ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ADVISORY OPINION TO
THE ATTORNEY GENERAL

RE: AMENDMENT TO BAR
GOVERNMENT FROM TREATING
PEOPLE DIFFERENTLY BASED
ON RACE IN PUBLIC EDUCATION

Case No. 97,086

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ADVISORY OPINION TO THE
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RE: AMENDMENT TO BAR
GOVERNMENT FROM TREATING
PEOPLE DIFFERENTLY BASED ON
RACE IN PUBLIC EMPLOYMENT

Case No. 97,087

ADVISORY OPINION TO THE
ATTORNEY GENERAL

RE: AMENDMENT TO BAR
GOVERNMENT FROM TREATING
PEOPLE DIFFERENTLY BASED ON
RACE IN PUBLIC CONTRACTING

Case No. 97,088

ADVISORY OPINION TO THE
ATTORNEY GENERAL

RE: END GOVERNMENT
DISCRIMINATION AND
PREFERENCES AMENDMENT

Case No. 97,089

BRIEF AMICUS CURIAE OF CAMPAIGN FOR A COLOR-BLIND AMERICA, INITIATIVE & REFERENDUM INSTITUTE, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE FLORIDA CIVIL RIGHTS INITIATIVE

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IDENTITY AND INTEREST OF AMICI CAMPAIGN FOR A COLOR-BLIND AMERICA, INITIATIVE & REFERENDUM INSTITUTE, AND PACIFIC LEGAL FOUNDATION

Amici Campaign for a Color-Blind America, Initiative & Referendum Institute, and Pacific Legal Foundation respectfully submit this brief in support of the Florida Civil Rights Initiative.

The Campaign for a Color-Blind America (CCBA) is a nationwide legal and educational organization, headquartered in Houston, Texas, and dedicated to the cause of educating the public about the injustice of racial preferences in public policy. Since its inception in 1993, CCBA files or joins friend of the court briefs to promote and protect the civil rights of all United States citizens,

The Initiative & Referendum Institute is a national nonprofit organization dedicated to educating and helping the citizenry protect its right to the initiative and referenda process throughout the country. Its mission is to research and develop clear analysis of the initiative process and its use; to inform and educate the public about the process and its effects; and to provide effective leadership in litigation--defending the initiative process and the right of citizens to reform their government.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization incorporated under the laws of the State of California for the purpose of litigating important matters of public interest. PLF has offices in Sacramento, California; Bellevue, Washington; Honolulu, Hawaii; and Miami, Florida. PLF's Florida office, known as the Atlantic Center, is staffed by a full-time attorney who is a member of the Florida Bar. PLF has previously participated before this Court in *Ray v. Mortham,* Case No. 94,653, involving the constitutionality of term limits, and *Volusia County and Volusia County School Board v. Aberdeen at Ormand Beach, L.P.,* Case No. 95,345, involving development impact fees

Since 1973, PLF has advocated the principle that all people should be treated equally by government without regard to their race or sex. PLF attorneys often represent the victims of laws that discriminate against individuals on the basis of these immutable characteristics. PLF considers this case to be of special significance because the Florida Civil Rights Initiative is designed to end this type of discrimination. It would prohibit the state and its political subdivisions from classifying individuals on the basis of immutable characteristics, including race and sex.

PLF has participated in numerous cases involving similar issues, including cases arising under Proposition 209, the California Civil Rights Initiative. The operative language of the California Civil Rights Initiative states:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Art. I, § 3 l(a).[1] This provision of the California Constitution is identical to the operative language of the Florida Civil Rights Initiative. PLF attorneys are currently representing the plaintiffs and respondents *in Hi-Voltage Wire Works v. City* of *San Jose,* Case No. SO803 18, presently pending before the California Supreme Court. There, the City of San Jose is requesting the California Supreme Court to reverse a decision from the court of appeal finding its public contracting program unconstitutional under the California Civil Rights Initiative. PLF attorneys also represent a taxpayer in litigation challenging a number of California statutes alleged to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States

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[1] Like the Florida Civil Rights Initiative, the California Civil Rights Initiative defines "state" to include cities, counties, the public schools and state university system, and all other political subdivisions or instrumentalities of or within the state, as well as the state government itself.

Constitution and the California Civil Rights Initiative. *Connerly v. State Personnel Board,* California Court of Appeal for the Third Appellate District, No. C032042.

Amici's attorneys are familiar with the facts of this case and believe that its public policy perspective in support of providing all individuals equal opportunity regardless of the individual's race or sex will provide an additional needed viewpoint on the issues presented by this consolidated case.

INTRODUCTION AND STATEMENT OF THE CASE

On October 26, 1999, the Secretary of State submitted to the office of the Attorney General four initiative petitions seeking to add section 26 to article 1 of the Florida Constitution. Although each petition is worded slightly differently, the purpose of each petition is to prohibit the government from treating persons differently on the basis of immutable characteristics.[2]

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[2] The four petitions pending before this Court include the following: Case No. 97,086 prohibits the government from treating persons differently on the basis of race, color, ethnicity, or national origin in public education; Case No. 97,087 prohibits the government from treating persons differently on the basis of race, color, ethnicity or national origin in public employment; Case No. 97,088 prohibits the government from treating persons differently on the (continued,..)

The operative language of the Florida Civil Rights Initiative set out in section 1 proclaims:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Appendix 1 at 4. The initiative makes clear that it applies to the state and its political subdivisions:

> For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, district, public college or university, or other political subdivision or governmental instrumentality of or within the state.

Appendix 1 at 1-4.

On November 23, 1999, the Attorney General petitioned this Court for a written opinion as to the validity of the Florida Civil Rights Initiative pursuant to article XI, section 3, of the Florida Constitution. In a strained interpretation of the Florida Civil Rights Initiative, the Attorney General's petition to this Court alleges that the Florida Civil Rights Initiative violates

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[2](...continued)
basis of race, color, ethnicity, or national origin in public contracting; and Case No. 97,089 prohibits the government from treating people differently on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contract. The full text of the four petitions is attached hereto.

the single-subject requirements. Instead of examining the singular ***purpose*** of the Initiative, prohibiting state government from classifying its citizens on the basis of immutable characteristics, the Attorney General focuses on the probable ***outcomes of adopting the measure.*** Thus, the Attorney General complains that the Initiative would create a two-tiered system in government operation because programs requiring federal funding are exempted from its mandates--obviously a potential ***outcome*** of adopting the Initiative, but one that would necessarily arise from the constitutional exigencies of our federal form of government. It is no part of the ***purpose of the Initiative*** to create such a two-tiered system! Similarly, the Attorney General asserts that the Florida Civil Rights Initiative lacks a singular, unified ***purpose*** because its adoption would affect multiple levels of government, and would impact a variety of governmental functions including contracting, education, and employment. Yet all the Attorney General has done is to **recognize** that effecting a ***comprehensive ban*** on discrimination by state government--the sole purpose of this Initiative--would necessarily have wide ranging ***effects*** across the spectrum of governmental entities and activities. Banning discrimination by each and every level and entity of state government, and banning it across the entire range of significant governmental activities,

evidences the very "logical and natural oneness of purpose" that this Court has recognized as necessary to comply with the single-subject doctrine. See ***Fine v. Firestone, 448 So.*** 2d 984,990 (Fla. 1984).

When the Initiative is properly examined under the single-subject requirement the single, unifying purpose is immediately apparent: to prohibit government from classifying persons on the basis of immutable characteristics. Each part of the Initiative is reasonably related to the others in the advancement of this single goal.

The Attorney General also gives a crabbed interpretation of the ballot title and summary requirement by asserting that it fails to advise the voters of the true meaning of the amendment. Yet, the true meaning of the Florida Civil Rights Initiative is clearly to bar government from classifying its citizens on the basis of immutable characteristics. The ballot title and summary does not mislead Florida voters. Amici will not address this issue directly in the present brief. However, the arguments herein demonstrating the singular purpose of the initiative provide indirect support for the proposition that the ballot title and summary do not mislead Florida voters.

SUMMARY OF ARGUMENT

The language of the Florida Civil Rights Initiative is plain and simple. It bars government from classifying persons differently based on immutable characteristics. This reading of the Initiative has a "logical and natural oneness of purpose," ***see Fine v. Firestone,*** 448 So. 2d at 990, that complies with the single-subject requirement for initiatives.

When government prefers one race over another, it does violence to the very notion of equality under the law. Instead of opening the doors of opportunity for all, such practices close doors in the faces of persons otherwise qualified. Employing racially discriminatory preferences to promote "racial diversity" is wholly inconsistent with our fundamental values of merit and fair treatment. While racial diversity may be a laudable goal, it is not sufficiently compelling to warrant being artificially created by government discriminating against some individuals while favoring others solely on the basis of a person's skin color. Racial diversity should be the byproduct of the lack of discrimination in our society; it should not be the result of the allocation of opportunities based on race. The people of Florida should be given the opportunity to demand of their government that each person is entitled to be evaluated on his or her own individual merits and

accomplishments, free from stereotypical treatment as a member of a racial class.

The Florida Civil Rights Initiative bars government from treating people differently on the basis of immutable characteristics, such as race. This proclamation is consistent with the goals of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to render the issue of race irrelevant in government decision making. The Florida Civil Rights Initiative furthers this purpose by imposing a flat ban on racial classifications. Moreover, there is nothing in any federal law requiring the state or its political subdivisions to implement a race-based program to accomplish the goal of nondiscrimination.

ARGUMENT

I

THE FLORIDA CIVIL RIGHTS INITIATIVE COMPLIES WITH THE SINGLE-SUBJECT RULE REQUIREMENT

A. An Initiative Must Have "a Logical and Natural Oneness of *Purpose*"

The power of the people of Florida to amend their constitution is implicit in article 1, section 1, of the Florida Constitution. William L. Martin, *Florida's Citizen Constitutional Ballot Initiatives: Fishing to*

Change the Process and Limit Subject Matter, 25 Fla. St. U. L. Rev. 57 (1997). Article XI, section 3, of the Florida Constitution gives the people of Florida the exclusive power to "propose the revision or amendment of any portion or portions of this constitution by initiative." Fla. Const. art. XI, § 3. After the people invoke this power and satisfy certain other requirements, the Attorney General of Florida is then required to request an opinion of this Court as to the validity of any initiative petition circulated. Susan L. Turner, *Revising the Role of the Florida Supreme Court in Constitutional Initiatives,* 7 1 -APR Fla. B.J. 5 1 (1997). Then, this Court provides an advisory opinion on the validity of the ballot initiative limited to two legal issues: whether the proposed amendment addresses a single-subject and whether the proposed amendment's title and summary are "printed in clear and unambiguous language." Fla. Stat. §101.161(a) (1995) The purpose of this Court's pre-election review is to ensure that voters are not misled and that they should have an opportunity to know and be on notice as to the proposition on which they will cast their vote. "What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Hill v. Milander, 72 So.* 2d 796,798 (Fla. 1954).

Article XI, section 3, of the Florida Constitution provides that a proposed amendment "shall embrace but one subject and matter directly connected therewith." Fla. Const. art, XI, § 3. This Court has stated that a proposed amendment must have a "natural relation and connection as component parts or aspects of a single dominant plan or scheme" in order to pass a single-subject test. *Advisory Opinion to the Attorney General re Limited Political Terms in Certain Elective Offices, 592 So,* 2d 225,227 (Fla. 1991). *In Fine v. Firestone,* 448 So. 2d 984, this Court stated:

> The purpose of the single-subject requirement is to allow the citizens to vote on singular changes in our government that are identified in the proposal and to avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support.

Id. at 993.

To comply with the one subject limitation, a proposed amendment must have a "logical and natural oneness ***ofpurpose."*** 448 So. 2d at 990 (emphasis added). The rationale of the single-subject requirement is to prevent the situation where a voter, who wants to support a proposition which the voter considers good or wise, is obligated to vote for another proposition which the voter considers bad or foolish and would otherwise reject. *City of Coral Gables v. Gray, 19 So.* 2d 318,322 (1944).

On November 23, 1999, the Attorney General sent a letter to this Court setting forth the proposed Florida Civil Rights Initiative, discussing its compliance with the above legal requirements and formally requesting this Court's opinion on the validity of the petitions.

The Attorney General asserts that the Florida Civil Rights Initiative does not comply with the single-subject requirement because (1) it creates a two-tiered system in government operation because programs requiring federal funding are exempted from its mandates; (2) the initiative defines the state to include all its political subdivisions, thereby impacting multiple levels of government; and (3) it impacts multiple functions of government regarding contracting, education, and employment. The Attorney General's argument errs because it addresses the undoubtedly broad and wide-ranging ***outcomes*** of adopting the initiative, rather than its singular ***purpose***. The single, unifying purpose of the Florida Civil Rights Initiative is to prohibit government from classifying its citizens on the basis of immutable characteristics. Each part of the Initiative--prohibiting ***each*** level of state government from discriminating on the basis of immutable characteristics--is closely and necessarily related to the others to achieve this oneness of purpose.

B. The Singular Purpose of the Florida Civil Rights Initiative Is to Prohibit Government from Classifying Persons on the Basis of Immutable Characteristics

An objective reading of the Florida Civil Rights Initiative demonstrates that it has the "logical and natural oneness of purpose." In clear, simple language, the operative language of the Initiative bars state government from discriminating against, or giving preferential treatment to, any individual or group on the basis of their immutable characteristics. This means that the state is prohibited from adopting programs that require it to classify its citizens differently based on such characteristics as the person's skin color or sex.

Other evidence that the logical purpose of the initiative is to bar government from classifying individuals on the basis of immutable characteristics is found in section (3) of the initiative, which states:

> This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any person or group on the basis of race, sex, color, ethnicity, or national origin.

Appendix 1 at 4. This section emphasizes that "affirmative action" programs that are race-neutral may continue while clearly prohibiting race-

conscious governmental action.[3] For instance, the government may provide special preferences to socioeconomically disadvantaged individuals. Public universities can give greater weight to attributes of individual applicants who have overcome disadvantages and provide assistance to disadvantaged students to increase the pool of highly qualified applicants. The government can eliminate unnecessary regulations or requirements that impede access to contracting, employment, and entrepreneurial opportunities. And of course, government may and should increase its vigilance in assuring that employment, education, and contracting opportunities are free from discriminatory influences. All these policies may inure disproportionately to the benefit of disadvantaged minorities, even though they do not entail discrimination or preferences. However, government cannot achieve these purposes by classifying its citizens on the basis of race and then distributing benefits and burdens based on those immutable characteristics.

Similarly, section (4) of the Initiative expressly allows sex classifications that are related to legitimate business necessity or privacy. Section (4) states:

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[3] For purposes of discussion in this brief, "race" includes color, ethnicity, and national origin.

> This section does not affect any otherwise lawful classification that: (a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or (b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or (c) Provides for separate athletic teams for each sex.

Appendix 1 at 4. Again, the express language of the Initiative clearly and consistently indicates that its purpose is to bar state government from classifying individuals on the basis of immutable characteristics.

The Ballot Title for each petition is further evidence that the initiative's singular purpose is to bar government from classifying persons based on immutable characteristics:

> AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION
>
> AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EMPLOYMENT
>
> AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC CONTRACTING
>
> END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT

Appendix 1 at 1-4. The summary of the initiative is another indication that its purpose is to prohibit government from classifying individuals on the

basis of immutable characteristics. For example, the summary to the petition prohibiting racial classifications in public education provides:

> Amends Declaration of Rights, Article I of the Florida Constitution, to bar state and local government bodies from treating people differently based on race, color, ethnicity, or national origin in the operation of public education, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that treat people equally without regard to race, color, ethnicity, or national origin. Exempts actions needed for federal funds eligibility.

Appendix 1 at 1. This Summary emphasizes that the purpose of the Initiative is to command government to remain race neutral in its treatment of Floridians in public education. The same considerations apply to public employment and public contracting.

The Florida Civil Rights Initiative is distinguishable from the initiative petition addressed in *Advisory Opinion to the Attorney General--Restricts Laws Related to Discrimination, 632 So.* 2d 1018 (Fla. 1994). In that advisory opinion, this Court struck down as violative of the single-subject rule an initiative petition restricting antidiscrimination protection to ten specifically enumerated classifications of people. This Court held that the proposed amendment would prohibit laws relating to discrimination based on immutable characteristics of race, color, religion, sex, national

origin, and ethnicity, but also on age, handicap, marital status, and familial status. Unlike the ten classifications of people described *in the Advisory Opinion to the Attorney General--Restricts Laws Related to Discrimination,* the Florida Civil Rights Initiative limits its classifications to immutable characteristics. Also, unlike the situation described *in the Advisory Opinion to the Attorney General--Restricts Laws Related to Discrimination* that would require separate votes on the ten classifications, the Florida Civil Rights Initiative asks the voters to cast only a single vote to bar government from classifying its people on the basis of immutable characteristics.

The logical and natural oneness of purpose of the Florida Civil Rights Initiative is to bar government from classifying individuals on the basis of immutable characteristics. The Attorney General's petition has confused ***purpose*** with ***outcome.*** The Florida Civil Rights Initiative complies with the single-subject requirement.

II

THE TALISMAN OF RACIAL DIVERSITY DOES NOT JUSTIFY GOVERNMENT DISCRIMINATION

A close reading of the Attorney General's petition to this Court makes clear that the Attorney General opposes the Florida Civil Rights Initiative

because it would limit the government's ability "to assimilate people of all national origins into society." November 23, 1999, Petition of Attorney General (Petition) at 4. In other words, the Attorney General believes government should be allowed to discriminate against individuals to promote racial diversity in government. While racial diversity may be a laudable goal, it cannot justify racial preferences that are nonremedial in nature. An interest in diversity, no matter how strong, cannot justify racial discrimination undertaken in a misguided, even if well intentioned, effort to achieve that goal.

Racial classifications bear no relation to individual merit or need and are irrelevant to almost every governmental decision. Using race to determine benefits and burdens in state government breeds divisiveness, not harmony. Racial preferences create not only enmity on the part of those who are not "preferred," but doubt among and about those supposedly benefited. Racial preferences invite and foster the view that society does not believe an officially recognized minority-group member can compete on an even playing field, and thus must be preferred to maintain his or her place in the workforce or at the university. In a society whose members increasingly are biracial or multiracial, preventing government from classifying individuals

on the basis of race or ethnicity means such individuals will not have to "choose sides" to determine school assignments, employment opportunities, and the like.

Racial diversity should be a byproduct of the lack of discrimination in our society. Racial diversity in government must result from nondiscriminatory employment practices, education programs, and contracting opportunities. A racially diverse workforce in government must result from nondiscriminatory employment practices that include recruitment opportunities, hiring, and promotion polices that are available to everyone without regard to the color of one's skin, Diversity in our public schools--whether elementary, secondary, or university--must be achieved through nondiscriminatory admission requirements that benefit all students without regard to race. Public contracts that are awarded to the lowest responsible bidder will assure taxpayers that their government is not discriminating and that their tax dollars are being spent in the most effective and efficient manner possible. Racial diversity should not be the result of the allocation of opportunities based on race. See Shelley *v. Kraemer*, *334* U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.").

Arnici endorse the concept of an open, integrated society, but oppose any effort to create that condition by acts that discriminate against any individual. Attempting to create racial diversity through discriminatory acts of preferring one race over another results in racial enmity causing violence to our fundamental notions of liberty--a cost too high for our society to incur.

If the Florida Civil Rights Initiative is adopted by the people, race-based programs will only be imposed in specified circumstances expressly provided for in the Initiative, such as when necessary to establish or maintain eligibility for federal funds or because of business necessity or privacy concerns. Such restrictions are constitutionally appropriate for, as Justice Powell observed, when political decisions

> touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background.

Regents of the University of California v. Bakke, 438 U.S. 265,299 (1978) (Powell, J.) (citing *Shelley v. Kraemer, 334* U.S. 22).

III

THE FLORIDA CIVIL RIGHTS INITIATIVE COMPLIES WITH THE FEDERAL CONSTITUTION AND WITH FEDERAL STATUTORY LAW

The purpose of the Florida Civil Rights Initiative is to bar government from classifying persons on the basis of immutable characteristics, such as race. The Attorney General raises the concern that the Florida Civil Rights Initiative would prohibit government from "adopting measures designed to redress past discrimination." Petition at 4. An examination of the federal constitution and federal statutory law reveals that the Attorney General's concern is without merit. First, the Equal Protection Clause may allow race-based remedies under the most narrow of circumstances, but it ***does not require*** such discrimination. On the other hand, the Florida Civil Rights Initiative provides greater protection against discrimination by banning the state from classifying individuals by race. Second, the Florida Civil Rights Initiative complies with the Civil Rights Act of 1964, which ***does not require*** subjecting individuals to different treatment on the basis of race.

A. The Florida Civil Rights Initiative Provides Greater Protection Than the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall deny any person within its jurisdiction equal protection of the laws. It protects persons, not groups. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200,227 (1995). "The central purpose of the Equal Protection Clause 'is to prevent the states from purposefully discriminating between individuals on the basis of race."' *Hopwood v. State of Texas, 78* F.3d *932,940 (5th Cir.), cert. denied,* 1 I6 S. Ct. 2581 (1996) (quoting *Shaw v. Reno, 509* U.S. 630,642 (1993)). "It seeks ultimately to render the issue of race irrelevant in government decisionmaking." *Id.* "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States, 320* U.S. 81, 100 (1943)

Recent decisions of the United States Supreme Court and the federal courts of appeals have made clear that the Equal Protection Clause in the context of race-preferential programs applies equally to all persons regardless of race. "[W]henever the government treats any person unequally

because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection," *Adarand,* 515 U.S. at 229-30; *Shaw v. Reno, 509* U.S. at 650-5 1. This is the case "whatever that [person's] race may be." *Adarand,* 515 U.S. at 230.

Accordingly, the Supreme Court has held that race-preference programs are presumptively invalid. The Court has held

> that all racial ***classifications***, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Adarand, 5 15 U.S. at 227 (emphasis added). *See also Wygant v. Jackson Board of Education,* 476 U.S. 267, 273, 280 (1986). The Ninth Circuit Court of Appeals recently underscored this point by explaining that any racial classification must be strictly scrutinized:

> [A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

Monterey Mechanical v. Wilson, 125 F.3d 702,712 (9th Cir. 1997). One need not establish that the classifications require that one individual or group benefit to the detriment of another. "[A] racial classification causes 'fundamental injury' to the 'individual rights of a person."' *Shaw v. Hunt,* 116 S. Ct. 1894, 1902 (1996). As Justice Thomas has noted:

> It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. . . . [W]hether a law relying upon racial taxonomy is "benign" or "malign". . . either turns on "'whose ox is being gored,"' or on distinctions found only in the eye of the beholder.

Adarand, 5 15 U.S. at 241 n.* (Thomas, J., concurring in part) (citations omitted).

To date, the Supreme Court has recognized as compelling only one governmental interest justifying racial classification: the remediation of the effects of past discrimination by the particular governmental entity itself. *City of Richmond v. J.A. Croson Company, 488* U.S. *469* (1989); *Wygant v. Jackson Board of Education, 476* US, at 274-76, 288; *Regents of the University of California v. Bakke, 43%* U.S. at 307;[4] *Hopwood v. State of*

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[4] Justice Powell's opinion in *Bakke,* 438 U.S. at 314-15, indicated diversity may also constitute a compelling state interest in the context of higher education. However, that view has never received the approval of a majority of the Supreme Court.

Texas, 78 F.3d at 939. Strict scrutiny of race-based legislation also requires that the legislation be "narrowly tailored" to further the compelling governmental interest. Narrow tailoring

> "ensures that the means chosen 'fit' [a] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."

Adarand, 515 U.S. at 226 (quoting *Croson, 488 U.S.* at 493 *(plurality* opinion)).

This narrow tailoring requirement serves a vital purpose. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Adarand, 5* 15 U.S. at 236 (quoting *Fullilove v. Klutznick, 448* U.S. 438, 537 (1980) (Stevens, J., dissenting)).

The Florida Civil Rights Initiative is a flat ban on racial classifications. It prohibits all state-sponsored race discrimination. Thus, it fulfills the "central purpose" of the Equal Protection Clause: "[T]he prevention of official conduct discriminating on the basis of race." *Washington v. Seattle School District No. 1,458* U.S. 457,482 (1982).

B. The Ninth Circuit Court of Appeals Has Found an Identical State Constitutional Provision Consistent with the Equal Protection Clause

On November 5, 1996, California voters approved the California Civil Rights Initiative by a 54.5% to 45.5% margin. Gail Heriot, *Proposition 209 and the United States Constitution,* 43 Loy. L. Rev. 613 (Winter 1998). It amended the California Constitution to read in pertinent part:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. 1, § 3 l(a). The full text of the California Civil Rights Initiative is set out in the California Ballot Pamphlet for the General Election of November 5, 1996, which was distributed to all voters prior to the election; attached to the Motion of Amici Campaign for a Color-Blind America, Initiative & Referendum Institute, and Pacific Legal Foundation for Judicial Notice of a State Constitutional Provision pursuant to F.S.A. § *90.202.*

Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), was the first court to interpret the California Civil Rights Initiative. In that case, the plaintiffs claimed that the California Civil Rights

Initiative conflicted with federal law because, among other things, it would prevent government agencies from enacting race-based and sex-based remedies to correct identified instances of past discrimination. *Coalition for Economic Equity v. Wilson, 122* F.3d *692,698 (9th* Cir.), *cert. denied,* 118 S. Ct. 397 (1997). The district court recognized that the California Civil Rights Initiative was intended to do something more than "simply restate existing law" prohibiting discrimination and restricting government use of race. *Coalition for Economic Equity v. Wilson, 946* F. Supp. at 1489. The court emphasized that "[b]y its terms , , , Proposition 209 prohibits *all* race and gender preferences, not merely those that operate in a 'zero-sum' fashion." *Id.* at 1503 n.24. Seeking to define the terms of the initiative, the court noted: "[T]he term 'preferences' includes, at a minimum, programs or policies that use racial or gender classifications." *Id.* at 1489 n.4,

On appeal, the Ninth Circuit made it clear that the California Civil Rights Initiative "prohibits the state from classifying individuals by race or gender." *Coalition for Economic Equity v. Wilson, 122* F.3d at 701. The Ninth Circuit then rejected the holding of the district court that such a prohibition on race classifications could violate the Equal Protection Clause of the Fourteenth Amendment. 122 F.3d at 701.

The Ninth Circuit quickly dismissed any notion that the federal Constitution required discrimination or preferences on the basis of race as a remedy for past discrimination. "That the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." *Id.* at 708. As the court noted: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." Id. at 709. The fact that a race-based program meets the federal standards does not mean that the program is constitutionally required. *Id.*

Here, the Florida Civil Rights Initiative demands that government treat all its citizens equally without regard to race. It protects all races under its nondiscrimination mandate by banning all state-sponsored race discrimination. As the Supreme Court has admonished, "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256,272 (1979).* The result of the Florida Civil Rights Initiative will be to eliminate programs that are presumptively unconstitutional because, by definition, they contain race classifications.

C. The Florida Civil Rights Initiative Does Not Conflict with Title VI or Title VII of the Civil Rights Act of 1964

The Florida Civil Rights Initiative employs the same antidiscirmination categories--race, sex, color, ethnicity, and national origin--set forth in the Civil Rights Act of 1964. The reason the Florida Civil Rights Initiative and other civil rights laws draw that line is the broad societal consensus that such factors are not relevant to a person's character or qualifications.

Title VI of the Civil Rights Act is codified in section 2000d of Title 42 of the United States Code. That section provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The plain language of this provision does not compel government to grant benefits or withhold those benefits on the basis of the applicant's race. Indeed, a plain language interpretation of the section precludes such action. In this regard, the language of Title VI is not far different from the language of the Florida Civil Rights Initiative,

Nothing in the federal courts' interpretation of Title VI preempts the clear mandate of the Florida Civil Rights Initiative. The federal district *court* in *Coalition for Economic Equity v. Wilson, 946* F. Supp. 1480, held that Title VI did not preempt anything in the California Civil Rights Initiative. "[N]othing on the face of Titles VI or IX indicates that Congress intended to maintain voluntary affirmative action under the two statutes." *Id.* at 15 17. The court further noted:

> The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action. Simply obstructing an action that is allowed under federal law does not, in itself, raise preemption concerns unless there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition *209.*

Id. at 1518.

Similarly, Title VII does not require local governments to discriminate against any group or individual or require the government to implement discriminatory "affirmative action" programs. 42 USC. § 2000e-2(a).

> It remains clear that *the* Act does not *require my* employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit

> members of the minority groups for whose protection the statute was enacted.

Johnson v. Transportation Agency, Santa Clara County, California, *480* U.S. 616,644 (1987) (Stevens, J., concurring).

There is nothing in the federal Constitution, nor any federal law, that requires the state government or its political subdivisions to implement a race-based program to accomplish the goal of nondiscrimination. "The Constitution and Title VII have been held, with exceptions irrelevant here, to permit affirmative action; they do not require it." *Yatvin v. Madison Metropolitan School District, 840* F.2d 412,415 (7th Cir. 1988). See *also Austin Black Contractors Association v. City of Austin, Texas, 78* F.3d 185, 186 n.3 *(5th Cir. 1996)* (citing *Associated General Contractors of California v. San Francisco Unified School District, 616* F.2d 1381 (9th Cir.), *cert. denied,* 449 U. S. 106 1 (1980) ("In making this ruling, we join the numerous other circuits that have previously determined that the Fourteenth Amendment does not require affirmative action.").

The Florida Civil Rights Initiative in plain, simple language makes clear that it is intended to eliminate racial barriers by insisting that

government act neutrally without regard to a person's skin color. It complies with federal statutory law.

CONCLUSION

The Florida Civil Rights Initiative states with unusual clarity that the state and its political subdivisions shall not discriminate or grant preferential treatment to any person on the basis of immutable characteristics such as race. The simple command leaves no doubt that the voters of Florida will be asked to cast but a single vote on whether to prohibit government from classifying persons on the basis of immutable characteristics such as race, sex, color, ethnicity, or national origin in the operation of public education, public employment and public contracting. Curbing government's power to classify and discriminate among people on the basis of race ultimately benefits Americans of all races, and it certainly conforms to the

constitutional guarantee of equal protection. This Court should give the people of Florida the opportunity to vote on the Florida Civil Rights Initiative,

DATED: December 2 1, 1999.

Respectfully submitted,

SHARON L. BROWNE

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APPENDIX 1

CONSTITUTIONAL AMENDMENT PETITION FORM

Title: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION

Summary:

Amends Declaration of Rights, Article I of the Florida Constitution, to bar state and local government bodies from treating people differently based on race, color, ethnicity, or national origin in the operation of public education, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that treat people equally without regard to race, color, ethnicity, or national origin. Exempts actions needed for federal funds eligibility.

I am a registered voter and herby petition the Secretary of State to place tbc following amendment to the Florida Constitution on the ballot in the general election.

Name ____________________

Please print name as it appears on Voter ID Card

Street Address ____________________

City ____________ County ____________ Zip ____________

Precinct ____________ Congressional District ____________

Voter ID # ____________ (or) Date of Birth ____________

Is this a change of address for voter registration

☐ Yes ☐ No Date signed ____________

ADD SECTION 26 TO ARTICLE 1, FLORIDA CONSTITUTION AS FOLLOWS:

(1) The state shall not treat persons differently based on race, color, ethnicity, or national origin in the operation of public education.

(2) This section applies only to action taken after the effective date of this section.

(3) This section does not affect any law or governmental action that does not treat persons differently based on the person's race, color, ethnicity, or national origin.

(4) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

(5) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(6) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, district, public college or university, or other political subdivision or governmental instrumentality of or within the state.

(7) The remedies available for violations of this section shall be the same, regardless of the injured party's race, color, ethnicity, or national origin, as are otherwise available for violations of then existing Florida education discrimination law.

(8) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Pursuant to §104.185, it is unlawful for any person to knowingly sign a petition for a particular issue or candidate more than one time. Any person violating the provision of this section shall, upon conviction, be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083

Mail completed Petition form to: FCRI, P.O. Box 10673, Tallahassee, FL 32302. Contributions mailed to [illegible] address.
Pd. Pol. Adv. by FCRI. Tel 1-800-711-5498

Serial No.: 99-01 Date Approved: 4/22/[illegible]

Title: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION

X ____________________

Sign As Registered

CONSTITUTIONAL AMENDMENT PETITION FORM

Title : AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EMPLOYMENT

Summary:

Amends Declaration of Rights, Article I of the Florida Constitution, to bar state and local government bodies from treating people differently based on race, color, ethnicity, or national origin in the operation of public employment, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that treat people equally without regard to race, color, ethnicity, or national origin. Exempts actions needed for federal funds eligibility.

I am a registered voter and herby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election.

Name ____________________

Please print name as it appears on Voter ID Card

Street Address ____________________

City __________ County __________ Zip __________

Precinct __________ Congressional District __________

Voter ID # __________ (or) Date of Birth __________

is this a change of address for voter registration

☐ Yes ☐ No Date signed __________

ADD SECTION 26 TO ARTICLE I, FLORIDA CONSTITUTION AS FOLLOWS:

(1) The state shall not treat persons differently based on race, color, ethnicity, or national origin in the operation of public employment.

(2) This section applies only to action taken after the effective date of this section.

(3) This section does not affect any law or governmental action that does not treat persons differently based on the person's race, color, ethnicity, or national origin.

(4) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

(5) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(6) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, district, public college or university, or other political subdivision or governmental instrumentality of or within the state.

(7) The remedies available for violations of this section shall be the same, regardless of the injured party's race, color, ethnicity, or national origin, as are otherwise available for violations of then existing Florida employment discrimination law.

(8) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Pursuant to §104.185, it is unlawful for any person to knowingly sign a petition for a particular issue or candidate more than one time. Any person violating the provision of this section shall upon conviction, be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083

Mail completed Petition form to: FCRI, P.O. Box 10875, Tallahassee, FL 32302. Contributions mailed to same address. Pd. Pol. Adv. by FCRI. Tel 1-800-711-5490

Serial No.: 99-02 Date Approved: 4/22/[illegible]

X ____________________

Sign As Registered

Title: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EMPLOYMENT

CONSTITUTIONAL AMENDMENT PETITION FORM

Title: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE D-Y BASED ON RACE IN PUBLIC CONTRACTING

Summary:

Amends Declaration of Rights, Article 1 of the Florida Constitution, to bar state and local government bodies from treating people differently based on race, color, ethnicity, or national origin in the operation of public contracting, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that treat people equally without regard to race, cola, ethnicity, or national origin. Exempts actions needed for federal funds eligibility.

I am a registered voter and herby petition the Secretary or State to place the following amendment to the Florida Constitution on the ballot in the general election.

Name ______________________________

Please print name as it appears on Voter ID Card

Street Address ______________________________

City ____________ County ________ Zip ________

Precinct __________ Congressional District ________

Voter ID # __________ (or) Date of Birth ________

Is this a change of address for voter registration

☐ Yes ☐ No Date signed ______________

ADD SECTION 26 TO ARTICLE 1, FLORIDA CONSTITUTION AS FOLLOWS:

(1) The state shall not treat persons differently based on race, color, ethnicity, or national origin in the operation of public contracting.

(2) This section applies only to action taken after the effective date of this section.

(3) This section does not affect any law or governmental action that does not treat persons differently based on the person's race, color, ethnicity, or national origin.

(4) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

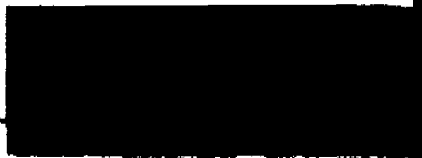
(5) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(6) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, district, public college or university, or other political subdivision or governmental instrumentality of or within the state.

(7) The remedies available for violations of this section shall be the same, regardless of the injured party's race, color, ethnicity, or national origin, as are otherwise available for violations of then existing Florida employment discrimination law.

(8) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Pursuant to §104.185, it is unlawful for any person to knowingly sign a petition for a particular issue or candidate more than one time. Any person violating the provision of this section shall upon conviction, be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083



Mail completed Petition form to: FCRI, P.O. Box 10875, Tallahassee, FL 32302. Contributions [illegible]. Pd. Pol. Adv. by FCRI. Tel 1-800-711-5498

X ______________________

Sign As Registered

Title: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC CONTRACTING

CONSTITUTIONAL AMENDMENT PETITION FORM

Title: END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT

Summary:

Amends Declaration of Rights, Article I of Florida Constitution, to bar government from treating people differently based on race, sax, color, ethnicity, or national origin in public education, employment, or contracting, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that treat people equally without regard to race, sex, color, ethnicity, or national origin. Exempts bona fide qualifications based on sex and actions needed for federal funds eligibility.

I am a registered voter and herby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election.

Name ____________________

Please print name as it appears on Voter ID Card

Street Address ____________________

City __________ County __________ Zip __________

Precinct __________ Congressional District __________

Voter ID # __________ (or) Date of Birth __________

Is this a change of address for voter registration

☐ Yes ☐ No Date signed __________

ADD SECTION 26 TO ARTICLE I, FLORIDA CONSTITUTION AS FOLLOWS:

(1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) This section applies only to action taken after the effective date of this section.

(3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any person or group on the basis of race, sex, color, ethnicity, or national origin.

(4) This section does not affect any otherwise lawful classification that: (a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or (b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or (c) Provides for separate athletic teams for each sex.

(5) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

(6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(7) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, district public college or university, or other political subdivision or governmental instrumentality of or within the state.

(8) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then existing Florida antidiscrimination law.

(9) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Pursuant to §104.185, it is unlawful for any person to knowingly sign a petition for a particular issue or candidate more than one time. Any person violating the provision of this section shall, upon conviction, be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083

Mail completed Petition form to: FCRI, P.O. Box 10875, Tallahassee, FL 32302. Contributions mailed to same address.
Pd. Pol. Adv. by FCRI. Tel 1-800-711-5490

Serial No.: 99-04 Date Approved: 4/[illegible]

Title: END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT X ____________________

Sign As Registered

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail to the Honorable Robert A. Butter-worth, Attorney General of the State of Florida, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, (850) 487-1963; Mr. Thomas M. Ervin, Jr., Ervin, Vam, Jacobs & Ervin, P. 0. Drawer 1170, Tallahassee, FL 32302, Council for Florida Civil Rights Initiative, (850) 224-9135; and FCRI, P.O. Box 10875, Tallahassee, FL 32302, (850) 386-3895, this 21st day of December, 1999.

SHARON L. BROWNE

Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, CA 95827

Motion to Appear Pending