D.A. 1-7-94

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IN THE SUPREME COURT
STATE OF FLORIDA

FILED
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CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

In re: Advisory Opinion to the Attorney General -- Restrict Laws Related to Discrimination

Case No. 82,674

BRIEF OF PARKER D. THOMSON and ARTHUR J. ENGLAND, Jr.

Comments with Respect to the Proposed Amendment

Original Proceeding
pursuant to Article V. Section 3(b)(10)
Florida Constitution

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INTRODUCTION AND SUMMARY

This brief is filed for the limited purpose of urging this Court to expand the issues considered in this proceeding, so as to consider the facial constitutionality under the United States Constitution of the proposed initiative petition which is the subject of this Original Proceeding.[1] It is submitted that this Court has discretion to consider, in the rare but appropriate case, federal constitutional issues. If this Court in Advisory Opinion to Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991) ("Advisory Opinion"), when stating that the federal constitutional issues there raised were "not justiciable," id. at 227, meant to say that such issues were never justiciable, then that decision is contrary to prior decisions of this Court. Such prior case law concluded that the facial constitutionality of a petition could be decided by the Court.

We submit that this Court should find proper the consideration of federal constitutional issues with respect to proposed initiative petitions if (i) the issue is one of facial constitutionality and (ii) not reaching a decision on such facial constitutionality could have serious consequences to the State.

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[1] These issues are not reached if the proposed initiative amendment is found not to comply with the "one subject and matter directly connected therewith" requirement of Article XI, Section 3 of the Florida Constitution, or not to comply with the ballot title and substance requirements of Section 101.161, Florida Statutes. Compliance with these requirements is not considered herein.

We submit that if this two-part test is applied here, the Court would consider the facial constitutionality of the proposed initiative petition at this time. And, based on the Colorado experience with its "Amendment 2", if this proposed initiative petition is facially unconstitutional (as the Colorado Supreme Court concluded as to Amendment 2), then its passage will never be of any utility to its proponents, while the campaign to secure the requisite signatures and electoral passage will be bitterly divisive to the State. Under these circumstances, the State as a whole will suffer greatly from the consequences of non-decision and the proponents will gain nothing by it.

I. The Consideration By This Court In This Original Proceeding of Federal Constitutional Issues Is Not Precluded By The Florida Constitution.

Until Advisory Opinion was rendered two years ago, this Court had never suggested that consideration of facial federal constitutionality of a proposed initiative petition was invariably precluded.

Certainly Article IV, Section 10, Florida Constitution does not preclude it. This section merely states:

> The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI.

The applicable general law is Section 16.061, Florida Statutes, which says, in pertinent part:

> The Attorney General shall...petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment...with s.3, Art. XI of the

> State Constitution and the compliance of the proposed ballot title and substance with s. 101.161.

That statutory provision nowhere precludes consideration of facial federal constitutionality.[2]

Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934)[3] and Gray v. Winthrop, 115 Fla. 721, 156 So. 270 (1934) each involved an amendment to the State Constitution proposed by the State Legislature. These decisions concluded that proposed amendments could be scrutinized for violation of the Federal Constitution, but only if the proposed amendment expressly violates a specific command of that Constitution. We interpret this as being a test of "facial constitutionality."[4] Grose v. Firestone, 422 So. 2d 303, 306 (Fla. 1982), also dealing with the validity of an amendment proposed by the State Legislature, said: "Appellant's argument that the substance of the amendment is unconstitutional [an argument not articulated in the opinion] is not a justiciable issue in this case...[citing Moss and Winthrop]" (emphasis added).

Certainly as late as 1991, the Attorney General believed that federal constitutional challenges to proposed initiative petitions

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[2] As noted above, if the proposed amendment does not comply with Article XI, Section 3, Florida Constitution, or Section 101.161, Florida Statutes, facial federal constitutionality need not be considered.

[3] In Moss the proposed amendment was challenged, inter alia, as violating the federal constitutional bar on state impairment of contracts.

[4] Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958), concluded an amendment was not facially unconstitutional if it "may conceivably be valid in some respects or under some conditions."

could be considered in appropriate cases after all these decisions, since he invited consideration of those issues in his letter of September 20, 1991 initiating Advisory Opinion.[5]

Had this Court declined to consider the federal constitutional issues in Advisory Opinion as an exercise of its discretion, its declination is understandable. For the term limitation there involved applied to state legislators and state constitutional officers as well as United States Representatives and Senators, and the proposed amendment contained a severability clause. Nor was the bitterly divisive campaign here in view likely to be generated by the issue of term limits.

We therefore urge that this Court clarify Advisory Opinion and conclude that consideration of federal constitutional issues as to a proposed initiative petition is discretionary, that discretion to be exercised in the appropriate, and rare, case.

II. The Court Should Exercise Its Discretion And Consider The Federal Constitutional Issues Here Involved.

The proposed initiative petition here involved is analogous to that passed by the electorate of Colorado. This is shown by comparing them:

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[5] This letter, attached as Exhibit 1, observed: "It might be construed that this initiative petition to limit the terms of United States representatives and senators, in effect, would alter the qualifications of such offices. If so, the question then arises whether a state may alter the qualifications of those seeking office for United States representative or senator, since such qualifications are exclusively provided in Art. I, ss. 2 and 3, U.S. Const. at p. 4."

COLORADO	FLORIDA
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 persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.	The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. As used herein the term "sex" shall mean the biological state of either being a male person or a female person; "marital status" shall mean the state of being lawfully married to a person of the opposite sex, separated, divorced, widowed or single; and "familial status" shall mean the state of being a person domiciled with a minor, as defined by law, who is the parent or person with legal custody of such minor or who is a person with written permission from such parent or person with legal custody of such minor.

The proposed Florida Amendment seems to seek to avoid, by omission, the constitutional problems encountered by Colorado is Amendment 2. While the Amendment 2 specifically prohibited government from passing any law protecting persons based on sexual orientation, the Florida Amendment accomplishes the same end result without so stating. The Florida Amendment, simply read, states no government may pass any law permitting protection of any class of people other than those specifically stated in the Amendment. The

Florida Amendment enumerates specific "suspect" classes as excepted from this prohibition, but then limits the scope of certain of those classes by imposing new constitutional definitions on them. The Florida Amendment facially excludes from protection not only homosexuals, lesbians, and bisexuals, but also, among others, pregnant women; persons infected with human immunodeficiency virus; persons with disabilities recognized under the American Disabilities Act; persons who are in the process of securing legal custody of any individual who has not attained the age of 18 years; persons associated with protected persons; and victims of prejudice based on sexual orientation.

As was well-publicized during the extraordinarily acrimonious initiative process in Colorado earlier this year, the passage of Amendment 2 was accompanied by virulent and destructive debate. Subsequent to the passage of Colorado's Amendment 2, numerous incidents of "gay-bashing" were reported, as well as several deaths. See Smith, Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment 2, 32 Washburn L.J. 367, 368-370 (1993); see also Note: Constitutional Limits On Anti-Gay Rights Initiatives, 106 Harv. L. Rev. 1905 (1993). Despite this painful history, once the initiative passed but before it could become effective, it was constitutionally challenged. And the challenge has been successful. See Evans v. Romer, 854 P.2d 1270 (Colo. 1993), cert. denied, Romer v. Evans, ___ U.S. ___, 126 L. Ed. 2d 365 (1993). Amendment 2 was held to be facially unconstitutional because it failed the strict scrutiny test of governmental action

by excluding gays and lesbians from their fundamental right under the Equal Protection Clause to participate equally in the political process.[6] Laws subject to the strict scrutiny standard, as the Colorado Supreme Court noted, "will be sustained only if they are supported by a compelling state interest and narrowly claim to achieve that interest in the least restrictive manner possible." (854 P.2d at 1275)

The Colorado Supreme Court found as a matter of law that Amendment 2 would leave homosexuals, lesbians, and bisexuals without "an effective voice in the governmental affairs which substantially affect their lives." Because Colorado's Amendment 2 singled out and prohibited this class of persons from seeking governmental action favorable to it, the Court concluded that they were denied the right to participate equally in the political process, noting:

> Prior to passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation... Thus like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment

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[6] That Court observed: "The precise scope of Amendment 2 need not be determined here, however, because neither the parties, nor their amici, have contended that Amendment 2 does not prohibit the enactment of antidiscrimination laws by state or local entities. Since all agree that Amendment 2 unambiguously attempts to do this, and since that restriction alone provides a sufficient basis for our conclusion, we need not determine what broader application Amendment 2 might have." (854 P.2d at 1284)

> process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause. (854 P.2d at 1286)

We take no position as to whether the proposed initiative petition here involved, a broader prohibition by omission than the Colorado's direct prohibition, is federally constitutional. We submit, however, that the decision of the Colorado Supreme Court gives reason to believe it may well not be constitutional.[7] This causes extraordinary concern that an equally contentious initiative process will occur here in Florida and, if the proposed initiative is in fact unconstitutional, will benefit not even its proponents. The State does not deserve such a devastating exercise in futility. Parties who can adequately advocate the constitutionality vel non of the proposed initiative are presently before this Court. This Court should exercise its discretion to consider the federal constitutional issues posed if the proposed amendment is found to meet the constitutional "single subject" and statutory ballot requirements.

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[7] Very recently a federal district court in Equality Foundation of Greater Cincinnati, Inc. v. The City of Cincinnati, 1993 U.S. Dist. LEXIS 16777, U.S.D.C. Ohio, 1993, preliminarily enjoined implementation of an amendment to the Cincinnati City Charter prohibiting enactment or enforcement of any ordinance or rule providing a person with "homosexual, lesbian, or bisexual orientation...with the basis to have any claim of minority or protected status, quota preference or other preferential treatment." The Court found a substantial likelihood that the Charter Amendment was unconstitutional.

CONCLUSION

For the reasons stated we submit that this Court should consider and exercise its discretion as to the federal constitutional issues presented by the proposed initiative here presented, if the proposed amendment is found to meet the constitutional "single subject" and statutory ballot requirements.

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STATE OF FLORIDA

OFFICE OF ATTORNEY GENERAL

ROBERT A. BUTTERWORTH

September 20, 1991

The Honorable Leander J. Shaw, Jr.
Chief Justice, and
Justices of The Supreme Court
of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

Dear Chief Justice Shaw and Justices:

In accordance with the provisions of Art. IV, s. 10, Fla. Const., and s. 16.061, Fla. Stat. (1989), it is my responsibility to petition this Court for a written opinion as to the validity of an initiative petition circulated pursuant to Art. XI, s. 3, Fla. Const.

On September 5, 1991, the Secretary of State, as required by s. 15.21, Fla. Stat. (1989), submitted to this office an initiative petition seeking to amend the State Constitution to limit the terms of office for state representatives and senators, members of the cabinet, the lieutenant governor, and United States senators and representatives from Florida. The petition provides:

> LIMITED POLITICAL TERMS IN CERTAIN ELECTIVE OFFICES
>
> The people of Florida believe that politicians who remain in elective office too long may become preoccupied with re-election and beholden to special interests and bureaucrats, and that present limitations on the President of the United States and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office.

EXHIBIT

1

Therefore, to the extent permitted by the Constitution of the United States, the people of Florida, exercising their reserved powers, hereby declare that:

1) Article VI, s. 4 of the Constitution of the State of Florida is hereby amended by:
   a) inserting "(a)" before the first word thereof and,
   b) adding a new sub-section "(b)" at the end thereof to read:

"(b) No person may appear on the ballot for re-election to any of the following offices:

"(1) Florida representative,
"(2) Florida senator,
"(3) Florida Lieutenant governor,
"(4) any office of the Florida cabinet,
"(5) U.S. Representative from Florida, or
"(6) U.S. Senator from Florida

"if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years."

2) This amendment shall take effect on the date it is approved by the electorate, but no service in a term of office which commenced prior to the effective date of this amendment will be counted against the limit in the prior sentence.

3) If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application. The people of Florida declare their intention that persons elected to offices of public trust will continue voluntarily to observe the wishes of the people as stated in this initiative in the event any provision of this initiative is held invalid.

The ballot title and summary for the proposed amendment provides:

LIMITED POLITICAL TERMS IN CERTAIN ELECTIVE OFFICES

Limits terms by prohibiting incumbents who have held the same elective office for the preceding eight years from appearing on the ballot for re-election to that office. Offices covered are: Florida Representative and Senator, Lieutenant Governor, Florida Cabinet, and U.S. Senator and Representative. Terms of office beginning before amendment approval are not counted.

SINGLE SUBJECT LIMITATION

Section 16.061, Fla. Stat. (1989), requires the Attorney General to petition this Honorable Court for an advisory opinion as to whether the text of the proposed amendment complies with Art. XI, s. 3, Fla. Const.

Article XI, s. 3, Fla. Const., reserves to the people the power to propose the revision or amendment of any portion of the Constitution by initiative. It requires, however, that any such revision or amendment "embrace but one subject and matter directly connected therewith." Evans v. Firestone, 457 So.2d 1351, 1353 (Fla. 1984). To comply with this one subject limitation, this Court has stated that a proposed amendment must have a "logical and natural oneness of purpose." In re Advisory Opinion to the Attorney General English--The Official Language of Florida, 520 So.2d 11, 12 (Fla. 1988), quoting, Fine v. Firestone, 448 So.2d 984, 990 (Fla. 1984).

The proposed initiative seeks to limit the terms of office of state representatives and senators, Florida cabinet members, the lieutenant governor, and United States representatives and senators. It would do so by prohibiting the appearance on the ballot for re-election of incumbents who, by the end of their current term, have held the same elective office for eight consecutive years. However, the proposed amendment would not apply to terms of office which began prior to its approval. I believe the proposed initiative petition complies with the single subject limitation required by Art. XI, s. 3, Fla. Const.

BALLOT SUMMARY

Section 16.061, Fla. Stat. (1989), also requires the Attorney General to petition this Honorable Court for an advisory opinion as to whether the proposed ballot title complies with s. 101.161, Fla. Stat. (1990 Supp.).

Section 101.161, Fla. Stat. (1990 Supp.), states the requirements for the ballot title and substance of a proposed constitutional amendment. This Court has stated on several occasions "that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982), quoting, Hill v. Milander 72 So.2d 796, 798 (Fla. 1954). The language of the summary of the initiative petition advises voters that the amendment to the Constitution limits the terms of the named elected officials, but does not apply to terms of office beginning prior to approval of the amendment. I believe this summary reflects the substance of the proposed amendment.

OTHER FACTUAL ISSUES

Section 16.061(1), F.S. (1989), provides that the Attorney General may raise any factual issues which it is believed would require a judicial determination.

It might be construed that this initiative petition to limit the terms of United States representatives and senators, in effect, would alter the qualifications of such offices. If so, the question then arises whether a state may alter the qualifications of those seeking office for United States representative or senator, since such qualifications are exclusively provided in Art. I, ss. 2 and 3, U.S. Const. See, State ex rel. Davis v. Adams, 238 So.2d 415, 416 (Fla. 1970), and Stack v. Adams, 315 F.Supp. 1295 (N.D. Fla., 1970).

The Court, therefore, may wish to consider whether the amendment would amount to a change in qualifications for the offices of United States representative and senator and whether the State of Florida has the authority to alter such qualifications.

I respectfully request this Court's opinion as to the issues raised herein.

Respectfully submitted,

Robert A. Butterworth
Attorney General

RAB/tgk

1993 U.S. Dist. LEXIS 16777 printed in FULL format.
EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. et al., Plaintiffs,

v.

THE CITY OF CINCINNATI, Defendant.

C-1-93-773

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WESTERN DIVISION

1993 U.S. Dist. LEXIS 16777

November 19, 1993, Decided
November 19, 1993, Filed

COUNSEL: [*1] For EQUALITY FOUNDATION OF GREATER CINCINNATI INC, plaintiff:
Alphonse Adam Gerhardstein, Cincinnati, OH. For RICHARD BUCHANAN, CHAD BUSH,
EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, HOME INC, plaintiffs: Alphonse Adam
Gerhardstein, Cincinnati, OH. Scott T. Greenwood, ACLU Of OHIO FOUNDATION Inc.,
Cincinnati, OH.

JUDGES: Spiegel

OPINIONBY: S. ARTHUR SPIEGEL

OPINION: ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on the Plaintiffs' Motion for Preliminary
Injunction (doc. 2), the Defendant's Memorandum in Opposition (doc. 5), the
Plaintiffs' Reply Memorandum (doc. 7), the Plaintiffs' Proposed Findings of Fact
and Conclusions of Law (doc. 9), Brief of Amicus Curiae of Ohio Human Rights Bar
(doc. 12), the Defendant's Proposed Findings of Fact and Conclusions of Law
(doc. 13), Brief of Amici Curiae Ohio Sociological Foundation (doc. 14), and the
Plaintiffs' Supplemental Reply (doc. 15). A hearing was held on this matter on
November 15, 1993.

EXHIBIT
2

INTRODUCTION

We announced on November 16, 1993, our intention of granting the Plaintiffs' Motion for Preliminary Injunction. We emphasize that we are sensitive to the concerns of the people who voted in favor of the passage [*2] of the Issue 3 Amendment. It is of paramount concern to the Court that all effected by this Order have an understanding of the role of the Court in this case. The Court is in no way granting special rights to any individual or group, nor is it usurping the democratic process. On the contrary, an essential principal of our system of government is that fundamental constitutional rights are not subject to popular vote. Thus, it is one of the most important roles of the federal courts to ensure that the constitutional rights of the few or the powerless are not infringed because their views are unpopular with the majority. Without these principals, and without the independence of the federal courts to preserve them, ours would not be a democracy at all but rather a tyranny at the whim of the majority.

PROCEDURAL BACKGROUND

The Plaintiffs in this case have filed a motion seeking a preliminary injunction prohibiting the implementation of the Issue 3 Amendment to the Cincinnati City Charter. Accordingly, we will analyze the issues before the Court under the appropriate four part test discussed below.

FACTUAL BACKGROUND

This action challenges the constitutionality of Article XII of [*3] the Cincinnati City Charter, passed by the voters on November 2, 1993. The plaintiffs allege that the amendment violates their rights of equal protection, free speech, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution and by the Constitution of the State of Ohio.

The amendment, titled Issue 3 on the ballot ("Issue 3" or the "Issue 3 Amendment"), provides:

ARTICLE XII
NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or

policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

[*4] The Charter of the City of Cincinnati is akin to a local constitution. It is the primary governance document in the city. Generally, local laws must comply with the Charter. Policy in the Cincinnati City Government is set by a nine member City Council which is elected at large every two years; the council candidate receiving the highest vote is also elected Mayor.

Guy Guckenberger was a Republican council member for over twenty years. He left the Council in February, 1992 to assume a position as a Hamilton County Commissioner. Mr. Guckenberger testified for the Plaintiffs at the hearing and the Court found him to be a credible and informative witness. He explained that City Council not only passes laws but also does a great deal of constituent work, assisting citizens in their efforts to have particular problems addressed by the City administration. While the day-to-day administration of the City government is left to a professional city manager, the City Council enacts ordinances and sets policy for the city manager and City administration and also has the responsibility and authority to hire and fire the manager.

Mr. Guckenberger explained that council members have many particular [*5] constituencies within the Cincinnati electorate such as environmental groups, the AFL-CIO, and Stonewall--a political advocacy group for lesbians and gays. The determination of the competing needs and demands of various groups is accomplished by private meetings with citizens as well as through special public hearings and through the weekly council committee meetings.

Mr. Guckenberger and plaintiff Richard Buchanan, also a credible witness, traced the political development of the gay citizens of Cincinnati. In 1983, Stonewall Cincinnati first endorsed City Council candidates, although many of the candidates refused to accept the endorsement.

Over the years, the gay and lesbian issues pursued through City Council Members included alleged harassment of gays by police in the City Parks, a dispute with the Civil Service Commission regarding the questions on sexual orientation and sexual history for police and fire recruits, and the City EEO ordinance and what eventually became the Human Rights Ordinance.

Mr. Guckenberger noted that although the gay and lesbian political voice was getting stronger over the last decade, many individuals would nonetheless introduce themselves at gay functions [*6] by first name only and otherwise indicate that they were not yet ready to declare themselves openly gay.

The Plaintiffs also provided testimony to the effect that the political history of lesbians, gays and bisexuals in Cincinnati is an indication that they are an identifiable group. For example, George Chauncey, an historian at the University of Chicago, stated in his affidavit that there is a well-documented history of discrimination in the United States against gay men, lesbians and bisexuals as a result of their sexual orientation. This discrimination has included status-or identity-based discrimination as well as conduct-based discrimination. Many laws have been passed that have been specifically targeted at and/or selectively enforced against gay men, lesbians and bisexuals.

Furthermore, we found credible the testimony of Plaintiff Roger Asterino who testified at the hearing. He, along with Plaintiff Edwin Greene who testified via affidavit, related their experiences as gay men. Rita Mathis, another credible witness who also testified at the hearing, told of her experience as a lesbian. The testimony of these witnesses included accounts of the discrimination they have experienced [*7] because of their sexual orientation. According to their testimony, they experience, among other things, fear of rejection by family and friends, fear of reprisal and violence and harassment in housing and employment.

Dr. Gonsiorek, a highly credentialed psychologist, testified credibly that the experiences of these plaintiffs were typical of the experiences of discrimination of lesbians, gay men and bisexuals. Dr. Gonsiorek showed that lesbians, gay men and bisexuals are an identifiable class because of their shared sexual orientation toward people of the same gender and their shared history of discrimination on the basis of their sexual orientation.

Plaintiff Mr. Asterino, who is 42, testified that he knew by an early age that he was gay and that he prayed to change. He was reluctant to "come out" to his family and co-workers and "came out" only this year to fight alleged sexual orientation discrimination at his job. Similarly, Plaintiff Ms. Mathis described her experience of discrimination as an African-American lesbian mother. Ms. Mathis cited instances of sexual orientation discrimination in her life and her fears not only for herself but for stigmatization or harassment of her [*8] son.

The Plaintiff Mr. Greene similarly testified via affidavit with respect to his experience of discrimination as an African-American gay man. Mr. Greene repeatedly experienced discrimination in employment prior to passage of the Human Rights Ordinance. He also showed the dual effects of racism and sexual orientation discrimination in his life.

In Mr. Guckenberger's opinion, if Article XII of the charter becomes effective, it is likely that elected city representatives and other city officials will be prevented from enacting, adopting, enforcing or administering any "ordinance, rule, regulation or

policy" on behalf of gay, lesbian, and bisexual citizens, regardless of its merit. Mr. Guckenberger noted that after Issue 3, laws that benefit the gay and lesbian community will have to be adopted by Charter amendment--a burdensome task that requires a city wide campaign and support of a majority of the voters; a far more onerous task than lobbying the City Council or City administration for protection of the gay community.

Moreover, the point of doing the campaign work and gaining access to council's political corridors of power is lost if counsel cannot deliver any response on the issues [*9] that affect this identifiable group. Thus, attempting to work with the City Council or administration would be rendered meaningless.

We find that by its own terms, Issue 3 singles out persons with "homosexual, lesbian or bisexual orientation." Furthermore, it does not target specific types of problems that affect all citizens for its restrictions, but rather it targets specific citizens based upon their sexual orientation. Mr. Guckenberger could recall no other time in the history of the City of Cincinnati when such a charter provision was enacted.

Finally, Cincinnati City ordinance No. 490-1992 (Human Rights Ordinance) prohibits discrimination based on many factors, including sexual orientation, in the areas of private employment, public accommodations and housing. Discrimination based upon sexual orientation, whether it be heterosexual, lesbian, gay or bisexual, is prohibited by this ordinance.

No evidence was offered by the Defendant City of Cincinnati or the intervenor to demonstrate that it is not substantially likely that the charter amendment will prohibit enforcement of the Human Rights Ordinance or EEO Ordinance insofar as they prohibit discrimination against gay men, lesbians [*10] and bisexuals. The charter amendment will not disturb enforcement of the provisions which prohibit discrimination against heterosexual people.

STANDARD

In determining whether to issue a preliminary injunction the district court must balance four interrelated criteria:

1) Whether the Plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;

2) Whether the Plaintiffs have shown irreparable injury;

3) Whether the issuance of a preliminary injunction would cause substantial harm to others; [and]

4) Whether the public interest would be served by issuing a preliminary injunction.

N.A.A.C.P. v. City of Mansfield, Ohio, 866 F.2d 162, 166 (6th Cir. 1989); Weaver
v. University of Cincinnati, 942 F.2d 1039, 1043 (6th Cir. 1991).

ANALYSIS

a) Substantial Likelihood of success

The Plaintiffs in this case claim that Issue 3 infringes, among other things, their fundamental right to participate equally in the political process, in violation of the Equal Protection Clause of the United States Constitution. Under the Equal Protection Clause there are three standards which may be [*11] applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis review. See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). Legislation that infringes a fundamental right must be examined under the strict scrutiny standard of review. Id.; Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969). Consequently, we must first consider whether the right to participate equally in the political process is a fundamental right. As discussed below, we conclude that there is a strong likelihood that such right exists, and that the Defendant has violated it. Accordingly we review this equal protection challenge under the strict scrutiny standard of review.

1

We find support for our decision in the thorough analysis of the Colorado Supreme Court in Evans v. Romer, 854 P.2d 1270 (Colo.), cert. denied, 1993 U.S. LEXIS 6909 (1993). The Evans court noted that, the right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our republic [*12] up to the present time.

Evans, 1276. Thus, it is not surprising that the United States Supreme Court has consistently rejected legislation establishing preconditions on the right to vote. See 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 precondition to vote); Harper v. Virginia Board of Elections, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966) (holding poll tax unconstitutional); Carrington v. Rash, 380 U.S. 89, 13 L. Ed. 2d 675, 85 S. Ct. 775 (1965) (holding unconstitutional law requiring civilian status to vote).

Although these cases dealt with laws directly restricting the exercise of the franchise, we find that these cases stand for the broader principal that all people have the right to be free from restrictions which would "pose the danger of denying some citizens any effective voice in the governmental affairs which would substantially affect their lives." Kramer, 395 U.S. at 627 (emphasis added). Thus, "any unjustified discrimination in determining who may participate in political affairs or in the selection of [*13] public officials undermines the legitimacy of

representative government." Id. at 626 (emphasis added). As a consequence, any laws which "fence out" a group of voters because of a fear of their views or because of the way they vote, threatens the group's ability to "exercise . . . rights so vital to the maintenance of democratic institutions." Carrington, 380 U.S. at 94. We readily conclude that these pronouncements embody principals not simply confined to cases involving the right to vote.

2

A second line of cases are more directly on point as they deal not with a precondition or restriction on the right to vote, but rather with the value of one's vote; in other words, the right to have one's vote count as well as be counted. See Reynolds v. Sims, 377 U.S. 533, 566, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) ("diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race"); New York City Board of Estimate v. Morris, 489 U.S. 688, 693, 103 L. Ed. 2d 717, 109 S. Ct. 1433 (1989) ("each and every [*14] citizen has an inalienable right to full and effective participation in the political process"); Gray v. Sanders, 372 U.S. 368, 380, 9 L. Ed. 2d 821, 83 S. Ct. 801 (1963) ("the right to have one's vote counted has the same dignity as the right to put a ballot in the box").

That these case stand for the broader proposition that all citizens have not only the right "to vote" but also the deeply rooted right to meaningful and equal participation in the political process was made crystal clear in Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964). In Sims, the Court observed that with the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political process of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent [*15] them. Full and effective participation by all citizens in state government requires therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Sims, 377 U.S. at 564-65 (emphasis added); New York City Board of Estimates, 489
U.S. at 693.

Consequently, if a representative is powerless to act on behalf of an identifiable group, the members of that group are not

"self-governing through the medium of elected representatives" see Sims, 377 U.S. at 564-65, and thus, the right to "put the ballot in the box" see Gray, 372 U.S. at 380 (1963), is but a meaningless procedure. Simply put, the right to vote for someone who is powerless to represent the voter renders meaningless the right to vote for that person. It has been written, the right to full and fair representation "imports more than the mere right to cast a vote that will be weighted as heavily as the other votes cast in the election." Lawrence H. Tribe, American Constitutional [*16] Law @ 13-7, at 1074. Therefore, although gay, lesbian and bisexual citizens have the right to cast a vote, Issue 3's restriction on council members' and other city administrators' ability to act on their behalf eliminates the very purpose and significance of that vote.

3

The third type of cases crucial to our decision are cases involving candidate eligibility. Again, in these cases, actual access to the ballot box was not at issue. Rather, in Williams v. Rhodes, for example, the Court held that certain state election laws violated the equal protection clause because they gave "two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate." 393 U.S. 23, 31 (1968). The Court continued that the "right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." Id. Although the plaintiffs in Williams were never denied their right to cast a vote, the Court nonetheless referred to the right to "vote [*17] effectively" simply in terms of the "right to vote."

Williams, 393 U.S. 23, 30, 31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (emphasis added).

Consequently, the Court required the state to demonstrate a compelling state interest.

Thus, the Court held that, in the present situation the state laws place burdens on . . . the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.

* * *

The State has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate.

Id. Again, of paramount importance was the right to vote effectively, not the mere right "to put a ballot in the box." n1

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n1 In fact, the Court recognized that "the right of individuals to associate for the advancement of political beliefs, and . . . the right [of voters] to cast their votes effectively . . of course, rank among our most precious freedoms." Williams, 393 U.S. at 30

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[*18]

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Finally, and perhaps most significantly, are the cases involving legislation which alters the normal political process of enacting laws with respect to an identifiable group. In Hunter v. Erickson, 393 U.S. 385, 21 L. Ed. 2d 616, 89 S. Ct. 557 (1969), the Supreme Court invalidated an Akron, Ohio city charter amendment, passed by a majority of the voters, that provided that the city council could implement no ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. In applying the strict scrutiny standard of review, the Court held the amendment violative of the Equal Protection Clause. Id. The Court stated in unambiguous terms that, even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 392-93 (emphasis added). [*19]

Similarly, in Gordon v. Lance, 403 U.S. 1, 29 L. Ed. 2d 273, 91 S. Ct. 1889, (1971), the Court considered the constitutionality of a state's constitutional and statutory mandates requiring approval of 60% of the voters before increasing bonded indebtedness, or increasing the tax rate beyond a certain amount. The Court stated that, we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be 'fenced out' from the franchise because of the way they will vote.

* * *

We conclude that so long as [the legislation does] not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.

Id. at 5, 7 (emphasis added) (citation and footnote omitted).

We acknowledge that Hunter, although significantly not Gordon, involved the issue of racial discrimination. We do not agree, however, that the holdings of these cases are limited to cases involving racial discrimination. n2 Rather, we conclude that these cases stand for the broader proposition that states may not disadvantage [*20] any identifiable group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf. See Evans, 854 P.2d at 1281, 1283; Gordon, 403 U.S. at 7 Hunter, 393 U.S. 385, 393, 89 S. Ct. 557, 21 L. Ed. 2d 616; Note, Constitutional Limits on Anti-Gay-Rights Initiatives, 106 Harv. L. Rev. 1905, 1916-17 (1993). Consequently, "so long as such provisions do not discriminate against or authorize discrimination against any identifiable class, they do not violate the Equal Protection Clause. See Gordon, 403 U.S. at 7 (emphasis added) (footnote omitted); Hunter, 393 U.S. 385, 393, 21 L. Ed. 2d 616, 89 S. Ct. 557; Evans, 854 P.2d at 1281, 1283; See also Taxpayers United v. Austin, 994 F.2d 291, 297 (6th Cir. 1993) (upholding constitutionality of nondiscriminatory restriction on ability to use the "initiative procedure" in Michigan, but cautioning that "our result would be different if . . . [the plaintiffs] were being treated differently than other groups seeking to initiate [*21] legislation"). n3

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n2 First, the cases speak unmistakably in race-neutral terms. See, e.g., Hunter v. Erickson, 393 U.S. 385, 21 L. Ed. 2d 616, 89 S. Ct. 557 (1969) ("State may no more disadvantage any particular group . . ."); Washington v. Seattle School District No. 1, 458 U.S. 457, 470, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982) ("laws structuring political institutions or allocating power according to "neutral principles . . . are not subject to equal protection attack"); Gordon v. Lance, 403 U.S. 1, 29 L. Ed. 2d 273, 91 S. Ct. 1889, (1971) ("so long as the [legislation does] not discriminate against or authorize discrimination against any identifiable class. . . . .").

Furthermore, Gordon, a case not involving race, was distinguished from Hunter not because the legislation in Gordon did not specifically involve a racial minority, but rather because the legislation involved no identifiable group at all. Thus, as the Supreme Court of Colorado pointed out, if Hunter were decided solely on the basis of the "suspect" nature of the class[] involved, there would have been no need for the Court to consistently express the paramount importance of political participation or to subject legislation which infringed on the right to participate equally in the political process to strict judicial scrutiny. To the contrary, were [Hunter] . . . simply a "race case[]" the Supreme Court would have been required to do nothing more than to note that the legislation at issue drew a distinction that was inherently suspect (i.e., that discriminated on the basis of race), and apply strict scrutiny to resolve [that]

case[]--irrespective of the right, entitlement, or opportunity that was being restricted. . . . Kramer v. Union School Free District No. 15, 395 U.S. 621, 628 n.9, 23 L. Ed. 2d 583, 89 S. Ct. 1886, .. Evans v. Romer, 854 P.2d 1270, 1283 (Colo. 1993); see Citizens for Responsible Behavior v. Sup. Court., 1 Cal. App. 4th 1013, 2 Cal. Rptr. 2d 648, 656 (Cal. App. 1991). [*22]

n3 We note that despite the Defendants' urging, we decline to interpret the phrase "identifiable group" as used in the above cases to be synonymous with the phrase "suspect category." See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 791, 792, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983) (labeling supporters of independent political candidate "identifiable group").

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5

In light of the forgoing, and based on the record, we conclude that there is a strong likelihood that under the Issue 3 Amendment, all citizens, with the express exception of gay, lesbian and bisexual citizens, have the right to appeal directly to the members of city council for legislation, while only members of the Plaintiffs identifiable group must proceed via the exceptionally arduous and costly route of amending the city charter before they may obtain any legislation bearing on their sexual orientation. Thus, there is a substantial likelihood that the Issue 3 Amendment "fences out" an identifiable group of citizens--gay, lesbian and bisexuals--from the political process by imposing upon them an added and significant burden on their [*23] quest for favorable legislation, regulation and policy from the City Council and city administration. n4

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n4 As Mr. Guckenberger testified, there is a "dramatic difference" between getting an ordinance passed and getting a charter amendment passed.

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Furthermore, with respect to the Plaintiffs' First Amendment claims, in this case, 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 for which they will have no recourse even remotely comparable to that of other groups, to obtain protection, thereby increasing the risks of, and consequently chilling, such expression. n5

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n5 In fact, one witness testified that with the passage of

issue 3, some members of organizations advocating gay, lesbians and bisexual rights have ceased donating to the organizations.

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[*24]

Therefore, we find a substantial likelihood that Issue 3 will "have the inevitable effect of reducing the total quantum of speech on a public issue" See Meyer v. Grant, 486 U.S. 414, 423, 100 L. Ed. 2d 425, 108 S. Ct. 1886 (1988); as such, there is a substantial likelihood that the implementation of issue 3 will chill the First Amendment rights of citizens and organizations dedicated to the advocacy of issues effecting the gay, lesbian and bisexual community. See Id.; see also Merrick v. Board of Higher Education, 116 Ore. App. 258, 841 P.2d 646, 651 (Or. 1992) ("Not only does the statute discourage [gays, lesbians and bisexuals] from telling others their sexual orientation, it also discourages them from becoming involved in groups advocating gay and lesbian rights, a constitutionally protected activity, because such involvement might expose them to personnel action. The statute's practical effect is to chill speech and other expression and to severely limit open communication . . . .").

7

Finally, we find especially significant the fact that under the Cincinnati Human Rights Ordinance heterosexuals are still a protected class of people, while Issue 3 would remove only [*25] gay, lesbian and bisexual citizens from those citizens protected from the ordinance's prohibition of discrimination based on sexual orientation. This only reinforces our conclusion that the Defendants have proffered no compelling justification to single out gay, lesbian and bisexual citizens for the additional and substantial burdens imposed on their ability to obtain legislation not required of any other identifiable group of citizens. The Court is unaware of what compelling state interest is furthered by removing City Council's and the City administration's ability to address the concerns of one single group of people no matter what need may arise in the future and under what circumstances, while all others may benefit from the direct action of the City Council and City administrators. n6

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n6 We also note that even under a rational basis standard of review, based on the record, there is a significant likelihood that amendment 3 would not pass muster. See Steffan v. Aspen, No. 91-5409, 1993 U.S. App. LEXIS 29521, at *39-*42 (D.C. Cir. Nov. 16, 1993) (military's ban on homosexuals lacked rational basis); Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991), cert. denied, 121 L. Ed. 2d 581, 113 S. Ct. 655 (1992) (same); Citizens for Responsible Behavior v. Sup. Court., 1 Cal. App. 4th 1013, 2 Cal. Rptr. 2d 648, 656 (Cal. App. 1991) (anti-gay initiative requiring

a majority vote to enact any prohibition on sexual orientation discrimination lacked rational basis).

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[*26]

Consequently, the Court finds that there is a substantial likelihood that Issue 3 infringes the Plaintiffs' First Amendment rights, and their fundamental right to participate equally in the political process. Similarly, we find that there is a strong likelihood that there is no a compelling state interest in the enactment of Issue 3.

b) Irreparable Harm and Harm to Others

We also conclude that the Plaintiffs will suffer irreparable harm if the Court does not issue the injunction because of the threatened infringement of the Plaintiffs' fundamental rights. See Evans v. Romer, 854 P.2d 1270, 1286 (Colo.), cert. denied, 1993 U.S. LEXIS 6909 (1993); Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (citing New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971)); Weaver v. University of Cincinnati, 942 F.2d 1039, 1043 (6th Cir. 1991). Similarly, we conclude that maintaining the status quo under the existing City Human Rights Ordinance and EEO Ordinance is the far more prudent course of action in light of the nature of the threat faced by the Plaintiffs in, among other [*27] things, their employment and housing situations. Thus, while no harm will occur to others if the preliminary injunction is issued, the increased threat of harassment which we view as likely to occur if Issue 3 is given effect, would seriously undermine the public interest.

CONCLUSION

Accordingly, the Court hereby GRANTS the Plaintiffs' Motion for Preliminary Injunction, prohibiting the implementation of issue 3, until further order of this Court, and ORDERS the Plaintiffs to post bond in the mount of one hundred dollars.

SO ORDERED.

Dated: November 19, 1993

S. Arthur Spiegel

United States District Judge