Ga. Const., Art. VI, § I, ¶ 4. (providing grant of power to order specific types of relief); Ga. Const., Art. VI, § V, ¶ 3 (providing for jurisdiction of the Court of Appeals).

Subsection (b) of Amendment One modifies 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 Amendment One 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 Amendment One 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, 357 S.E.2d 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 Amendment One constitutionally repeals 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, Amendment One violates the single-subject rule.

**B. Amendment One Confronted Voters With an Unconstitutional Dilemma at the Voting Booth.**

Through its disregard of the single-subject rule, Amendment One presented 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 were forced either to vote to support all of the subjects or to oppose them entirely.

The Supreme 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).

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. *Rea*, 130 Ga. at 772, 61 S.E. at 708. 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 the Georgia Supreme 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.

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

Here, Amendment One presents precisely the same problem condemned by the Supreme Court in *Rea*. Amendment One forced 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).<sup>5</sup> By voting “yes” on the Amendment, such a voter was “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 was 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

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<sup>5</sup> 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).

Complaint at ¶¶ 8-13. Amendment One 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 such harm.

**III. THE BALLOT LANGUAGE BY WHICH AMENDMENT ONE 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 disguised the sweeping impact of Amendment One and thus denied Georgia voters the due process right to a fair and meaningful vote. Because the ballot language selected by the General Assembly referenced only the portion of Amendment One creating a constitutional definition of marriage, it did not reflect that Amendment One 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. Courts have consistently acknowledged the importance of ballots themselves in complying with constitutional voting requirements. As recently as this fall, in the case of *Mead v. Sheffield*, the Georgia Supreme Court reaffirmed that when a vote is marred by “an essential prerequisite to the holding of a valid election, such as . . . the contents of the ballot itself, the election is, of course, invalid.” 2004 WL 1944824, at \*2 (quoting *State v. Carswell*, 78 Ga. App. 84, 88, 50 S.E.2d 621, 624 (1948)); *see also Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (“To the extent 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. X, § I, ¶ II. Historically, the Georgia General Assembly enacted legislation empowering the Governor to draft ballot language, subject to the requirement that the ballot language be sufficient to allow the voters “to intelligently pass upon any such proposed amendment.” 1939 Ga. Laws 305, 306 (repealed by 1962 Ga. Laws 618). The language of this delegating legislation, requiring that ballot language allow voters to vote “intelligently,” triggered heightened judicial review of ballot language. *See, e.g., Seago v. Richmond County*, 218 Ga. 151, 126 S.E.2d 657 (1962) (finding ballot language insufficient). In 1962, however, the General Assembly repealed the delegating legislation, restoring its own responsibility for ballot language and in the process deleting the legislated requirements for ballot language sufficiency. Even so, ballot language must comport with underlying constitutional requirements. Georgia courts thus continue to 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 e.g. id.* at 556, 208 S.E.2d at 100 (“[T]he ballot language here in issue shows itself upon examination to be adequate . . .”); *Carter*, 230 Ga. at 522, 198 S.E.2d at 157 (“The language which was printed on the ballots in this case was clearly sufficient to identify the amendment which the electorate was called upon to ratify or reject.”); *Donaldson*, 262 Ga. at 51-52, 414 S.E.2d at 640 (determining that the amendment at issue was sufficiently identified and otherwise observing that “a careful comparison of the amendment and the ballot language reveals that the ballot language at issue here is not inaccurate or ‘affirmatively misleading’ . . .”). 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, 682 (1992); *McLennan v. Aldredge*, 223 Ga. 879, 159 S.E.2d (1968).

In *Sears v. State*, although conducting only minimal judicial review, the Supreme Court suggested the General Assembly's discretion in drafting ballot language should not be unfettered. While ultimately upholding the ballot language at issue, the Supreme 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*, the Supreme Court went further in expressing its view that ballot language should accurately convey the purpose and effect of a proposed amendment: “[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 sufficient to identify the amendment at issue, the Supreme Court's language demonstrates its belief that the General Assembly should choose language that accurately informs voters of a proposed amendment's purpose and effect.<sup>6</sup>

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<sup>6</sup> While the method of choosing ballot language varies from state to state, most states recognize that ballot language can at some point become so inadequate or misleading as to compromise fundamental due process requirements. *See, e.g., Nesbitt v. Myers*, 73 P.3d 925 (Or. 2003) (striking ballot language because it failed to identify the second subject in Amendment One); *Fla. Ass'n of Realtors, Inc. v. Smith*, 825 So. 2d 532,

The Georgia Supreme Court has been consistent in its message that ballot language must be adequate to identify the amendment at issue. *See, e.g., Donaldson*, 262 Ga. at 51-52, 414 S.E.2d at 640-41. The ballot language at issue here is so misleading as to fail on that score, because it identifies only one of four amendments on which the voter's ballot must be cast through a single vote. Even under the applicable minimal judicial review, the ballot language selected by the General Assembly to present Amendment One warrants judicial intervention. The General Assembly has gone too far. While it is true enough that the ballot language allowed voters to ascertain that they were voting on an amendment concerning the definition of marriage, the ballot language was manifestly insufficient to indicate that voters were 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 politically-charged ballot language chosen by the General Assembly enhanced the probability of ratification by minimizing and disguising Amendment One's true consequences. While *Sears* and *Donaldson* call for highly deferential review concerning the "ascertainment" or "identity" of a given amendment, the Supreme 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

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640 (Fla. Dist. Ct. App. 2002) (striking ballot language because it "would not fairly, clearly, and unambiguously advise voters of the substance of the proposed constitutional amendment"); *Broadwell v. Grice (In re Title, Ballot Title & Submission Clause, & Summary Pertaining to the Proposed Initiative Designated "Governmental Business")*, 875 P.2d 871, 875-77 (Colo. 1994) (holding that ballot language referencing "consumer protection" and "open government" was improper because it was "misleading inasmuch as it emphasizes a single aspect of the Initiative that is distinct from and unrelated to the much broader intent of the Initiative"); *Smith v. American Airlines, Inc.*, 606 So.2d 618, 621 (Fla. 1992) (striking ballot language because it failed to advise voters that taxes on the property at issue could increase by as much as fifteen times the current rate); *Say v. Baker*, 322 P.2d 317, 320 (Colo. 1958) (striking ballot language because the phrase "Freedom to Work" contained in the ballot title and submission clause constituted a catch phrase).

case, quarter truths). The General Assembly's power to select ballot language is not and cannot be absolute. The affirmatively misleading ballot language designated by the General Assembly cannot survive even deferential review.

### CONCLUSION

Amendment One is constitutionally defective because it violates both the single-subject rule and due process. This perfect storm of electoral unconstitutionality cannot be indulged. Addressing the pure questions of law raised by this case, this Court should declare that Amendment One violates the single-subject rule and is constitutionally deficient as a result of the language by which it was presented to the voters on the ballot. Alternatively, this Court should sever subsection (b) of Amendment One as unconstitutional. *See Ray v. Mortham*, 742 So.2d 1276, 1280-1281 (Fla. 1999) (applying Florida's statutory severability analysis to constitutional amendment); *Mohamed v. State*, 276 Ga. 706, 709, 583 S.E.2d 9, 12 (2003) (setting forth Georgia's statutory severability analysis).

Respectfully submitted this \_\_\_\_ day of December, 2004.

Alternative treatment of severability:

**VI. FOR THE REASONS STATED ABOVE, AMENDMENT ONE SHOULD BE DECLARED UNCONSTITUTIONAL. IN THE ALTERNATIVE, THIS COURT SHOULD SEVER SUBSECTION (B) OF AMENDMENT ONE.**

Although Georgia courts have not addressed the question of whether constitutional amendments are severable, Georgia courts routinely sever unconstitutional portions of statutes. *See, e.g., Holmes v. Traweek*, 276 Ga. 296, 297, 577 S.E.2d 777,

779 (2003) (severing unconstitutional venue provision from statute). Other states have applied their statutory severability analysis to constitutional amendments. *See, e.g., Ray v. Mortham*, 742 So.2d 1276, 1280-1281 (Fla. 1999) (holding that doctrine of severability applies to constitutional amendments and reasoning “[j]ust as we view the severability of laws with deference to the legislative prerogative to enact the law, we conclude that we must afford no less deference to constitutional amendments initiated by our citizens and uphold the amendment if, after striking the invalid provisions, the purpose of the amendment can still be accomplished”).

Under Georgia’s severability analysis, subsection (b) could be severed from Amendment One. “Where one portion of a statute is unconstitutional, [the] court has the power to sever that portion of the statute and preserve the remainder if the remaining portion of the Act accomplishes the purpose the legislature intended.” *Mohamed v. State*, 276 Ga. 706, 709, 583 S.E.2d 9, 12 (2003); *Nixon v. State*, 256 Ga. 261, 264(3), 347 S.E.2d 592 (1986). On the other hand, “[w]hen an unconstitutional portion of a statute is so connected with the general scope of the statute that to sever it would result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose, the statute must fall in its entirety.” *State of Ga. v. Jackson*, 269 Ga. 308, 312, 496 S.E.2d 912 (1998) (refusing to sever unconstitutional portion of statute because it would require “radically rewriting the ordinance”). As explained *supra*, subsection (a) of Amendment One defines marriage as the union of a man and woman, while subsection (b) accomplishes several different objectives. Based on the ballot language and the title of Amendment One, it is clear that subsection (a) was the portion of Amendment One on which the electorate voted. *See also State ex rel. Ohio AFL-CIO v. Voinovich*, 631

N.E.2d 582 (Ohio 1994) (stating that where a statute is constitutionally infirm because it contains multiple subjects, the portions of the statute that cover “extraneous subjects” can be severed). By severing subsection (b), the Court will accomplish the purpose the legislature intended as well as give effect to the will of the electorate. *See Wheeler v. Bd. of Trustees*, 200 Ga. 323, 334, 37 S.E.2d 322, 329 (1946) (stating, “[u]nder our system of government the method of expressing the will of the people is by voting in a legally held election.”).

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