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SUPREME COURT OF FLORIDA

IN RE:

ADVISORY OPINION TO THE ATTORNEY GENERAL - RESTRICT LAWS RELATED TO DISCRIMINATION

CASE NO. 82,674

BRIEF OF INTERESTED PARTY AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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The ballot summary states that the amendment:

> Restricts laws related to discrimination to classifications based upon race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. Repeals all laws inconsistent with this provision.

After obtaining ten percent of the signatures in one-fourth of the congressional districts, the AFA submitted the initiative petition to Secretary of State Jim Smith, who then submitted the petition to Attorney General Robert Butterworth pursuant to § 15.21, Fla. Stat. The Attorney General, pursuant to Art. IV, § 10, Fla. Const., requested an advisory opinion from this Court on the initiative's validity. In this Court's November 16, 1993 Interlocutory Order, the Court acknowledged the Attorney General's request, and ordered all interested parties to file their briefs on or before December 6, 1993. The ACLU submits this brief as an interested party, and urges this Court to invalidate the AFA ballot initiative.

SUMMARY OF ARGUMENT

The AFA has proposed an amendment to the Florida Constitution which would prohibit any governmental entity in Florida from enacting, and would repeal all existing, laws "regarding discrimination" which recognize any status other than "race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status." The initiative thereby places discrimination against other groups beyond the reach of the law. In essence, the AFA is seeking to constitutionalize certain forms of discrimination.

Although the target of the AFA's effort is not identified in the text of the amendment, or in its title or ballot summary, neither has the AFA attempted to hide its motives. The materials circulated by the AFA to garner support for the initiative are clear: the objective of the amendment is to prohibit legal protection for persons on the basis of their sexual orientation -- in other words, to constitutionalize discrimination against homosexuals and bisexuals. (See Exhibit A.)

At the same time, in its effort to draft a facially unbiased amendment, the AFA has also overlooked numerous other existing rights, privileges, and protections which will be nullified if the amendment is allowed to take effect. For example, the amendment omits classifications based on: (1) residence (as a qualification for the right to vote or hold office); (2) criminality or lack of it (as a qualification for

the right to vote or hold office); (3) economic status (as a qualification for welfare benefits, or for protection for non-profit entities such as churches); (4) service in the armed forces (as a condition for veterans' benefits); and (5) ability (as a qualification for gifted or remedial school programs). Existing laws based on these classifications would be eviscerated under the proposed amendment.

The AFA's unstated objective to target homosexuals, and the other unintended consequences of the amendment, point up the defects of the initiative. Florida law requires that an initiative encompass only a single subject and that its summary be written in clear and unambiguous language. By implicating classifications ranging from sexual orientation to economic status to military service, the AFA initiative is not limited to a single subject. In addition, the ballot summary completely fails to advise the voters of the purpose and consequences of the amendment as required by Florida law. For these reasons, the amendment must be invalidated.

Moreover, as written, the proposed amendment would affect most every article and section of our state Constitution. For this reason, the proposal should properly be categorized as a revision rather than an amendment. Because revisions require a constitutional convention, the AFA should follow procedures to call for a convention if it desires to cause such broad-based change.

While this Court could invalidate the initiative on

these grounds alone, it should also do so because the proposed amendment is facially unconstitutional. Although this Court has declined to consider constitutional challenges to ballot initiatives in the past, this case presents the most compelling argument for reviewing constitutional issues. In sharp contrast to the term limit amendment at issue in Advisory Opinion to Atty. Gen., 592 So. 2d 225 (Fla. 1991), the AFA initiative is not subject to any conceivable constitutional construction. While there are valid policy reasons for refusing to address constitutional objections where the initiative is subject to a reasonable constitutional construction, this initiative presents no such case for judicial restraint. Here, there is no arguable constitutional construction to save the amendment.

The proposed amendment violates the fundamental First Amendment rights of Florida citizens to petition the government for redress of grievances, and to participate in the political process. These fundamental rights cannot be restricted absent a compelling state interest. Here, the objective of the AFA initiative is to constitutionalize discrimination against certain groups or individuals. There cannot be even a legitimate state interest in discrimination for its own sake, or in preventing efforts to protect persons against discrimination. For these reasons, the proposed amendment violates the First Amendment.

The proposal similarly violates fundamental rights protected by the equal protection and due process clauses of the Fourteenth Amendment. Indeed, the proposed amendment fails to

satisfy even the most minimal level of rationality review. Essentially, the amendment's only purpose is to permit discrimination against politically unpopular groups. But the equal protection and due process clauses protect all citizens from state enforcement of private discrimination. Finally, the proposal is unconstitutionally vague and overbroad. For these reasons, the proposed amendment is subject to no conceivable constitutional construction; it must be invalidated.

INTRODUCTION

The AFA's ballot initiative is a calculated effort to place anti-homosexual discrimination beyond the reach of the law. Materials being circulated by the AFA as part of its initiative campaign indicate clearly the AFA's objective. These materials, attached hereto as Exhibit A, are titled "Why Gay Rights Are Not Civil Rights" and "Let's Stop The Homosexual Agenda NOW!!!" The AFA's unambiguous goal is to eliminate any existing legal protection for the rights of homosexuals, and to forever prohibit the enactment of such protections. In essence, the AFA is seeking to constitutionalize discrimination based on one's sexual orientation.

At the same time, the proposal also omits a wide variety of existing classifications which recognize rights, privileges or protections for other unenumerated groups. For example, the amendment would effectively eliminate any legal rights or privileges based upon: (1) residence (as a qualification for the right to vote or hold office); (2) criminality or lack of it (as a qualification for the right to vote or hold office); (3) economic status (as a qualification for welfare benefits, or for protection for non-profit entities such as churches); (4) service in the armed forces (as a condition for veterans' benefits); and (5) ability (as a qualification for gifted or remedial school programs). This Court should consider these wildly diverse ramifications as it judges the validity of the initiative at this advisory hearing.

A. The Proposal Does Not Meet The Single Subject Requirement Because It Affects Broadly Disparate Topics And Lacks A Logical Oneness Of Purpose.

The purpose of the single subject requirement is to "protect against multiple precipitous changes in our state constitution." Advisory Opinion to the Atty. Gen., 592 So. 2d 225, 227 (Fla. 1991); Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984). Thus, "a proposed amendment is valid if it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme.'" Id. (quoting City of Coral Gables v. Gray, 19 So. 2d 318, 320 (Fla. 1944)). An amendment that serves more than one purpose or interferes with disparate government functions will not meet this requirement. See Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984) (initiative limiting defendant liability and amending the summary judgment rule served multiple purposes and did not meet the single subject rule); Fine v. Firestone, 448 So. 2d 984 (initiative freezing all government revenue collection did not meet the single subject requirement because it affected disparate government functions: general taxation, ability to provide services for which user fees were charged, and ability to finance capital improvements through bond issuance).

Some of the likely repercussions of adopting the initiative are described above. (See p. 7, supra.) Essentially, the proposed amendment -- which would have the effect of abrogating residency qualifications for state elected officials, preventing hate-crime laws from addressing gay-bashing,

I. THE PROPOSED AMENDMENT FAILS THE SINGLE SUBJECT AND THE CLEAR AND UNAMBIGUOUS LANGUAGE REQUIREMENTS.

Under Florida law, there are two issues this Court must consider in an advisory hearing. The Florida Constitution states:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, *provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith.* Art. XI, § 3, Fla. Const. (Emphasis supplied.)

Section 101.161, Fla. Stat. provides:

> Whenever a constitutional amendment . . . is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in *clear and unambiguous language* on the ballot. (Emphasis supplied).

An initiative must focus on only a single subject and the summary which appears on the ballot must be written in clear and unambiguous language. These two requirements dovetail with the constitutional principle of due process of law, which requires that the voter be given adequate notice of what he or she is asked to decide. Smith v. American Airlines, Inc., 606 So. 2d 618 (Fla. 1992).

> The voter should not be misled and . . . he [should] have an opportunity to know and be on notice as to the proposition on which he is to cast his vote . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that *which he must decide* . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.

Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954).

A. The Proposal Does Not Meet The Single Subject Requirement Because It Affects Broadly Disparate Topics And Lacks A Logical Oneness Of Purpose.

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Some of the likely repercussions of adopting the initiative are described above. (See p. 7, supra.) Essentially, the proposed amendment -- which would have the effect of abrogating residency qualifications for state elected officials, preventing hate-crime laws from addressing gay-bashing,

abolishing the Department of Veteran Affairs, and outlawing any state entitlement programs providing rights or privileges based upon economic status -- affects vastly different government functions and lacks "a logical oneness of purpose".[1] "[H]ow an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal." Fine v. Firestone, 448 So. 2d at 990; Evans v. Firestone, 457 So. 2d 1351 (where constitutional amendment is an aggregation of dissimilar provisions, defect is not cured by either an application of an overbroad title or by virtue of being self-contained). The proposed amendment therefore does not meet the single subject requirement.[2]

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[1] Likewise, the initiative proposal also fails to "identify the articles or sections of the constitution substantially affected." Fine v. Firestone, 448 So. 2d at 989.

[2] Moreover, assuming it would be permissible for Florida voters to pick and choose those classifications or groups against whom discrimination would be protected by the constitution (which it is not), the proposed amendment violates the single subject requirement by lumping together all unenumerated groups. Voters do not have the option of keeping existing privileges based on military service, while eliminating any protections based on residency. Similarly, a voter who believes racial discrimination should continue to be illegal, but who feels that protection based on marital status is unnecessary, is unable to express this view. The initiative lumps together so many disparate categories that voters are left with a take-it-or-leave-it proposition. "This [single subject] requirement avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." Fine v. Firestone, 448 So. 2d at 988.

B. The Ballot Title And Summary Do Not Meet The Clear And Unambiguous Language Requirement Because They Fail To Identify All Of The Ramifications Of The Proposed Amendment.

Florida law requires that the purpose of a proposed amendment be apparent from the language of the ballot title and summary. § 101.161, Fla. Stat. A ballot title and summary will be found to use clear and unambiguous language only where the chief purpose behind the initiative, its meaning and major ramifications are readily apparent. The Court is "required by § 101.161 to ensure that the ballot summary clearly communicates what the electorate is being asked to vote upon." Smith v. American Airlines, Inc., 606 So. 2d 618 (Fla. 1992). See also Wadhams v. Board of County Commissioners, 567 So. 2d 414 (Fla. 1990); Askew v. Firestone, 421 So. 2d 151, 154-55 (Fla. 1982).

The "true meaning" of the proposed AFA amendment is conspicuously unstated in the title and summary, and indeed, even in the text of the amendment. However, the AFA's promotional materials (see Exhibit A) make clear that the ultimate objective of the initiative is to constitutionalize discrimination against homosexuals. While the AFA makes no effort to hide this objective, neither does it state it clearly and unambiguously in the ballot title and summary as required by Section 101.161. See Evans v. Firestone, 457 So. 2d at 1355 ("the voter must be told clearly and unambiguously . . . what the amendment does. . . . The ballot summary should tell the voter the legal effect of the amendment. . . ."); Askew, 421 So. 2d at 156 ("A proposed amendment cannot fly under false colors . . . The burden of

informing the public should not fall only on the press and opponents of the measure -- the ballot . . . summary must do this.").

Nor do the title and ballot summary even hint at the other wide-ranging ramifications of the proposed amendment. By prohibiting legal recognition of any privilege or protection for any unenumerated group, the initiative implicates a broad spectrum of existing laws. As described above, (see p.7, supra) the initiative would eliminate existing classifications based on residency, economic status, and military service, among others -- in addition to sexual orientation. The voters of this State are entitled to notice of these unstated effects of the initiative. Because the proposed amendment covers such disparate areas of state government -- areas which are not even hinted at in the summary -- it fails to provide voters with proper notice of what they are being asked to vote upon. The voters of the state cannot possibly be expected to anticipate the myriad of changes that will be wrought if the initiative succeeds. Therefore, the initiative fails adequately to inform the voters in violation of fundamental due process principles.

II. THE AFA PROPOSAL IS NOT AN AMENDMENT BUT A CONSTITUTIONAL REVISION, AND CAN ONLY BE ACCOMPLISHED THROUGH A CONSTITUTIONAL CONVENTION.

Florida law differentiates between constitutional amendments, which may be quite broad but which must have a "logical oneness of purpose", and revisions of the constitution. Theoretically, a person or group could launch an initiative to

turn Florida into a monarchy and dissolve the entire constitution. To prevent such sweeping change, a revision may not be enacted without a constitutional convention. Art. XI, §§ 3 and 4, Fla. Const.

A proposed change is properly categorized as a revision rather than an amendment when it affects more than a single section or even an article of the Constitution. See Adams v. Gunter, 238 So. 2d 824 (Fla. 1970). For example, a change to a unicameral legislature was found to be a revision because "it would not only radically change the whole pattern of government in this state and tear apart the whole fabric of the constitution, but would even affect the physical facilities necessary to carry on the government." Id. at 831. See also Rivera-Cruz v. Gray, 104 So. 2d 501 (Fla. 1958) (series of 14 interlocked amendments was considered to be a revision).

The AFA proposal would eliminate existing legal rights or privileges based on residence, criminality, economic status, service in the armed forces, and ability -- to name but a few. Essentially every article and most sections of the Florida Constitution are affected. For example, Article III, §§ 1 and 15-16; Article V, §§ 2-9, 17-18 and 20; Article VI, §§ 2, 5-6 and 16; Article VIII; and Article X, §§ 4 and 6, all create rights and establish protections and privileges based upon residence, such as the right to hold any state office, to have access to a court or school in a particular district, and to pay lesser taxes on a homestead. Article IV, § 11 authorizes

creation of the Department of Veteran Affairs, thereby recognizing a group based upon an unenumerated status (service in the armed forces). Likewise, the inability to recognize a right, privilege or protection based upon economic status would eviscerate Article VII (Finance and Taxation).[3]

Such sweeping change far exceeds the scope of any proposed amendment ever before considered by this Court. Because the proposed amendment conflicts with so many existing constitutional provisions, the amendment would be interpreted to supersede these existing provisions. Floridians Against Casino Takeover, 363 So. 2d at 341. Whether or not the AFA intends these far reaching changes, the AFA in essence is proposing to rewrite Florida's Constitution. As such, the AFA proposal is a revision, not an amendment. It can be accomplished only though a constitutional convention.

III. THIS COURT SHOULD CONSIDER CONSTITUTIONAL ARGUMENTS AGAINST THE PROPOSED AMENDMENT AT THIS ADVISORY HEARING.

An essential principle of our system of government is that a "citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. Forty-Fourth Gen. Assembly of Colorado, 377 U.S. 713, 716, 845 S. Ct. 1459, 12 L.Ed.2d 632 (1964). Because the

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[3] In Florida, it is an established principle of constitutional construction that whenever a new amendment conflicts with the state constitution, the amendment supersedes the existing constitutional provision. Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337, 341 (Fla. 1978). See also Metro-Dade Fire Rescue Serv. Dist. v. Metropolitan Dade County, 616 So. 2d 966, 970 (Fla. 1993).

proposed amendment violates fundamental constitutional rights, this Court should now go on to consider the unconstitutionality of the proposed amendment. Under the Supremacy Clause, a state constitution cannot conflict with the federal Constitution.[4] Therefore, a federally unconstitutional state constitutional amendment can never be valid.

The ACLU recognizes that this Court declined to address constitutional arguments against a ballot initiative in Advisory Opinion to Atty. Gen., 592 So. 2d 225 (Fla. 1991). However, the facts of this case counsel against such judicial restraint. Here, as set forth more fully below (see pp. 17-25, infra), the proposed AFA amendment has no conceivable constitutional construction. This distinguishes this case from Advisory Opinion to Atty. Gen., in which the proposed amendment limiting the terms of Florida elected officials was arguably subject to a constitutional interpretation. This distinction is consistent with this Court's prior holdings which state that an amendment should be stricken if it is not subject to any constitutional interpretation.

Indeed, a half-century of this Court's jurisprudence suggests that this Court must invalidate an initiative where it "expressly, specifically and inevitably" violates the United States Constitution. Gray v. Moss, 156 So. 262 (Fla. 1934). "In order for a court to interfere with the right of the people to

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[4] Indeed, the text of the proposed amendment explicitly states that it shall be enacted "to the extent permitted by the Constitution of the United States".

vote on a proposed constitutional amendment, the record must show that the proposal is clearly and conclusively defective." Askew v. Firestone, 421 So. 2d at 154. See also Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981).

> [I]f a duly proposed amendment to the state Constitution does not in terms so plainly, palpably, and inevitably violate some command or limitation of the Federal Constitution as to make the text of the proposed amendment necessarily void as an entirety, its submission to the voters should not be enjoined. . .

Gray v. Moss, 156 So. at 264. See also Weber v. Smathers, 338 So. 2d 819, 821 (Fla. 1976) (the citizens of Florida have a right to change their constitution "in any manner they see fit so long as they keep within the confines of the Federal Constitution"). This Court should now address whether the proposed amendment conflicts with the U.S. Constitution. If it does, it must not be allowed to appear on the ballot.

In his dissenting opinion in Advisory Opinion to Atty. Gen., 592 So. 2d 225, Justice Overton outlined the compelling reasons for deciding questions of constitutionality of a proposed amendment at an advisory hearing:

> A review at this time . . . would save both proponents and opponents of the amendment considerable expense to the state of the futile election. To allow the people to vote and then, if adopted, hold the provision unconstitutional on its face perpetrates a fraud on the voting public. . . .[B]oth our constitution and case law recognize our authority to resolve this strictly legal issue now, without further court proceedings.

Id. at 229-30.

The AFA's proposed amendment can never be subject to any constitutional interpretation. It is "plainly, palpably, and inevitably" void in its entirety. Gray v. Moss, 156 So. at 264. For these reasons, the ACLU urges this Court to consider the initiative's constitutionality at this advisory hearing.

IV. THE PROPOSED AMENDMENT IS UNCONSTITUTIONAL.

A. The Proposal Violates The First Amendment.

The First Amendment protects the freedom "to petition the government for a redress of grievances . . . [and] to engage in group effort towards those ends . . . [as well as] in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. US Jaycees, 468 U.S. 609, 622 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984). The right of citizens to participate in the process of our government is among the most fundamental ideals of our constitutional system. See John Hart Ely, Democracy and Distrust 87 (1980). Indeed, in Williams v. Rhodes, 393 U.S. 23, 40, 89 S. Ct. 5, 21 L.Ed.2d 24, (1968), the Supreme Court recognized that "the right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms."

The AFA proposal effectively prevents individuals and groups from petitioning the government for rights, privileges or protections, when those protections extend beyond the AFA's specified categories of persons. By its terms, the amendment would outlaw such legislation. Therefore, the right to petition for legal protection for any other group -- including homosexuals

-- is rendered meaningless.

In a long line of cases, the U.S. Supreme Court has invalidated laws that restrict access to the political process. See, e.g., Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 89 S. Ct. 1886, 23 L.Ed.2d 583 (1969) (invalidating law requiring children or ownership of property as a pre-condition to vote); Williams v. Rhodes, 393 U.S. 23 (overruling an Ohio law which made it "virtually impossible" for new political parties to reach the ballot); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966) (prohibiting a poll tax on the grounds that it inhibited access to the political process for the indigent); Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) (preventing the dilution of the vote through districting that was not based upon population).

Earlier this year in Evans v. Romer, 854 P.2d 1270 (Colo. 1993), the Colorado Supreme Court upheld an injunction preventing the State of Colorado from enforcing a constitutional amendment similar to the proposed AFA amendment.[5] The Colorado

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[5] The Colorado amendment at issue in Evans v. Romer stated:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of

court based its decision on the fundamental right to access to the political process. Id. at 1276. The court found that the amendment "singles out and prohibits [homosexuals, lesbians and bisexuals] from seeking governmental action favorable to it and thus, from participating equally in the political process." Id. at 1285.

A similar amendment to the City of Cincinnati Charter recently met with the same fate. In Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, No. C-1-93-773 (S.D. Ohio Nov. 19, 1933) (order granting preliminary injunction),[6] the court issued a preliminary injunction preventing a charter amendment entitled "No Special Class Status May Be Granted Based Upon Sexual Orientation, Conduct or Relationships" from taking effect. In holding that the amendment violates the First Amendment, the court concluded that

> not only will gay, lesbian and bisexual citizens be virtually unable to obtain legislation for their group no matter how great the need, but also their advocacy may expose them to discrimination from which they will have no recourse even remotely comparable to that of the other groups, to obtain protection thereby increasing the risks of, and consequently chilling, such expression.

Slip Op. at 16-17.

> persons to have or claim any minority status quota preferences, protected status or claim of discrimination . . .

854 P.2d at 1272.

[6] Attached as Exhibit B.

The proposed AFA amendment would similarly violate the fundamental right to access to the political process for homosexuals and other unenumerated groups. Because the proposed amendment restricts First Amendment rights, it is subject to strict scrutiny. It may be upheld only if it serves a compelling state interest unrelated to the suppression of ideas, and cannot be achieved through less restrictive means. Roberts, 468 U.S. at 623.

The AFA cannot justify this deprivation by any compelling state interest. It is clear that the purpose of the proposed amendment is to constitutionalize certain forms of discrimination by placing them outside the power of government to remedy. As demonstrated above (see p. 7, supra), the goal of the AFA is to protect anti-homosexual discrimination. This is constitutionally impermissible. "The Constitution places no value on discrimination." Runyon v. McCrary, 427 U.S. 160, 176, 96 S. Ct. 2586, 49 L.Ed.2d 415 (1976) (quoting Norwood v. Harrison, 413 U.S. 455, 469, 93 S. Ct. 2804, 37 L.Ed.2d 723 (1973)). See also U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 37 L.Ed.2d 782 (1973) (disallowing a statute preventing households of unrelated individuals from obtaining food stamps, concluding that a "desire to harm a politically unpopular group" -- hippies -- "cannot constitute a legitimate governmental interest").[7] Thus, no compelling state

[7] Nor do the First Amendment's guarantees of free speech, association and religion provide a right to discriminate. "While invidious private discrimination may be characterized as a form of

interest exists to justify this facially unconstitutional initiative.

B. The Proposal Violates The Equal Protection Clause.

The Equal Protection Clause of the United States Constitution guarantees that all citizens similarly situated be treated alike. Government regulations that target a suspect class or violate a fundamental right will be subjected to strict scrutiny and sustained only if narrowly tailored to serve a compelling state interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985). Because the proposed amendment restricts the fundamental right to participate in government processes, it is subject to strict scrutiny for equal protection purposes. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621; Evans v. Romer, 854 P.2d at 1276; Equality Foundation, Slip Op. at 9.[8]

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exercising freedom of association protected by the First Amendment . . . it has never been afforded affirmative Constitutional protections." Runyon v. McCrary, 427 U.S. at 176 (quoting Norwood v. Harrison, 413 U.S. at 470). See also Bob Jones University v. United States, 461 U.S. 574, 103 S. Ct. 2011, 76 L.Ed.2d 157 (1983) (discrimination based upon sincerely held religious beliefs may be prohibited by the government because of the compelling state interest in preventing discrimination).

[8] In addition, by omitting nonmarital children from the enumerated list of protected groups, the proposed amendment facially discriminates against them. This classification is suspect and triggers heightened scrutiny. Laws which discriminate against nonmarital children must be substantially related to an important state interest. See Picket v. Brown, 462 U.S. 1, 103 S. Ct. 2199, 76 L.Ed.2d 372 (1983); United States v. Clark, 445 U.S. 23, 100 S. Ct. 895, 63 L.Ed.2d 171 (1980). As previously discussed, the proposed amendment does not serve an important state interest and should be invalidated.

In Hunter v. Erickson, 393 U.S. 385, 89 S. Ct. 557, 21 L.Ed.2d 616 (1969), the Court held that a state may not disadvantage any particular group by making it more difficult to enact legislation on the group's behalf. Hunter involved an ordinance that prevented the city of Akron from passing a housing ordinance barring racial, religious or ancestral discrimination, without first subjecting it to referendum election. The city argued that the ordinance was neutral since it equally prevented minority and majority races from passing such ordinances. The Court held that the ordinance unconstitutionally discriminated because the majority races would not need to pass anti-discrimination legislation. Essentially, only those people suffering from discrimination would seek to pass anti-discrimination ordinances; by preventing this, the ordinance violated equal protection. See also Evans v. Romer, 854 P.2d at 1279-80.

Moreover, the initiative violates equal protection guarantees even under the most minimal level of scrutiny: it is not even rationally related to a legitimate government purpose. There can never be a legitimate state interest in discrimination for its own sake. "Under the Equal Protection Clause, discrimination for its own sake is not a permissible purpose for classification." In Re Griffiths, 413 U.S. 717, 721 n.8, 93 S. Ct. 2851, 37 L.Ed.2d 910 (1973). Likewise, in Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984), the Supreme Court held that a state may not award custody based upon the fact

that a child is likely to encounter prejudice growing up in a mixed-race household. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect". Id. at 426. See also Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L.Ed.2d 830 (1967) (striking down a California constitutional amendment allowing property owners to sell their land to whomever they chose, finding that the amendment acted to repeal an anti-discrimination housing ordinance and to create a constitutional protection for discrimination); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L.Ed.2d 1010 (1967); Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, (1948). Since no legitimate state interest exists to justify the proposed amendment, it cannot pass even rational basis review. It should be invalidated.[9]

C. The Proposal Violates The Due Process Clause.

The Due Process Clause of the Fourteenth Amendment protects fundamental rights -- those rights expressly protected by the text of the Constitution, and those rights so basic as to be contained in any conception of liberty. See Twining v. New Jersey, 211 U.S. 78 (1908). As discussed above, the proposed amendment violates the fundamental right to participate equally

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[9] The federal courts have begun to recognize that discrimination on the basis of sexual orientation fails under rational basis review and violates the equal protection clause. See, e.g., Steffan v. Aspin, 62 U.S.L.W. 2309 (D.C. Cir. Nov. 16, 1993); Meinhold v. U.S. Dept. of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993).

in the political process and does not serve a compelling state interest. Moreover, the proposed amendment is also unconstitutional and violative of due process because it is vague and overbroad.

1. The amendment is overbroad.

A law is overbroad if, in proscribing constitutionally unprotected conduct, it proscribes conduct that is protected by the guarantees of free speech or free association. Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L.Ed. 1093 (1940). Even if the amendment reaches some unprotected conduct, it fails because it also proscribes clearly protected activity. Among its ramifications, the proposed ordinance would prohibit recognition and funding or tax exemptions (creation of a privilege or right) for all groups at state universities, counties or municipalities unless they are formed based upon race, gender, etc. This affects political parties, student political groups, all non-profit organizations including religious groups, etc. The activities engaged in by these organizations are protected by the First Amendment. Indeed, the proposal is overbroad for the same reasons that it does not meet the Florida single subject requirement.

2. The amendment is unconstitutionally vague.

A law is vague if the conduct it proscribes is so unclearly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Papachristou v. City of Jacksonville, 405 U.S. 156,

92 S. Ct. 839, 31 L.Ed.2d 110 (1972); Connally v. General Construction Co, 269 U.S. 385, 46 S. Ct. 126 (1926). Since the language of the proposal could be applied in ways which its drafters never intended and would not approve, its meaning and application are unclear and the amendment is unconstitutionally vague.

CONCLUSION

For the foregoing reasons, the ACLU urges this Court to declare invalid the AFA initiative to amend Article I, Section 10 of the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Interested Party American Civil Liberties Union Foundation of Florida, Inc. has been furnished by U.S. mail to: Honorable Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399-1050; Honorable Jim Smith, Secretary of State, The Capitol PL02, Tallahassee, Florida 32399-0250; and Mr. David E. Caton, Chairman, American Family Political Committee of Florida, Post Office Box 17943, Tampa, Florida 33682 this 3d day of December, 1993 .

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