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IN THE SUPREME COURT OF FLORIDA

IN RE:	Advisory Opinion to the Attorney General - Restricting Laws Related to Discrimination	)	CASE NO. 82-674

Initial Brief of:

Florida Public Interest Law Section (PILS),
Florida AIDS Legal Defense & Education Fund (FALDEF),
Florida Association of Women Lawyers (FAWL),
Florida Legal Services, Inc. (FLS),
Floridians Respect Everyone's Equality (FREE),
Floridians United Against Discrimination (FUAD),
Miami Area Legal Services Union,
National Lesbian & Gay Lawyers Association (NLGLA),
National Organization for Women (Florida Chapter) (NOW),
People for the American Way,
Southern Poverty Law Center,
United Teachers of Dade Gay & Lesbian Caucus,

In Opposition to the Proposed Amendment

Attorneys For Respondents:

Chesterfield H. Smith
Holland & Knight
701 Brickell Avenue, 30th Floor
P.O. Box 15441
Miami, FL 33131-2852

William E. Adams, Jr.
Cooperating Attorney
Lambda Legal Defense &
Education Fund
3305 College Avenue
Fort Lauderdale, FL 33314
(305) 452-6133

Suzanne Goldberg
Lambda Legal Defense &
Education Fund
666 Broadway
New York, NY 10012-2317
(212) 995-8585

Rosemary Wilder
Gay & Lesbian Lawyers
Association

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STATEMENT OF THE CASE AND FACTS

(a) Introduction

The initiative proposed by the American Family Political Committee of Florida (hereinafter AFPC), the component of the American Family Association which is coordinating the petition drive, seeks to amend the Florida Constitution by striking laws protecting lesbians and gay men against discrimination. The proposal's title and summary do not indicate this purpose; rather, those sections, as well as the initiative itself, would prohibit any level of Florida's government from protecting a variety of classes of citizens from discrimination, even where the need for such protections is well-documented and agreed to by members of government. The respondents argue that this initiative must be struck from the ballot because 1) its title and summary are inaccurate; 2) it addresses multiple subject matters; and 3) it violates the fundamental constitutional rights of Florida's citizens.

(b) Procedural Background

This matter is before the Court pursuant to a request from the Attorney General for an advisory opinion concerning the validity of an initiative petition to amend the Florida Constitution in accordance with article IV, §10 of the Florida Constitution and §16.061(1), Florida Statutes (1991). The full title and text of the proposed amendment submitted by the AFPC of Florida is as follows:

"Laws Related to Discrimination are Restricted to Certain Classifications"

FULL TEXT OF PROPOSED AMENDMENT: BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

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 I, Section 10 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)" 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 being either 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."

2) All laws previously enacted which are inconsistent with this provision are hereby repealed to the extent of such inconsistency.

3) This amendment shall take effect on the date it is approved by the electorate.

On November 4, 1993, the Attorney General for the State of Florida submitted a letter to the Court requesting an advisory opinion concerning the proposed amendment. On November 16, 1993, this Court issued an Interlocutory Order authorizing interested parties to file briefs on or before December 6, 1993, and setting

oral argument for January 7, 1994. Pursuant to that order this brief is submitted on behalf of the interested parties described below in opposition to the proposed initiative.

(c) **Facts**

(1) The AFPC Petition Drive

Because this is an original proceeding without a trial record, the respondents have attached an appendix with relevant materials to assist the Court in understanding the factual scenario in which this petition arises. On March 15, 1993, AFPC president David Caton unveiled the AFPC's petition drive to amend Florida's Constitution with the statement, "Homosexuality is not a civil right." "Group Measures to Block Rights for Gays," The Gainesville Sun, Mar. 16, 1993, at 6B. (App., Ex. G).

By calling the American Family Political Committee of Florida at 1-800-GAY-LAWS, interested people may request a copy of the AFPC petition accompanied by a cover letter and a brochure entitled "Are Homosexual Rights Traditional Civil Rights?" See Cover Letter and Brochure (App., Exs. B & C). Describing the petition's purpose, the letter says: "This petition is designed to stop homosexual activists and other special interest groups from improper inclusion in discrimination laws." Id. The letter, which is signed by Mr. Caton, also explains that the amendment "would prevent homosexuality and other lifestyles from gaining special protection from inclusion in discrimination laws." Id.

The accompanying brochure, which includes a section entitled "Let's Stop the Homosexual Agenda Now," asks readers to support

the petition drive by circulating and signing the petition and contributing funds to the petition drive. See "Are Homosexual Rights Traditional Civil Rights?" (App., Ex. C). Like Mr. Caton's letter, the brochure explains that the amendment "would repeal existing homosexual rights laws and prevent the adoption of future homosexual rights laws" as well as "prevent other special interest groups from misusing discrimination laws." Id.

(2) The Targeted Class: Lesbians and Gay Men in Florida

As the AFPC's promotional literature makes clear, the amendment's primary goal is to cut back the civil rights protections available to lesbians and gay men in Florida. Currently, ordinances prohibiting sexual orientation discrimination, which protect heterosexuals as well as lesbians, gay men, and bisexual persons from arbitrary discrimination based upon their sexual orientation, are in place in the following cities and counties in Florida: Key West, Miami Beach, Tampa, West Palm Beach, Alachua County, Hillsborough County, and Palm Beach County.

In addition, the violence perpetrated against lesbians and gay men has led legislators to include sexual orientation as a protected classification in bias crime laws. A study by the National Institute of Justice indicates that gay men and lesbians are probably victimized more than any other minority groups and another has found that one in five gay men and almost one in ten lesbians report that they have been physically assaulted because of sexual orientation. Note, Sexual Orientation and the Law, 102 Harv.L.Rev. 1508, 1541 (1989). See also Herek, Myths About Sexual

Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 167 (1991) (A copy of the latter article is attached in the Appendix as Exhibit H)

(d) Interests of the Respondents

Florida AIDS Legal Defense and Education Fund (FALDEF) is a not-for-profit corporation formed to provide legal services and community education to persons with HIV infection. It has joined this challenge to protect the individuals, including gay men, whom it assists who will be impacted by this initiative.

The Florida Public Interest Lawyer Section (PILS) is a section of the Florida Bar which advocates for the legal needs of people who are generally disenfranchised, underrepresented, or lack meaningful access to traditional public forums. The Section joins this challenge to assert the interests of lesbians, gay men, bisexuals, and others who will be denied protection from discrimination as a result of this measure.

The Florida Association of Women Lawyers (FAWL) is a large voluntary statewide association of attorneys of both genders whose purposes include improvement of the administration of justice and the promotion of women's legal rights and the integrity of the individual and the family. It has joined this challenge to promote equality and protection for individuals and families in Florida.

Florida Legal Services, Inc., is the state organization formed to provide support and assistance to the legal aid and legal services organizations throughout Florida, which provide representation to indigent Floridians. Its interest in this

action is to protect indigent Floridians whose programs and legal rights are threatened by the AFPC initiative.

Floridians Respect Everyone's Equality (FREE) is an organization formed under section 501(c)(4) of the Internal Revenue Code to educate the public concerning the consequences of ballot initiatives which seek to restrict the civil rights of Floridians, including gay men and lesbians. Its interest in this challenge is to protect Florida citizens from the restrictions upon civil rights caused by the AFPC initiative.

Floridians United Against Discrimination (FUAD) is an organization formed under section 501(c)(4) of the Internal Revenue Code dedicated to fighting discrimination in Florida. Its interest in this legal action is to fight the discrimination which is encouraged by this initiative against Florida residents.

The Miami Area Legal Services Union (MALSU), an affiliate of the National Organization of Legal Services Workers, Local 2320 of the United Automobile Workers (UAW), AFL-CIO, represents the attorneys and support staff of Legal Services of Greater Miami. Its purposes include attempting to obtain civil rights protections for many groups, including some of those targeted by the AFPC initiative, and it is for that reason that the Union joins this legal action.

The National Lesbian and Gay Lawyers Association (NLGLA) is a national bar association formed to provide support and advocacy on behalf of lesbian and gay attorneys. It joins this action because of its interest in promoting the civil rights of gay men, lesbians,

and bisexuals who are targeted by the AFPC initiative.

The National Organization of Women, Florida Chapter, is a national organization formed to seek equal rights for women in our society. Its interest in this challenge is to protect the equal rights of all of the Florida citizens threatened by this initiative.

People for the American Way is a 300,000-member national organization formed to protect constitutional liberties. Its interest in this action is to protect the constitutional liberties of its Florida members.

The Southern Poverty Law Center is a non-profit organization dedicated to protecting victims of injustice. Its Legal Division represents victims of intolerance in state and federal courts. Its interest in this action is to assist all of the victims of intolerance targeted by this initiative.

The United Teachers of Dade's Gay and Lesbian Caucus, an officially recognized caucus of United Teachers of Dade, is a non-profit organization formed in order to educate, elucidate, and organize around those issues of concern to the Gay and Lesbian community. It participates in this response because of its deep belief that this proposed amendment challenges its members' civil rights, inherent human dignity, and very livelihood.

SUMMARY OF THE ARGUMENT

The initiative submitted by the AFPC proposes to amend the Florida Constitution without explaining the proposal's central purpose as described in the organization's literature promoting the

amendment (supra, p. 2): to repeal existing city and county civil rights laws which prohibit sexual orientation discrimination and to prevent future passage of such laws at any level of Florida government. The amendment's vague language puts at risk numerous Florida statutory and constitutional provisions that protect a wide range of citizens in addition to the targeted class of lesbians and gay men. Apparently the result of a dangerous attempt to mislead the public, the title, summary and measure itself fail to explain the amendment's pernicious effect upon a variety of unrelated laws as well as its violation of Floridians' fundamental constitutional rights.

This Court should strike the AFPC's proposed initiative from the ballot because: (1) it violates Florida statutory requirements that its language be clear and unambiguous; (2) it violates the Florida Constitution by encompassing more than a single subject; and (3) its title violates Florida statutory requirements requiring clarity. Further, because the proposed initiative palpably violates the fundamental constitutional rights of identifiable classes of Florida citizens, this Court should strike the measure now before the citizens of Florida are subjected to a long, divisive, and most significantly, harmful election campaign on a constitutionally infirm measure.

The proposed initiative would disable all levels of government from passing civil rights legislation to protect persons outside of the measure's narrow set of classifications. As a result, it would preclude those citizens from participating meaningfully in the

political process on an equal footing with those of their fellow citizens who are included in the initiative's special categories. By creating separate classes of citizens--some with more access to government, others with less-- the measure violates the fundamental constitutional right of identifiable classes of Floridians to equal participation in the political process.

Moreover, cutting off the right of selected citizens to seek legislation with its resulting termination of the right to petition the government seriously impedes freedom of expression, including the freedom to engage in political speech. The AFPC's initiative raises the risk of speaking out against the proposed measure already faced by those who support civil rights protections for lesbians and gay men. Because it would legally immunize many forms of discrimination from government action, the measure greatly increases the danger that those who oppose it--especially if they support lesbian and gay civil rights--will face discrimination and yet be unable to obtain protection from government. Even recognizing this Court's reluctance to consider pre-election constitutional arguments, this measure presents one of those rare instances when such examination is necessary to protect citizens from irreparable harm.

ARGUMENT

I. THE AFPC'S PROPOSED INITIATIVE LIMITING ANTI-DISCRIMINATION LAWS IS DEFECTIVE BECAUSE IT VIOLATES FLORIDA STATUTORY AND CONSTITUTIONAL REQUIREMENTS.

A. The Ballot Summary Violates the Requirements of Florida Statutes, §101.161 Because It Fails to Provide Voters Fair Notice of the Proposed Amendment's Chief Purpose.

The ballot summary for this initiative fails to clearly inform voters of its intent and effect. When a constitutional amendment "[i]s 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." § 101.161, Fla. Stat. (1991) The ballot summary requirement was "designed to assure that the elector have fair notice of the proposed amendment's chief purpose." (citations omitted). Advisory Opinion to the Attorney General-Limited Marine Net Fishing, 620 So.2d 997, 999 (Fla. 1993); In re Advisory Opinion to the Attorney General-Homestead Valuation Limitation, 581 So.2d 586, 588 (Fla. 1991). In providing clear and unambiguous notice, this Court stated in Grose v. Firestone, 422 So.2d 303 (Fla. 1982), that the summary must contain:

> no hidden meanings and no deceptive phrases. The summary says just what the amendment purports to do. It gives the public fair notice of the meaning and effect of the proposed amendment.

In addition to ensuring that the language presented is understandable, courts will review the summary to see if it omits material facts, Florida League of Cities v. Smith, 607 So.2d 397, 399 (Fla. 1992); Advisory Opinion to the Attorney General: Limited Political Terms in Certain Elective Offices, 592 So.2d 225, 228

(Fla. 1991), or is misleading, Limited Political Terms, 592 So.2d at 228; Evans v. Firestone, 457 So.2d 1351, 1354-55 (Fla. 1984). In Smith v. American Airlines, 606 So. 2d 618 (Fla. 1992), the Florida Supreme Court found the summary addressing taxation of leaseholds of government-owned property to be defective because the summary failed to explain that the new taxation rate would be based on the real property method and the rate could be increased fifteen times.

The AFPC initiative's summary falls far short of meeting the standard set by this Court. In its entirety, the summary reads:

> 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 amendment.

This summary fails to comply with any of the factors required by this Court in determining if fair notice is given. It is unclear, ambiguous, and misleading because it does not reveal to the electorate the main purpose of the initiative--to deny gay men and lesbians the right to seek, and state and local governments the right to pass and maintain, anti-discrimination legislation. The main targets of the initiative are mentioned nowhere in the summary nor in the amendment itself. This type of deception is common amongst the proponents of these "anti-gay" amendments as has been noted by one legal commentator: "These groups frequently distort the true nature of their organizations, rely upon discredited experts and facts, and conceal from voters the true purpose of their legislation." (citations omitted) Note, Constitutional Limits

on Anti-Gay Rights Initiatives, 106 Harv.L.Rev. 1905, 1907 (1993). This type of subterfuge is precisely the evil against which this Court has consistently guarded.

The fact that gay men and lesbians are the primary, and thus far, the only publicly-named targets of the AFPC is abundantly clear from their printed materials. As noted in the Facts Section of this brief (supra, p. 2) the AFPC literature criticizes gay men and lesbians and makes clear that the initiative's purpose is to stop sexual orientation civil rights legislation. Not only is the toll free number for the petition drive 1-800-Gay-Laws, but also the second paragraph of the cover letter, which accompanies the petitions sent to callers, states, "This petition is designed to stop homosexual activists and other special interest groups from improper inclusion in discrimination laws." (App. Ex.). Nowhere does the AFPC define the "other special interest groups."

If the summary stated this purpose, there might be an argument that this summary was not misleading, but that is not the case: the only place where it is not made abundantly clear that this initiative is about the rights of lesbians and gay men is in the amendment itself and its ballot title and summary. This sort of disguised purpose--where the campaign materials state an intent different from the initiative language itself--has been rejected by this Court:

> [t]he availability of public information about a proposed amendment cannot be a substitute for an accurate and informative ballot summary. As this Court stated in Askew, 'the burden of informing the public should not fall only on the press and opponents of the measure--the ballot title and summary must do this.' (citation

omitted).

Smith v. American Airlines 606 So.2d at 621.

In addition to requiring that the amendment state its primary purpose, the Court must look to see if the measure would have additional hidden effects. The initiative, in the portion pertinent to this discussion, states that the state and its political subdivisions:

> [s]hall 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 . . . .

However, the measure fails to define its central terms--discrimination, right, privilege, protection, characteristic, trait, status, or condition--thus making the scope of this extremely broad proposal unclear. The ambiguity is particularly pernicious because the initiative's language voids any law which provides a "right, privilege, or protection" for any characteristic, trait, status, or condition not included among its list of special classes. Neither the amendment nor its summary reveal the laws which would be repealed.

A startling array of laws may fall prey to this amendment. No Florida case has provided a specific definition for the term "discrimination," but a number of cases discuss discrimination in a wide variety of contexts.[1] When a statute provides no definition

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[1]See Cooper v. Tampa Electric Co., 154 Fla. 410, 413, 17 So.2d 785, 787 (1944) (charging different utility rates to customers outside of city limits may be discrimination, albeit lawful); Clay Utility Company v. City of Jacksonville, 227 So.2d

of a term, the courts will look to the term's plain and ordinary meaning. Doe v. Thompson, 620 So.2d 1004, 1005 (Fla. 1993) (using dictionary meaning of "personally"); Florida League of Cities, 607 So.2d at 399; Smith v. American Airlines, 606 So.2d at 620; In re Advisory Opinion to the Attorney General: English--The Official Language, 520 So.2d 11, 13 (Fla. 1988). Dictionary definitions of the term "discrimination" equate it with any difference in treatment. Roget's College Thesaurus 138 (rev. ed. 1978); American Heritage Dictionary of the English Language 376 (New College ed. 1976) ("to make a clear distinction; distinguish; differentiate; to act on the basis of prejudice").

This definition of "discriminate" and the restrictions on laws providing benefits thus place a broad variety of statutes in jeopardy, a result to which the amendment fails to alert or warn voters. A lengthy list of statutes which "discriminate" (i.e., make distinctions) and provide "rights, privileges, or protections" to persons based upon characteristics, traits, statuses, or conditions not mentioned in the amendment is included in the appendix to this brief. (App., Ex. D) Some of the statutes which are endangered include those providing benefits based upon the status of being a veteran (Fl. Stat. §11.2135 (1) (1991), exempting disabled veterans from entrance exams and specific hiring

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516, 518 (Fla. 1st DCA 1969); Fla. Stat. § 83.64 (4) (treating people differently as to rent charged and services rendered in residential property); Fla. Stat. §723.003(13) (same as to mobile home parks). The law does not even have to actually contain the word "discrimination" to be construed as a "law regarding discrimination" by a Florida court.

procedures for state employment; Fl. Stat. §295.07(1) (1991), hiring and retention preferences for disabled veterans and their spouses), or a state resident (Fl. Stat. §196.031 (1991), homestead property tax exemptions for residents; Fl. Stat. §240.1201 (1991), tuition preferences for state residents attending state universities and colleges). Further, the initiative would limit the powers of local governments, thus amending the Municipal Home Rule Powers Act, Fla. Stat., §166.021 (1991). By its own terms, this measure might be the basis for striking all of the protections and rights extended to corporations, their shareholders, directors, and officers, all of which are rights, privileges, or protections extended because of the legal status of these persons. This amendment could void all consumer protection statutes which provide protections based upon a person's status or condition of being a consumer. It may impact the broad number of statutes which prohibit "discrimination" in the determination of rates or provision of insurance protection outside of those conditions listed in the amendment. It may also affect all of the statutes which provide blanket prohibitions against discrimination in setting rates or providing other protections as applied to persons not in the initiative's enumerated groups. In addition, this Court's recent anti-discrimination rule for attorneys as it covers economic status, sexual orientation, and physical characteristic also could be endangered. The Florida Bar Re: Amendments to Rules Regulating the Florida Bar, 18 FLW S393 (June 23, 1993). The statutes which provide benefits to indigent persons (Medicaid-Fla.

Stat., §409.211; Optional State Supplementation Benefits-Fla. Stat., §409.212; Aid to Families with Dependent Children--Fla. Stat., §409.235) could be repealed because they provide privileges based upon economic status. The initiative gives no guidance on how these provisions will be affected.

The initiative may also amend the Florida Constitution as well as Florida statutes. Three separate Florida Circuit Courts have ruled that the Florida Constitutional Privacy Amendment, Art. I, §23, provides protection to gay men and lesbians from governmental interference. Seebol v. Farie, 16 FLW C52 (Fla. 16th Cir. Ct. 1991); Woodard v. Gallagher, 1 FLW Supp 17 (Fla. 9th Cir. Ct. 1992); Cox v. Dry, 1 FLW Supp. 352 (Fla. 12th Cir. Ct. 1993). This initiative may remove such protection.

Furthermore, the initiative could affect the Florida Equal Protection Clause, Art. I, §2. In addition, it will impact sections concerning home rule powers, Art. VIII, and the homestead provisions, Art. VII, §6. Section II. B. of this brief (infra, p. 24) describes how this provision violates the Equal Protection Clause of the United States Constitution. For the same reasons, this initiative would also amend the Florida Equal Protection Clause. In fact, it would seem that this initiative more accurately amends that clause, as opposed to the Bill of Attainder Section to which it is attached. Further, this initiative limits the powers of local governments. Article VIII, §1, which sets out the Home Rule Powers of the counties and municipalities, removes the power of counties and municipalities to protect their citizens

against unfair discrimination. The amount of power to be delegated to local governments is a complex area which has been developed over time in Florida and should not be upset because of a poorly drafted initiative which does not consider the importance of this balance of power. See generally, Vaubel, Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule, 23 Stetson L. Rev. 643 (1993), Broward County v. City of Fort Lauderdale, 480 So.2d 631, 634 (Fla. 1985) (discussing history of the changes to the Florida Constitution concerning the powers of counties and municipalities). The Constitution's provision for homestead exemptions confers a privilege based upon residency status and could thus be altered by this initiative.

The initiative's summary clearly falls short of statutory requirements. It misleads the public and omits critical information, thereby completely failing to inform voters of its primary purpose. The measure is also ambiguous and unclear; it fails to define key terms and explain the breadth of its impact. The voters are entitled, pursuant to Fla. Stat., §101.161, to an explanation of what they are asked to approve. This initiative summary fails to meet this statutory requirement. In an apparent effort to mislead voters, the proponents of the amendment reveal neither the initiative's true intent, nor its actual effect. The Court must not allow the initiative's placement upon the ballot because it is impossible for a reasonable voter to ascertain the amendment's chief purpose or ultimate impact from reading the ballot summary.

B. The Initiative Limiting Anti-Discrimination Laws Violates Article XI, §3 of the Florida Constitution Because it Embraces More Than One Subject.

Article XI, §3, Florida Constitution, requires that a proposal to amend the Constitution "shall embrace but one subject and matter directly connected therewith." In its most recent advisory opinion, this Court stated that in determining if an initiative embraces more than one subject, the Court must consider if the various segments of the amendment have a "natural relation and connection as component parts or aspects of a single dominant plan or scheme." (citations omitted). Limited Marine Net Fishing, 620 So.2d at 999. This Court has viewed the standard as necessary "to prevent the proposal of an amendment which contains two unrelated provisions, one which electors might wish to support and one which they might disfavor." Id. at 999 (citing Limited Political Terms in Certain Elective Offices, 592 So.2d at 225). This problem, referred to as "logrolling," caused the Court to strike proposed measures in both Evans v. Firestone, 457 So.2d at 1354, and Fine, 448 So.2d 984, 995-96 (Fla. 1984)(Ehrlich, J., concurring). The Constitutional single-subject requirement is meant to "protect against multiple precipitous changes in our state constitution." (citations omitted) Limited Political Terms, 592 So.2d at 227, and to promote clarity. Addressing the goal of clarity, Justice Shaw stated that the single-subject requirement helped ensure "that the initiatives are sufficiently clear so that the reader, whether layman or judge, can understand what it purports to do and perceive

its limits." Fine, 448 So.2d at 998 (Shaw, J., concurring).

In addition to examining a provision's facial validity, this Court has consistently applied a functional analysis to initiatives. Even after abandoning its earlier "locational" test which voided initiatives because they impacted different statutes or portions of the Constitution, this Court has continued to consider it significant when an initiative would affect different sections of the Constitution: "how 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, 448 So.2d at 990. Thus, the Court has rejected proposals which change multiple statutes. In Fine, the Court disapproved an initiative which addressed the generation and expenditure of revenues. because it affected the government's ability to tax, government user-fee operations, and funding of capital improvements through revenue bonds. Fine 448 So.2d at 990. The Court rejected the proponents' attempts to characterize the provisions as simply affecting the single subject of revenues.

The Court has also disapproved expansive provisions covering different subjects encompassed within a "cloak of broad generality." In Evans, the Court voided a provision which attempted to modify the concept of joint and several liability, to limit certain types of damages, and to make the summary judgment rule a part of the Florida Constitution. Rejecting the attempt to characterize the proposal as simply an effort to bring about tort

reform, the Court found the breadth of coverage "so broad as to fail to delineate the subject or subjects of this amendment in any meaningful way." Id. at 1353-54. Applying the functional limitation test, the Court disapproved of the amendment's multi-faceted effect on legislative and judicial functions. Justice McDonald also addressed the cloak of generality principle in Fine. Finding that the subject of "revenues" actually encompassed a multitude of subjects, Justice McDonald criticized the proponents who revealed "only the tip of the iceberg . . . . The very broadness of the proposal makes it impossible to state who it will affect." Fine, 448 So.2d at 995 (McDonald, J., concurring).

The AFPC initiative violates all of the single-subject requirement standards. The initiative would affect a number of governmental functions and has an impact upon a broad number of subjects. First, the initiative limits the ability of the state legislature to pass legislation. Second, it limits the ability of city and county governments to pass legislation. Third, it limits the executive branch's ability to make policies which may fall within the initiative's broad coverage of "laws." Therefore, the amendment affects different levels and branches of government.

Further, the initiative addresses multiple subjects in that it prohibits government protections for many diverse groups and would strike laws passed to effectuate a variety of policies. As discussed in the ballot summary section of this brief, this provision would place numerous statutes in jeopardy of repeal. (supra, pp. 11-12). The groups affected and the policies

underlying the laws are diverse. The general reference to "laws covering discrimination" cannot be used to cloak the multitude of subjects encompassed by this broad proposal.

The initiative also engages in precisely the sort of "logrolling" that this Court and Florida's Constitution rejects. Although aimed at lesbians and gay men, it would also affect all other persons who are currently protected by anti-discrimination legislation or might ever seek such protection based upon a characteristic not enumerated in the initiative. Because of the diversity of the groups excluded by this initiative, many voters might approve of limiting protection to some of the groups, notwithstanding the constitutional defects of such a position, but groups whom they favored would also be "logrolled" into this proposal.

In summary, the initiative fails to contain a single dominant plan or scheme. It combines numerous unrelated groups and classes of persons. It brings multiple precipitous changes to the Florida Constitution as well as limiting the powers of all branches of state government and all levels of local governments. Moreover, as outlined in the ballot summary analysis above, there are severe problems in clarifying the amendment's ultimate impact; thus, the clarity purpose of the single subject requirement is violated as well. The initiative, therefore, fails to meet the single subject requirement because it repeals statutes which have no natural mutual relationship; it cuts too broad a swath to satisfy the Florida Constitution, affecting persons and subjects far beyond its

stated scope.

C. The Initiative Limiting Anti-Discrimination Laws Violates Florida Statute, §101.161 Because It Has a Defective Ballot Title

The language of a ballot title must be "clear and unambiguous", Limited Political Terms, 592 So.2d at 228, so that it can fairly "advise the voter sufficiently to enable him to intelligently to cast his ballot." (citations omitted) Homestead Valuation Limitation, 581 So.2d at 588. The AFPC ballot title of the proposed initiative, "Laws Related to Discrimination are Restricted to Certain Classifications" fails dismally to meet this test. Although all of the possible ramifications of an initiative need not appear in the ballot title, the title must at least convey an initiative's central purpose.

This initiative's central purpose is to restrict the rights of gay men and lesbians. Its title, "Laws Related to Discrimination are Restricted to Certain Classifications", fails even to hint at this purpose. Voters should not have to glean the purported purpose of amendments to the Florida Constitution from campaign advertisements or brochures. See Smith v. American Airlines, 606 So.2d at 621. Further, the title fails to warn voters of the impact upon existing laws benefiting other groups which would be repealed because of the ill-defined wording of the initiative. This title is misleading and defective on its face.

II. THE COURT SHOULD HOLD THE INITIATIVE INVALID ON THE GROUND THAT IT IS PALPABLY UNCONSTITUTIONAL.

While this Court has wisely expressed reluctance to address

Constitutional violations in pre-election ballot initiative challenges, the AFPC initiative presents the extreme case of palpable and patent unconstitutionality which merits review. Every single court that has considered proposals similar to the AFPC initiative, including courts in California, Oregon, Colorado, and Ohio, has found that the proposals violated constitutional rights. This Court should join those in the other states who have rejected these measures.

A. The Court Should Consider the Constitutional Invalidity of the Initiative Prior to Its Placement on the Ballot.

1. The Court Has Stated That It Would Consider "Palpable" Constitutional Violations in Conducting Pre-Election Reviews.

This Court has held that where a proposed initiative is sufficiently and "palpably" unconstitutional, it will consider such constitutional infirmities and invalidate the measure at the pre-election stage. Such measures may be struck "'when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances,'" Limited Political Terms, 592 So.2d at 229 (Overton, J., concurring in part and dissenting in part, quoting Gray v. Winthrop, 115 Fla. 721, 726-27, 156 So. 270, 272 (1934)). See also Dulaney v. City of Miami Beach, 96 So.2d 550, 551 (Fla. 3rd DCA 1957)("An election should not be held if the ordinance proposed was clearly invalid on its face.").

Courts in other states similarly recognize that pre-election review of constitutional violations is appropriate in "the truly

extreme case." Hessey v. Burden, 615 A.2d 562, (D.C. App. 1992). Circumstances of patent unconstitutionality often trigger review "on the ground that the electorate has no right to enact an unconstitutional law." Id. See, e.g., Whitson v. Anchorage, 608 P.2d 759, 762 (Alaska 1980)(initiative right, while closely guarded, does not extend to legislation which violates United States or Alaska Constitution). The AFPC initiative presents this extreme case.

Considerations of efficiency and fiscal responsibility may also mandate pre-election review. Justice Overton, concurring in part and dissenting in part from this Court's recent review of the proposed term limitations initiative, identified the value of pre-election review of constitutional challenges:

> A review at this time, should this legal issue be resolved adverse to the proponents of the amendment, would save both proponents and opponents of the amendment considerable expense and the considerable expense to the state of a futile election. To allow the people to vote and then, if adopted, hold the provision unconstitutional on its face perpetuates a fraud on the voting public.

Limited Political Terms, 592 So.2d at 229-30 (Overton, J., concurring in part and dissenting in part). See also Hessey, 615 A.2d at 573; State ex rel. Voss v. Davis, 418 S.W.2d 163, 168 n.4 (Mo. 1967)("Usually courts will not inquire into the validity of an act of legislation until it has become fait accompli, but here we will rule on the constitutional question because, if unconstitutional, we should not put Kansas City to the burden and expense of submitting the amendments to a vote.")(citations omitted); Utz v. City of Newport, 252 S.W.2d 434, 437 (Ky. 1952).

2. The Proposed Initiative Requires Pre-Election Constitutional Review Because It Is Patently Unconstitutional.

Because the AFPC's proposed initiative "crosses the threshold of patent unconstitutionality," Hessey, 615 A.2d at 573, it presents this Court with such an extreme case that merits immediate constitutional review. This measure is extreme because it restructures the entire political process, and in doing so, creates a new two-tiered citizenship status under which some citizens have meaningful access to government and others do not. This initiative is not simply a legislative referendum on whether the State of Florida should pass sexual orientation anti-discrimination legislation as the AFPC literature suggests; rather, it is an amendment to the Florida Constitution limiting elected officials' ability to pass civil rights legislation and prohibiting groups of Florida citizens from obtaining such legislation. It would repeal or amend the ordinances prohibiting sexual orientation discrimination passed by the duly elected officials of the cities of Key West, Tampa, West Palm Beach, and Miami Beach as well as the Counties of Alachua, Hillsborough, and Palm Beach. Thus, elected officials are prohibited from providing protection to their constituents even if unfair discrimination is occurring in their communities. In addition, other citizens of Florida would be prevented from seeking civil rights legislation from their duly elected officials except for those individuals who need protection against discrimination based upon the statuses approved by the AFPC.

By submitting fundamental equal protection and first amendment

rights to popular vote, the proposed measure diminishes the ability of the targeted citizens to exercise their fundamental constitutional rights. West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed.2d 1628, 1638 (1943). In Gordon v. Lance, 403 U.S. 1, 6, 91 S.Ct. 1889, 29 L.Ed.2d 273, 276-77 (1971), the United States Supreme Court reiterated that "the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy." See also Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 659 (E.D. La. 1961),("No plebescite can legalize an unjust discrimination."), aff'd, 368 U.S. 515 (1962); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed.2d 313, 326 (1985)("[i]t is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause"). The rights of groups seeking protection from discrimination, who are not enumerated in the proposed measure, cannot depend upon the groups' ability to mount a political campaign to fend off misleading proposals such as the one offered by the AFPC.

The AFPC initiative's discriminatory restriction on political participation and virtual authorization of a selected set of bases for discrimination certainly lies among the few subjects which are fundamentally inappropriate subjects for the initiative process. As former Oregon Supreme Court Justice Hans Linde explains, "[a] statewide initiative may be a legitimate process for enacting a gross receipts tax and not for raising social barriers between

groups of citizens." Linde, When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19, 32 (1993).

The Court should not wait to void an invalid initiative until an acrimonious, divisive campaign has shattered the political equipoise of Florida. To quote a California Court which struck a proposed initiative seeking to limit the rights of lesbians and gay men: "If an ordinance proposed by initiative is invalid, routine deference to the process will often require the charade of a pointless election." Citizens for Resp. Behavior v. Super. Court, 1 Cal.App.4th 1013, 2 Cal.Rptr.2d 648 (Cal.App. 4 Dist. 1991). The Florida electorate should not be subjected to a campaign for a pointless election; this Court should take the present opportunity to declare the initiative unconstitutional.

B. The Initiative is Palpably Unconstitutional Because It Infringes the Fundamental Right of Lesbians, Gay Men, and Other Minority Group Members to Participate Equally in the Political Process

1. The Right to Participate Equally in the Political Process Is a Fundamental Constitutional Right Which Is Subject to Strict Scrutiny

The Equal Protection Clause of the United States Constitution, Amendment XIV, U.S. Const., applies to all citizens, not just members of suspect classes, and forms the basic foundation of our nation's democracy. Whether or not citizens are classified in ways traditionally considered suspect by the United States Supreme Court, see, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 369; 6 S.Ct. 1064, 1070; 30 L.Ed. 220, 226 (1886), they may rely on this guarantee which embodies the Framers' intent "not only to guard the

society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." Madison, Federalist No. 51 (Mentor ed. 1961) at 323. The fundamental rights endangered by the AFPC's proposal are core to our nation's democratic process as well as to the integrity of every Floridian:

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights . . . depend on the outcome of no elections.

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 638 (1943). This Court must not tolerate such dangerous misuse of the initiative process.

The levels of judicial scrutiny utilized in equal protection analysis--strict, intermediate, and minimal-- are well established. See City of Cleburne v. Cleburne Living Center, 473 U.S. at 440-41. Generally, states have wide latitude to legislate and their actions are presumed to be constitutional so long as the statutory or constitutional classification rationally relates to a legitimate state interest. Id. However, laws or constitutional amendments that discriminate on the basis of a "suspect" classification, see, e.g., Graham v. Richardson, 403 U.S. 365, 372; 91 S.Ct. 1848, 1852; 29 L.Ed.2d 534, 541-42 (1971) (alienage); Loving v. Virginia, 388 U.S. 1, 11; 87 S.Ct. 1817, 1823; 18 L.Ed.2d 1010, 1017 (1967) (race); Korematsu v. United States, 323 U.S. 214; 65 S.Ct. 193, 89 L.Ed. 194, reh'g denied, 324 U.S. 885, 65 S.Ct. 674, 89 L.Ed. 1435 (1944) (national ancestry and ethnic origin), or that infringe on fundamental constitutional rights, Cleburne 473 U.S. at 440, Graham v. Richardson, 403 U.S. at 365, face the most exacting standard of

review -- strict scrutiny. To justify such a measure, the state must demonstrate that it seeks to achieve a compelling interest, that its proposed action is necessary to achieve its goals, and that it has no less intrusive alternatives that it can undertake. Kramer v. Union Free School Dist., 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786, reh'g denied 458 U.S. 1131 (1982).[2]

Because the proposed Initiative would restructure Florida's political process and cut off the political participation of various classes of citizens, it merits the strictest standard of review. This Court should prevent this attempt by one segment of society to vote away the fundamental rights of others, a proposition which would turn the Constitution's promise of equal protection on its head.

The right of citizens to participate in the political process has been celebrated as a core democratic value from the inception of the United States as a democratic republic to the present day. See Evans v. Romer, 854 P.2d 1270, 1276 (citing John Hart Ely, Democracy and Distrust 87 (1980)), cert. denied, 114 S.Ct. 419 (1993). The right to vote, the right to representation in a republican form of government, and the right to petition the government for redress of grievances all form part of this

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[2]"Quasi-suspect" classifications based on gender, see Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) and illegitimacy, see Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978) receive intermediate scrutiny and can be justified by a showing that the law in question is substantially related to an important government interest.

fundamental constitutional guarantee. See, e.g., Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), reh'g denied, 379 U.S. 870. (one person, one vote); Dunn v. Blumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); Milton v. Smathers, 389 So.2d 978, 982 (Fla. 1980).

Indeed, equal participation in the process of government lies at the heart of the United States Supreme Court's political participation jurisprudence of the last three decades. In contexts ranging from reapportionment, see, e.g., Reynolds v. Sims, Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964), to minority party rights, see, e.g., Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 72 (1968) to wealth or property restrictions, see, e.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) and other similar roadblocks to effective political participation, see, e.g., Dunn v. Blumstein, 405 U.S 330, 92 S.Ct. 995, 31 L.Ed.2d 22 (1972); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), the Court has underscored the importance of participation in the political process to our constitutional democracy. Without fail, it has emphasized that the right of meaningful political participation is the fountainhead of all other rights and, as such,

merits the strongest possible constitutional protection. Reynolds v. Sims, 377 U.S. at 562; Wesberry v. Sanders, 376 U.S. 1, 17 (30). The Court, therefore, has subjected laws infringing this fundamental right to its strict scrutiny review. Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988). The Court locates its rationale at the heart of the Constitution: "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 379-80, 83 S.Ct. 801, 808, 9 L.Ed. 821 (1963).

Participation in the political process is critical to our constitutional democracy; thus, state-imposed burdens on the participation of identifiable groups must satisfy the highest scrutiny. See Evans v. Romer, 854 P.2d at 1279, ("The common thread [among these cases] is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest"). See also Equality Foundation of Greater Cincinnati v. Cincinnati, ___F.Supp.___ (So.D.Ct. Ohio, Nov. 19, 1993) (Slip Opinion, App., Ex. H).

2. The Initiative Would Restructure Florida's Government According to Non-neutral Principles Previously Struck by the United States Supreme Court

Measures such as the proposed initiative, intended to cut back the civil rights of an identifiable minority group and stem the normal functioning of the democratic process, are not new in American history. Indeed, shortly after the African-American civil

rights movement won some legislative victories in the form of anti-discrimination laws, a counter-movement arose to overturn those laws and prevent future passage of similar measures. See, e.g., Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967)(invalidating initiated constitutional amendment aimed to overturn California laws prohibiting race discrimination in housing and prevent future passage of such laws); Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969)(invalidating initiated charter amendment intended to overturn Akron's anti-discrimination ordinance and prevent future passage of similar ordinances). In striking down these initiated amendments, the United States Supreme Court evaluated the facially neutral language of the measures in their contemporary context to understand their true intent and effect, and it affirmed that such measures infringe and endanger the fundamental right of equal participation in the political process.

In Hunter v. Erikson, an Akron charter amendment passed by voters required that anti-discrimination measures related to race, religion, or ancestry receive majority voter approval prior to enactment, while other ordinances remained subject to the original rule which required only City Council approval. Although the classification involved in Hunter was based upon race, the Court invalidated the amendment not simply because of its racial classification, but rather because it interfered with the right of persons to participate on an equal footing in the political process. Hunter, 393 U.S. at 391. While Akron could decide to

require all of its municipal legislation to be approved by plebiscite, the Court held that it could not selectively burden legislation that might benefit a particular group.

> [T]he 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 393 (citations omitted). To support its conclusion, the Court relied on two voting rights cases. Id. (citing Reynolds v. Sims, 377 U.S. 533 (1964) (unconstitutional apportionment favoring rural counties) and Avery v. Midland County, 390 U.S. 474 (1968) (unconstitutional apportionment among single-member districts of substantially equal populations violated right to vote).

Thirteen years later, in Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S.Ct. 318, 73 L.Ed.2d 896 (1982), the Court invalidated an initiative adopted by Washington voters which denied local school districts the right to use mandatory busing to achieve racial integration. The measure at issue barred minority groups from seeking favorable remedial programs from district school boards which otherwise continued to administer virtually all aspects of the school system. Relying on Hunter, the Court held that the voters had interfered impermissibly with the political process by burdening minority groups efforts' to secure beneficial programs. See id. at 467-70. The Washington Court adopted Justice Harlan's view articulated in Hunter that the restructuring of government processes may take place only according to "neutral principles." Id. at 469. Thus, the Court concluded that the

imposition of uniform requirements on the political process is not unconstitutional "[b]ecause such laws make it more difficult for every group in the community to enact comparable laws.'" Id. at 470 (quoting Hunter v. Erickson, 393 U.S. at 393 (emphasis in original).

The Hunter and Washington initiatives did "not attemp[t] to allocate governmental power on the basis of any general principle," but rather used "the racial nature of an issue to define the governmental decisionmaking structure, and thus impose substantial and unique burdens on racial minorities." Id. However, while both cases involve racial classifications, the Court's analysis centers on the burden on "any particular group," Hunter, 393 U.S. at 392. After extensively analyzing these two cases, the Colorado Supreme Court concluded, "it would be erroneous to conclude that the 'neutral principle' precept is applicable only in the context of race discrimination." Evans v. Romer, 854 P.2d at 1281. See also Equality Foundation of Greater Cincinnati v. Cincinnati, ___ F.Supp. ___, slip op. at 14-15.

Similarly, in Gordon v. Lance, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971), the United States Supreme Court again applied the Hunter analysis to the issue of political participation. In resolving the challenge to a statutory-required supermajority requirement for increasing West Virginia's bond indebtedness or state tax rates, the Court asked whether "any sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." Id. at 5. In contrast to

Hunter, the Gordon court could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing." Id. The Court then restated the governing constitutional standard: "[S]o long as such provisions do not discriminate against or authorize discrimination against any identifiable class, they do not violate the Equal Protection Clause." Id. at 7.

In sum, therefore, the right of citizens to participate on equal footing in the political process is a fundamental constitutional right. Any measures which impede exercise of that right by an identifiable class are subject to strict judicial scrutiny. Because participation is an independently protectible constitutional value, courts must be suspicious of any effort to burden that value by singling out and interfering with meaningful political participation by identifiable groups. Whether the proposed inhibition relates to wealth, military service, property ownership, tax status, sexual orientation, or, as here, all of the above, the constitutional right to political participation must prevail.

3. The Initiative's Facially Neutral Language Cannot Overcome Its Violation of Equal Protection Guarantees.

The Court must review the AFPC initiative in the context of Florida's state and local civil rights laws to ascertain its immediate objective, ultimate effect, historical context and the conditions existing prior to its enactment. Reitman, 387 U.S. at 373. As discussed above, despite its purported objective, the proposed initiative would repeal not only laws which prohibit

sexual orientation discrimination but also those which prohibit discrimination or provide rights, benefits, or privileges to numerous other groups. Further, it would prohibit the state, municipalities and any other government entities from adopting any law based upon classifications which may currently or in the future form the basis for discriminatory treatment.

Rather than remove all anti-discrimination laws from state and local control, the proposed initiative isolates certain classifications which it deems worthy of protection, repeals all other existing protective laws, and revises the political process so that people seeking protection based on other non-enumerated classifications must overcome enormous and possibly insurmountable political hurdles. In its effect, therefore, the initiative is similar to Colorado's Amendment 2, which prohibited all state governmental entities from recognizing claims of discrimination against lesbians, gay men and bisexuals.[3] See Evans v. Romer, 854 P.2d 1270, (Col. 1993). Upholding a preliminary injunction against Amendment Two's enforcement, the Colorado Supreme Court clearly identified the measure's constitutional flaw:

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[3]Amendment 2 provides:
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.

> In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." Kramer, 395 U.S. at 627. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. ...Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.

Evans v. Romer, 854 P.2d at 1285.

The Evans court explained that prior to Amendment 2's passage, lesbian, gay and bisexual Colorado citizens could avail themselves of the political process on the same basis as all other citizens seeking legislation beneficial to them. If the amendment had taken effect, however, "the sole political avenue by which this class could seek such protection would be through the constitutional amendment process." Id. at 37.

The Idaho Attorney General, pursuant to a statutorily-required review process, has also found that a proposed initiative which sought to restrict the rights of lesbians and gay men would violate equal protection guarantees for reasons similar to those given by the Colorado Supreme Court. Like the AFPC initiative, the Idaho provision attempts to prevent gay men and lesbians from obtaining anti-discrimination protections; it differs from the AFPC initiative mainly in that it does not hide its antipathy toward the targeted class as does the Florida provision.[4] (A copy of the

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[4]Idaho's initiative proposes to amend Idaho Statutes, section 18-7304, as follows:
Prohibits Extension of Legal Minority Status Based on Homosexual Behavior. No agency, department or political subdivision of the

Idaho Attorney General opinion is attached in the Appendix).

Because it would remove all anti-discrimination laws from state and local control by isolating certain classifications for protection, repealing all other existing protective laws, and placing virtually insurmountable political hurdles in front of all others seeking protection, the AFPC's initiative goes even further than the initiatives in Colorado and Idaho. It is, of course, impossible to predict what characteristics will require protective legislation in the future. Indeed, legislation against race and gender discrimination was not adopted until many years after the phenomenon of such discrimination was widely-acknowledged. Similarly, fifteen years ago, there was no need for HIV/AIDS discrimination legislation because the disease had not yet been identified in this country. Although people with HIV faced discrimination as soon as the disease became known, the courts did not recognize until much later that this was discrimination on the basis of a disability. The AFPC's proposal's wide reach will only increase the harm Floridians will suffer.

Courts have consistently inquired beyond the facial meaning of statutes to discover invalidating purposes. This was true in both Reitman and Hunter where the initiatives' facially neutral language

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State of Idaho shall enact or adopt any law, statute, ordinance, regulation, resolution, rule, order, agreement or policy which has the purpose or effect of establishing homosexuality as the legal or social equivalent of race, color, religion, gender, age, national origin, marriage or family; or that otherwise extends minority status, affirmative action, quotas, special class status, or any other categorical provision or similar concept which includes or is based on homosexuality.

did not rectify their constitutional flaws. In Reitman, for example, the proposed constitutional amendment did not specifically name the groups which were being targeted. Rather, the initiative barred the State and any of its agencies or subdivisions from interfering with "the right of any person ... to decline to sell, lease or rent ... [his] property to such person or persons as he, in his absolute discretion, chooses." 387 U.S. at 371. Despite this facially neutral language, the United States Supreme Court held that the initiative violated equal protection guarantees by affirmatively authorizing and encouraging racial discrimination in the housing market and by establishing the right to discriminate as "one of the basic policies of the State." Id. at 381. The United States Supreme Court specifically noted that the California Supreme Court "quite properly undertook to examine the constitutionality of [the amendment] in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" Id. at 373.

In Hunter as well, the Supreme Court recognized that the Akron charter amendment, which appeared to be neutral on its face, was a subterfuge for an attempt to condone discrimination. Id. at 390. While acknowledging "the section draws no distinctions among racial and religious groups," and that "Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end," id. at 390, the Court nonetheless found it had a discriminatory impact.

> [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is

> that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that.

Id. at 391.

4. The Initiative Does Not Survive Minimal, Much Less Strict, Scrutiny; the State Has No Legitimate Interest in Permitting or Promoting Discrimination or Cutting Any Group of Citizens out of the Political Process.

As recognized by the Colorado and California state courts and the Federal District Court in Ohio, the right to equal opportunity to participate in the political process is a fundamental constitutional right. See Evans v. Romer, Citizens for Responsible Behavior, Equality Foundation v. Cincinnati. Because the initiative infringes upon that right by attempting to tie the hands of Florida's government even when circumstances clearly warrant government action, the sole remaining issue is whether the initiative can survive strict scrutiny. It cannot. A law which infringes the fundamental right to participate in the political process withstands strict scrutiny only if it is narrowly tailored to achieve a compelling state interest. *Evans, Plyler v. Doe, 457 at 216.* The AFPC's initiative does not satisfy either prong of this test.

Several local governments in Florida plainly believe that circumstances warranted passage of anti-discrimination legislation to protect against sexual orientation discrimination, yet this legislation would be nullified by the AFPC's proposed measure. Likewise, protective legislation and programs for other classifications of citizens might also be invalidated or changed

because of this measure. (See Appendix, Ex. D). Government has no compelling interest in depriving anyone of the ability to obtain protection against discrimination. Put another way, there is no legitimate state interest in preventing elected officials from responding to the legitimate concerns of an identifiable group of citizens. Nor, in particular, is there a compelling interest in preventing lesbians and gay men from being protected by anti-discrimination laws. Lesbians and gay men have long been targets of unfair discrimination, bigotry, and violence. Supra, Note, Constitutional Limits on Anti-Gay Rights Initiatives, 106 Harv.L.Rev. at 1906 n. 12. Cf. Citizens for Responsible Behavior (no rational basis for government to burden passage of laws prohibiting sexual orientation or HIV-related discrimination).

Moreover, the AFPC's promotional materials do not articulate a legitimate, let alone a compelling, state interest.[5] A review of its literature demonstrates that the American Family Association seeks to pass the proposed initiative for an illegitimate purpose. The equal protection clause does not permit states to treat groups differently solely for the sake of different treatment. Further, the mere "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." United States

[5]This Court may properly review campaign materials to discern the AFA's motivation in promoting the initiative. In Epperson v. Arkansas, 393 U.S. 97, the Supreme Court examined newspaper advertisements and letters to the editor about an initiative prohibiting the teaching of evolution in public schools. In invalidating the initiative, the Court relied on its examination to conclude that "fundamentalist sectarian conviction was and is the law's reason for existence." 393 U.S. at 107-08. See also Reitman, 387 U.S. at 373.

Department of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973)(emphasis in original). This Court cannot permit prejudice and fear to justify discrimination. See Cleburne, 473 U.S. at 447 ("mere negative attitudes ... are not permissible bases" for discriminating against the mentally retarded.)[6] Moreover, discrimination motivated by antipathy does not become legitimate simply because religious beliefs form the basis for the social disapproval.[7]

Like the thinly veiled objective of the city ordinance invalidated in Citizens for Responsible Behavior, the hostile and discriminatory purpose of the proposed initiative leaps from the face of its proponents' campaign literature. See supra, Facts

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[6]The United States Supreme Court and many lower courts have held that adverse government action against particular groups of people does not serve a legitimate government interest if it is premised on antipathy arising from prevailing fears of, prejudice toward, or stereotypes about the group's members. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 433 (1984)("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989, 999 & n.30 (11th Cir. 1990) (vacating summary judgment and remanding for analysis of whether withdrawal of zoning approval for residential program for formerly incarcerated individuals was based on mere negative attitudes or fear); Burstyn v. City of Miami Beach, 663 F. Supp. 528, 537 (S.D. Fla. 1987)("[w]here fear and prejudice [regarding elderly people] are a motivating factor in passage of an ordinance, a violation of the equal protection clause results").

[7]See, e.g., Marks v. City of Chesapeake, 883 F.2d 308, 311 (4th Cir. 1989)(denial of permit to practice palmistry as "rituals" believed to be heretical not a legitimate purpose; officials cannot act solely "in reliance on public distaste for certain activities"); Islamic Center of Mississippi v. City of Starkville, 840 F.d 293, 3 (5th Cir. 1988) (neighbors' negative attitudes and fears not a permissible basis for distinguishing between familiar and unfamiliar religions).

Section (a). By presenting an amendment that fails to mention homosexuality, the AFPC cannot overcome the measure's discriminatory purpose and effect or otherwise mask its campaign of hostility and prejudice.

C. The Initiative is Palpably Unconstitutional Because It Violates the First Amendment to the United States Constitution.

1. The Initiative Violates The First Amendment's Protection of Expressive Conduct.

The AFPC initiative violates the First Amendment to the United States Constitution because it substantially increases the risk of engaging in expressive conduct and inhibits the core political speech of lesbians, gay men and others in classifications not deemed eligible for anti-discrimination protection. Because it would disable every branch of state and local government from providing any protection from discrimination to such individuals, the proposed initiative would increase the risk of retaliation in employment, housing and public accomodations for lesbians, gay men and others in non-enumerated groups who engage in expressive activity. The state may not so amplify the perils of engaging in protected expression without compelling justification.

Ordinarily, the First Amendment does not require that the government protect individuals from retaliation by private persons because of expressive conduct. But see Edwards v. South Carolina, 372 U.S. 229, 236-37, 83 S.Ct. 680, 684, 9 L.Ed.2d 697 (1963)(state must act to protect demonstrators threatened with violence by those who abhor their views). Any individual who advocates social changes runs the risk that before the change occurs, he or she will

suffer retaliation. See, e.g., Dorr v. First Kentucky National Corp., 796 F.2d 179 (6th Cir. 1986)(bank employee fired for being president of gay Christian organization); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971) cert. denied, 405 U.S. 1046 (1972) (gay man not hired as librarian because of his activities in support of lesbian and gay civil rights).

However, if the government substantially increases an individual's risk of private retaliation for protected expression, the First Amendment requires the government to demonstrate a compelling justification for exposing those who engage in expressive conduct to increased risk. N.A.A.C.P. v. Alabama ex rel Patterson, 357 U.S. 449, 458-464; 78 S.Ct. 1163, 1169-75; 2 L.Ed.2d 1488, 1497-1501 (1958). In N.A.A.C.P., the state of Alabama sought to discover the N.A.A.C.P. Alabama branch's membership list in an action brought against the N.A.A.C.P. for failure to register as a foreign corporation doing business in the state. Refusing to produce the lists, the N.A.A.C.P. claimed that its members would be exposed to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility" and that such exposure was bound to discourage people from joining and participating in its activities. 357 U.S. at 452-54, 462-63.

Similarly, in Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed. 480 (1960), the N.A.A.C.P. refused to turn over membership lists to two Arkansas cities who required the lists as part of the cities' business tax. Again, the N.A.A.C.P. argued that providing the lists would subject its members to harassment,

threats of bodily harm and economic reprisals, offering proof that public identification of members had previously led to harassment and threats.

In both cases, the United States Supreme Court rejected the states' arguments that any repressive effect resulting from exposure of the lists had no First Amendment significance because the retaliation and threats would result from private, not governmental, action. N.A.A.C.P., 357 U.S. at 463; Bates, 361 U.S. at 524. Although it was true that the state was not itself discouraging N.A.A.C.P. membership in either case, it was the state which would make new retaliation and threats possible by demanding the lists.

Likewise, under the proposed initiative, the government would substantially increase the risk of retaliation against those in non-enumerated classes who engage in expressive conduct. Currently, lesbians, gay men and others who work for protection against discrimination balance for themselves the risk of retaliation with the potential that government might provide protection or redress. The need for protection has been recognized by the 139 jurisdictions in this country which include sexual orientation in their anti-discrimination laws. Note, Constitutional Limits on Anti-Gay Rights Initiatives. By sweeping aside every potential means of redress for private retaliation -- making government protection from discrimination a virtual impossibility -- the initiative would increase dramatically the risk of expression. The First Amendment demands a compelling

justification for this endangering of protected speech -- which neither the State nor the initiative's proponents can provide.

Furthermore, the proposed initiative will taint the political process now, prior to the election. Because it would bar government from protecting non-enumerated classes against discrimination, lesbians, gay men and others who enter the public debate against the initiative may expose themselves to retaliation should the initiative pass and not later be invalidated by this court. Indeed, lesbians and gay men who participate in the anti-initiative campaign are likely to face harm -- on the job, in housing or elsewhere. Even if such retaliation did not ultimately occur, it would be only a courageous few who could, before the election, dismiss the possibility. There can be no question that many will refrain from engaging in political speech against the initiative out of fear of the consequences of its passage.

Prior to an election, this Court can and should address this initiative's taint on the political process by its present, chilling effect on the protected expression of lesbians, gay men and others. The equitable powers of this Court compel it to act before individuals have suffered harm from their fear of retaliation caused by an unconstitutional measure -- for an alleged constitutional infringement alone will often constitute irreparable injury. Goldie's Bookstore v. Superior Court of the State of California, 739 F.2d 466, 472 (9th Cir. 1984) (citing Wright & Miller, 11 Federal Practice and Procedure, sec. 2948 at 440 (1973)). The loss of First Amendment freedoms, even for minimal

periods of time, constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373; (1976). See also Dombrowski v. Pfister, 380 U.S. 479, 486-87; 85 S.Ct. 1116, 1121-22; 14 L.Ed.2d 22 (1965)("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights....The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.") This Court should not permit such an injurious campaign to take place where its ultimate result will be an invalid Constitutional amendment.

2. The Initiative Violates the Right of Citizens to Petition Their Government for a Redress of Grievances

The proposed constitutional amendment should not appear on the ballot for the additional reason that on its face it violates the Petition Clause of the First Amendment to the United States Constitution. The Petition Clause provides the following:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

AMEND. 1, U.S. CONST.

This Court has noted that the right to petition is a core constitutional right which originated in English law. *Cate v. Oldham*, 450 So. 2d 224, 25-26 (Fla. 1984). It stemmed from the right to petition local assemblies in colonial America, a right that required governmental hearing and response. Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142 (1986). The United States Supreme

Court has stated the function of the right to petition: "In a representative democracy such as this, these branches of government act on behalf of the people and to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 137; 81 S.Ct. 523, 5 L.Ed.2d 464, reh'g denied, 365 U.S. 875 (1961). Persons may not be deprived "of their right to petition in the very instances in which that right may be of the most importance to them." Id. at 472.[8] The government does not guarantee success to any group seeking legislation, but it must guarantee access to those bodies which might enact protective legislation. The Supreme Court has also stated that, "[I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the Government for a redress of grievances' to establish a category of lawful state action that citizens are not permitted to urge." City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991) (citation omitted) (holding that antitrust laws may not be extended to inhibit right to petition). The opinion by the Idaho attorney general attached

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[8]In Citizens for Responsible Behavior v. Superior Court, 1 Cal.App. at 1027 n.9, the court noted that the proposed initiative arguably "attempts to restrict the right to petition .... This is so because the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance." 2 Cal.Rptr. at 655 n.9. Cf. Merrick v. Board of Higher Education, 841 P.2d 646 (1992) (electorate's repeal of executive order banning sexual orientation-based discrimination found to violate Oregon's constitutional guarantee of free expression).

in the Appendix found a proposed provision would violate the Petition Clause because it restricted the ability of lesbians and gay men to petition state and local governments for protective and corrective legislation. (App., Ex. E).

Florida courts have also recognized that the right to effectively petition for redress of grievances "on which other cherished rights ultimately depend." *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1065 (Fla. 1st DCA 1977), aff'd, 372 So.2d 913 (1978). It is "a form of democratic expression at its purest." *Krivanek v. Take Back Tampa Political Committee*, 603 So. 2d 528, 531 (Fla. 2d DCA 1992).

Similarly, the United States Supreme Court has zealously guarded the right to petition and participate in the political process.[9] The initiative in this case raises impermissible barriers to any persons seeking legislative protection from their governments. Such restrictions may be justified only for the most compelling of reasons. There are no compelling state interests which would justify the implementation of this Initiative.

III. Conclusion

The AFPC proposal plainly violates the First and Fourteenth Amendments to the United States Constitution. Now is the proper

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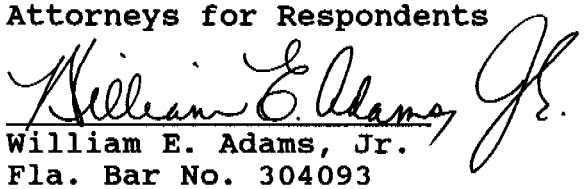
[9]See Kramer v. Union Free School District, 395 U.S. 621 (1969) (declaring unconstitutional statute which denied right to vote in school board elections to persons who are not parents and who do not pay school taxes); City of Columbia v. Omni Outdoor Advertising, 499 U.S. (1991)(anti-trust laws may not be extended to inhibit right to petition).

time for this Court to address these palpable violations. In any event, the measure's violations of Florida's ballot title, ballot summary, and single subject requirements mandate the striking of the measure.

Respectfully submitted,

Attorneys for Respondents



William E. Adams, Jr.
Fla. Bar No. 304093
Cooperating Attorney for Lambda
Legal Defense and Education Fund
3305 College Avenue
Fort Lauderdale, FL 33314
(305) 452-6133

Chesterfield H. Smith
Holland and Knight
701 Brickell Ave., 30th Fl.
P.O. Box 15441
Miami, Fl 33101-5441

Suzanne Goldberg
Lambda Legal Defense and
Education Fund
666 Broadway
New York, NY 10012-2317
(212) 995-8585

Rosemary Wilder
Gay and Lesbian Lawyers
Association of Florida
(305) 940-7557

IN THE SUPREME COURT OF FLORIDA

IN RE:	**Advisory Opinion to the Attorney General - Restricting Laws Related to Discrimination**	)	**CASE NO. 82-674**

Appendix for Initial Brief of:

Florida Public Interest Law Section (PILS),
Florida AIDS Legal Defense & Education Fund (FALDEF),
Florida Association of Women Lawyers (FAWL),
Florida Legal Services, Inc. (FLS),
Floridians Respect Everyone's Equality (FREE),
Floridians United Against Discrimination (FUAD),
Miami Area Legal Services Union,
National Lesbian & Gay Lawyers Association (NLGLA),
National Organization for Women (Florida Chapter) (NOW),
People for the American Way,
Southern Poverty Law Center,
United Teachers of Dade Gay & Lesbian Caucus,

In Opposition to the Proposed Amendment

EXHIBIT LIST