OA 03-06-2000

IN THE SUPREME COURT 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
Advisory Opinion to the Attorney General 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 Governmental Discrimination and Preferences Amendment	Case No. 97,089

ANSWER BRIEF OF PROPONENT - INTERESTED PARTY FLORIDA CIVIL RIGHTS INITIATIVE

THOMAS M. ERVIN, JR.
Florida Bar No. 107788
C. EVERETT BOYD, JR.
Florida Bar No. 190960
of the law firm of
Ervin, Varn, Jacobs & Ervin
Post Office Drawer 1170
Tallahassee, FL 32302
(850)224-9135

COUNSEL FOR PROPONENT
FLORIDACIVIL RIGHTS INITIATIVE

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement of the Case and Facts	2
Summary of Argument	3
Argument:	
THE FOUR PROPOSED AMENDMENTS EACH MEET THE SINGLE-SUBJECT REQUIREMENT OF ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION, AND THE TITLE AND BALLOT SUMMARY REQUIREMENTS OF SECTION 101.161, FLORIDA STATUTES.	6
A. The Scope, Standard, and Principles of Review in These Proceedings.	6
B. The Proposed Amendment in Case No. 97,089.	24
C. The Proposed Amendments in Case No. 97,086; Case No. 97,087, and Case No. 97,088.	29
Conclusion	34
Certificate of Service	35
Certificate of Size and Style of Type	37

CITATION OF AUTHORITIES

	Page(s)
CASES:	
Adams v. Gunter, 238 So. 2d 824 (Fla. 1970)	3,6,8,9,11,13
Advisory Opinion to the Attorney General - Fee on Everglades Sugar Production, 681 So. 2d 1124 (Fla. 1996)	9,21,22
Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission, 705 So. 2d 1351 (Fla. 1998)	10,28,29
Advisory Opinion to the Attorney General re Limited Casinos, 644 So. 2d 71 (Fla. 1994)	9,18,29,31
Advisory Opinion to the Attorney General - Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993)	18
Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991)	19,27
Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns, 693 So. 2d 972 (Fla. 1997)	18,27,31
Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998)	24
Advisory Opinion to the Attorney General re Stop Early Release of Prisoners, 661 So. 2d 1204 (Fla. 1995)	29
Advisory Opinion to the Attorney General re Tax Limitation, 644 So. 2d 486 (Fla. 1994)	24
Advisory Opinion to the Attorney General re Tax Limitation, 673 So. 2d 864 (Fla. 1996)	20,28,31

Page(s)

CASES CONTINUED:

Advisory Opinion to the Attorney General re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998) 9,10

Askew v. Firestone, 421 Sa. 2d 151 (Fla. 1982) 23,32

Fine v. Firestone, 448 So. 2d 984 (Fla. 1984) 10,11,27,30

In Re Advisory Opinion to the Attorney General - Restricts Law Related to Discrimination, 632 So. 2d 1018 (Fla. 1994) 15,17,25,26

Ray v. Mortham, 24 Fla. L. Weekly S412 (Fla. Sept. 2, 1999) 19

State v. Florida Police Benevolent Association, Inc., 613 So. 2d 415 (Fla. 1992) 21

Weber v. Smathers, 338 So. 2d 819 (Fla. 1976) 10,32

FLORIDA CONSTITUTION

Art. I, § 2 3,4,12,16,17,23,25,26,30

Art. I, § 6 20,21

Art. III, § 1 6

Art. XI, § 3 1,3,4,5,6,7,8,9,11,12,13,17,20 22,24,25,26,27,28,29,32,34

FLORIDA STATUTES:

§ 101.161 1,3,4,6,13,20,22,28,34

PRELIMINARY STATEMENT

In these consolidated proceedings five Initial Briefs have been submitted on behalf of opponents to the proposed citizen-initiative constitutional amendments. Four of those Initial Briefs contend that the proposed amendments violate the "one subject and matter directly connected therewith" requirement of Article XI, Section 3, Florida Constitution. All contend that the titles and summaries of the proposed amendments violate the requirement of section 101.161, Florida Statutes, of an explanatory statement not exceeding seventy-five words in length "of the chief purpose of the measure."

Much of that which has been argued by opponents was anticipated and addressed in the previously filed Initial Brief of Proponent – Interested Party Florida Civil Rights Initiative. As is appropriate to, if not necessitated by, the simultaneous filing and service of opposing briefs in such proceedings, this Answer Brief will be predominately in the nature of reply to the briefs of opponents.

Nothing better demonstrates the need for, and wisdom of, the vehicle for constitutional amendment initiated directly by the people than review of the briefs of opponents and interest groups filed herein.

STATEMENT OF THE CASE AND FACTS

FCRI will rely on its statement included in its previously filed Initial Brief of Proponent - Interested Party Florida Civil Rights Initiative and will not submit herein any supplemental statement.

SUMMARY OF ARGUMENT

The right of the people to propose and vote upon revisions or amendments to anv portion-or portions of 'the Florida Constitution, as it now exists is expressly provided and guaranteed in Article XI, Section 3, Florida Constitution. That constitutional right, after being judicially restricted in its original form in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970), was broadened by the people by constitutional amendment effective in 1972.

The opponents to the instant proposals seek to not only reinstate pre-1972 restrictions, but impose even greater and more insurmountable burdens on the people's reserved power by a process of extremely restrictive and narrow reading of the "one purpose and matter directly connected therewith" proviso of Article XI, Section 3, Florida Constitution, and unlimited expansion of requirements they would read into, though not set forth in, section 101.161, Florida Statutes.

The present proposals seek to proscribe one form of ongoing governmental discrimination (preference) based on race, sex, color, ethnicity, and national origin. In so doing, those proposals will complement and interact with existing Article I, Section 2, Florida Constitution, which proscribes discrimination based upon the same factors in another form (deprivation). No modification or amendment of the existing provision is either proposed or affected.

This Court has recognized time and again that an amendment which merely "affects" various branches or levels of government will not fail one-subject analysis. It is only where the amendment

"alters or performs the functions" of various branches or levels that it becomes subject to challenge, The instant proposals do not "alter or perform" any such functions, but merely "affect" same by proscribing a form of governmental discrimination based upon factors already recognized in Article I, Section 2, Florida Constitution.

The opposing briefs herein promote extensions of this Court's prior announcements and opinions that would effectively and dramatically amend Article XI, Section 3, and section 101.161, Florida Statutes, by a process of judicial "creep." It is respectfully submitted that the Court should reject this effort and be guided in its deliberations by only the language and express restrictions of those provisions, rather than by opponents' expansions of prior pronouncements respecting different proposals.

Upon proper analysis, the "End Governmental Discrimination and Preferences Amendment" and its title and summary meet every requirement of "one subject" and of section 101.161, Florida Statutes. Singleness of subject is established by the fact that all classifications included therein are already included in Article I, Section 2, Florida Constitution. No "logrolling" of new classifications is included. The title and summary adequately advise the public of the chief purpose of the measure. All other provisions of the text are directly connected to the single subject, and are in the nature of details, limitations, or anticipated ramifications which are not required to be explained in the seventy-five word summary. That all legal and constitutional

requirements are met by the narrower three proposals from which "sex" is omitted and in which public employment, contracting, and education are separated is even more evident and clear.

That this Court, or some other court, may later be called upon to determine the existence or extent of conflict with federal law provides no basis for challenge in these proceedings. All Florida constitutional provisions axe subject to such challenge and analysis under the doctrine of federal supremacy. The potential for such challenge has never, before, been held to disqualify a proposal. It should not now be held to do so.

This Court should approve the four proposals before it for placement on the ballot. The people of Florida are quite possessed of the common sense and knowledge to make theix own decision whether their Constitution should be so revised. By Article XI, Section 3, Florida Constitution, they are guaranteed the right to do so. This Court should, by its Advisory Opinion, afford the people that right.

ARGUMENT

THE FOUR PROPOSED AMENDMENTS EACH MEET THE SINGLE-SUBJECT REQUIREMENT OF ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION, AND THE TITLE AND BALLOT SUMMARY REQUIREMENTS OF SECTION 101.161, FLORIDA STATUTES.

A. The Scope, Standard, and Principles of Review in These Proceedings.

The briefs of opponents filed herein, and the extremely restricted reading of Article XI, Section 3, Florida Constitution, set forth therein, require a short historical review.

Prior to 1968 the Florida Constitution did not include any provision authorizing constitutional amendment by citizen initiative petition. The 1968 Florida Constitution, however, included the initial version of Article XI, Section 3, which provided:

> SECTION 3. Initiative.--The power to propose amendments to any section of this constitution by initiative is reserved to the people. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight per cent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

(Emphasis added.)

Thereafter, in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970), this Court considered and rejected a citizen initiative proposal which would have amended Article III, Section 1, Florida Constitution, to create a unicameral legislature. In so holding, this Court focused on the restrictive term "amendment" (as opposed

to or contrasted with the broader term "revise") and upon the singular nature of the phrase "any section."

In dissenting from the majority's restrictive reading and holding whereby the opportunity and right of citizens to vote was denied, Justice Ervin observed in pertinent part at page 835:

> As a court, we can't 'play God' for the people and 'wet-nurse' them on the supposition that if we don't they will make egregious errors foreign to our political philosophy. Fears that 'the people drunk' will overawe 'the people sober' are unjustified in the long run.
>
> The great pity produced in the majority opinion is that the people believed in adopting the 1968 Constitution they had the power to initiate major changes in the Constitution; that they had a 'club in the closet,' so to speak, to use when all other instrumentalities and sources for organic change failed to materialize. . . .

Justice Boyd, also dissenting, noted in pertinent part at page 835 that

> [t]he initiative section of the 1968 Constitution is a recognition of the inherent power of the people to propose and adopt amendments to the Constitution by petition of the people at large, and without the necessity of relying upon public officials to initiate such amendments. This Court should give liberal construction to this provision in order that the power of the people to amend their government will not be unreasonably limited.

While these words of wisdom in dissent did not sway the majority of the Court in 1970, the citizens of Florida responded in 1972 by then amending Article XI, Section 3, Florida Constitution, to provide that

> **SECTION 3. Initiative .--The power to propose the revision or amendment of anv portion of portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.**

(Emphasis added.)

Thus, the people of Florida rejected restriction of their right to mere "amendment" by express addition of the authority to propose "revision," and removed the singular restriction to "any section" and replaced it with the broader authorizing phrase "any portion or portions of this constitution.*'

The inescapable intent of the 1972 language was to broaden the power reserved to the people under Article XI, Section 3, and lessen the judicially announced restrictions of the majority in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970). The wisdom of dissenting Justices Ervin and Boyd was established, or vindicated, by the people's further amendment in 1972.

The newly adopted broader authority reserved by and to the people was not without restriction, however, for added therein was the requirement that any such revision or amendment "embrace but one subject and matter directly connected therewith." Article XI, Section 3, Florida Constitution (1972).

The course of constitutional litigation regarding Article XI, Section 3, since 1972 might well be described as a continuous effort whereby those in established government, and those special interests with great influence on established government, strive to have this Court narrowly read the "one subject and matter directly connected therewith" requirement so as to effectively remove the reserved power of the people to initiate major or significant changes in their Constitution.

Thus, opponents of change have previously urged, and urge herein, that any proposed amendment or revision which by interaction affects or impacts any other existing constitutional provisionmust fail. This recurring effort to effectively reinstate the pre-1972 restrictions announced in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970), has been rejected time and again by this Court. Advisorv Opinion to the Attorney General re Term Limits Pledge, 718 so. 2d 798, 802 (Fla. 1998); Advisorv Opinion to the Attorney General - Fee on Everslades Suqar Production, 681 So. 2d 1124, 1128 (Fla. 1996); Advisory Opinion to the Attorney General re Limited Casinos, 644 So. 2d 71, 74 (Fla. 1994).

Similarly, opponents of change have previously urged, and urge herein, that any proposal which merely "affects" several branches or levels of government must fail. This effort, too, has been rejected by this Court, with the announcement that a proposal which "affects" several branches or levels of government will not fail, but that it is only

> when a proposal substantially alters or performs the functions of multiple branches that it violates the single subject test.

(Emphasis added.) Advisory Opinion to the Attornev General re Term Limits Pledge, 718 So. 2d 798, 802 (Fla. 1998); Advisory Opinion to the Attornev General re Fish and Wildlife Conservation Commission, 705 So. 2d 1351, 1353-1354 (Fla. 1998).

In essence, what opponents now seek to accomplish is a pronouncement or holding that any proposal which "affects" multiple branches or levels of government necessarily "alters" the "functions" of same and must therefore fail. By such linguistic sophistry, opponents seek to silently reverse the above-cited, and many other, decisions of this Court expressly announcing that "affect" is not a ground for single-subject rejection.

That such a result is neither justified nor authorized is readily demonstrated by consideration of Weber v. Smathers, 338 So. 2d 819 (Fla. 1976), wherein this Court approved an Ethics in Government proposal which imposed requirements as to all public officers, candidates, and employees of all levels of Florida government. The proposal extended beyond financial disclosure to creation of an independent commission to conduct investigations, providing for forfeiture of pension benefits, and restriction on legislative and other lobbying activity.

In Fine v. Firestone, 448 So. 2d 984 (Fla. 1984), Justice Shaw, concurring in result only, warned of the improper consequences and insurmountable limitations which would arise if

the "function of government" test was read and applied in the extreme fashion now urged by opponents, to wit, at page 999:

> The introduction of the function of government test is dicta which, if followed, will carry us from the one extreme in *Floridians* of largely nullifying the one subject limitation to the opposite extreme of making the limitation practically insurmountable. The ethics in government amendment which we upheld in *Weber* would certainly fail the test, assuming, as I believe we can, that ethics in government is applicable to all branches and functions of government. It is primarily for this reason that I concur only in result.

These forewarned consequences and insurmountable burdens have thus far been avoided by this Court's consistent recognition that a proposal which affects several branches or levels of government will not fail unless it goes further and "substantially alters or performs the functions" of multiple branches or levels. To now read Article XI, Section *3,* Florida Constitution, to proscribe any proposal which merely affects multiple levels or branches of government would clearly be contrary to the broadening intent of the 1972 amendment thereto. It would, in effect, establish new restrictions even more draconian and burdensome than those announced in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970), and rejected by the citizens of Florida by their 1972 constitutional amendment.

Such a reading or holding would be nothing less than effective judicial amendment of Article XI, Section *3,* Florida Constitution, to remove its express authorization of proposals to revise or amend "any portion or portions of this constitution.*' The language of Article XI, Section 3, Florida Constitution, does not exclude from

its operation and authorization proposals which would affect fundamental rights as denied, OK preserved, by the various branches or levels of Florida government.

Recognition of the foregoing, and of the difference between a proposal which "affects" governmental functions and one which "alters" functions, is of critical importance in this proceeding and in future matters regarding the reserved power of the people to amend their Constitution under Article XI, Section 3, Florida Constitution.

The proposals under consideration in the four consolidated proceedings herein "affect" all branches and levels of government in Florida by proscribing one form of governmental discrimination in the future actions or performance of their various functions. The proposals do not "alter" the "functions" of such branches or levels of government. No such "functions" are transferred from one branch to another, or from one level to another. No new systems or procedures for the performance of such "functions" are proposed. No existing governmental "function" is either created or abolished. No new governmental body or entity is created to receive or perform any governmental "function" now exercised by some existing branch or level of government.

All that is proposed by the citizen-initiative amendments before the Court is the proscription of one form of governmental discrimination. Under existing Article I, Section 2, governmental discrimination in the form of denial or deprivation of rights is proscribed. Under the proposed amendments, governmental

discrimination in the form of granting preferences or "extra" rights is proscribed. To hold that such a change and its "affect" thereby "alters" governmental "functions" in a manner proscribed by Article XI, Section 3, Florida Constitution, and its "one-subject" proviso, would effectively limit and amend the express promise therein that the people may revise or amend "any portion or portions of this constitution." Such a holding would effectively remove from the people any power to ever present any proposal dealing with fundamental rights by citizen initiative proposal.

Such a holding would mean that, once again, the people's expectation and belief in 1972 that they had reserved the power to initiate major changes in the Constitution will have been judicially frustrated. Adams v. Gunter, 238 So. 2d 824, 833-835 (Fla. 1970) (Ervin dissenting). The people's "club in the closet" to use when all other instrumentalities and sources for organic change have failed to materialize, will have been effectively and totally removed. Id. at p. 835. This Court should not so hold.

Certain opponents have labored mightily to establish, or at least argue, that "discrimination" and "governmental preferences" are themselves distinct or separate subjects. Indeed, the Florida Board of Regents argues at page 14 of its Initial Brief that:

> However, these subjects are logically and legally distinct. Governmental discrimination concerns treating certain minorities less favorably; on the other hand governmental preferences involve treating certain minorities more favorably.

The Board even pursues this further by arguing at page 26 that a violation of section 101.161, Florida Statutes, is created.

> The titles and summaries are cleverly crafted to disguise their purpose by combining both discrimination and preference prohibitions. By broadly joining together the subjects of discrimination and preferences, when the true purpose of the proposal is to abolish preferences, the titles and summaries are misleading as they 'fly under false colors.' . . .

The problem with this argument, as to "one subject" and sufficiency of summary, is that the opponents insist on erroneously treating "discrimination" and "deprivation of rights" as if they were synonymous, or the exact same and singular subject. This is simply not so. Deprivation of rights of minorities (i.e., treatment of minorities less favorably) is one form or type of discrimination. Granting of governmental preferences to minorities (i.e., treatment of minorities more favorably) is another form or type of discrimination.

Both deprivation and preference are encompassed within the term, or subject, of governmental discrimination. The latter form of governmental discrimination is being practiced by various Florida governmental entities. The people of Florida full well know it. The proposals before this Court seek to afford the people of Florida the opportunity at the polls to declare that such governmental discrimination should be discontinued to the extent practicable and possible.

It is understandably difficult for opponents of the proposals before this Court to acknowledge or admit that the governmental practices they wish to preserve, continue, or promote are, in fact, discrimination based on race, sex, color, ethnicity, or national

origin. The unavoidable fact, however, is that those practices are simply another form of such discrimination. In order to grant a minority a legal preference or enhanced legal right, government must visit on the non-minority a dis-preference, or diminishment of equal legal right. In other words, such practices and programs constitute governmental discrimination, pure and simple, and the people of Florida know it, whether or not opponents of the current proposals are willing to acknowledge it.

Thus, it is clear that ending "governmental discrimination and preferences*' clearly comes within a single subject, and the use of such terms in the title to the proposal considered in Case No. 97,089 is in no way misleading to the public. If there are "false colors " in these proceedings, they are being flown by opponents who insist that preferences based on race are not a form of governmental discrimination.

Every opposing brief filed herein has placed heavy reliance on this Court's prior opinion in In re Advisorv Opinion to the Attornev General - Restricts Laws Related to Discrimination, 632 so. 2d 1018 (Fla. 1994). This prior opinion has been treated extensively in the Initial Brief of FCRI. It is clear, however, that opponents fail to recognize the significant differences between the proposal rejected therein and the proposals to be considered herein.

In the prior 1994 proceedings the proposal would have forbidden any Florida governmental entity from adopting or enacting any law "regarding discrimination against persons which creates,

establishes or recognizes any right, privilege, or protection based upon any characteristic, trait status, or condition other than" those listed therein. *Id.* at p. 1019. In this respect the proposal directly addressed discrimination by deprivation of rights, which is the subject of existing Article I, Section 2, Florida Constitution.

Moreover, it added to the persons or characteristics already recognized in existing Article I, Section 2, Florida Constitution, the additional factors of "marital status" and "familial status," the former being specifically defined to be limited to lawful unions of persons of the opposite sex.

This Court's rejection of the proposal therein turned in part on the finding that the amendment '*modifies Article I, Section 2, of the Florida Constitution" and in part on requiring the voter to make a choice to accept such new classifications as marital status or familial status in order to support protection from discrimination based on established characteristics such as race or religion.

As treated more fully above, and in the Initial Brief of FCRI, the proposals herein address discrimination by preference or favorable treatment and, therefore, do not modify existing Article I, Section 2, but simply add a new or additional constitutional protection against a different form of discrimination. Moreover, and again as treated more fully in the Initial Brief of FCRI, the characteristics upon which that additional protection is based are characteristics which are

already recognized in Article I, Section 2, as constitutionally designated as entitled to protection from discrimination. Thus, no "logrolling" of new basis or characteristic for protection is presented, and the requisite "oneness" of purpose is maintained.

It is also true that in In re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994), the Court observed that the proposal rejected therein "encroaches on" the powers of various governmental branches or levels. This language, however, surely was not intended to be a camouflaged method of invalidating the above-discussed "alters functions" test and establishing that any "affect" or "interaction" produces invalidity. If this Court intended to effectively outlaw citizen-initiative changes of any "fundamental" rights, it surely would have stated so directly and forthrightly. That would be the unavoidable affect of a new "encroaches on the powers" test. It is respectfully submitted that this Court's prior statement should not be so broadly read or interpreted. Certainly, Article XI, Section 3, Florida Constitution, does not by its terms require or authorize such a reading.

Various opponents have also argued that the "remedies" provisions of the four proposals somehow create a "one subject" or title and summary defect. This Court may note that in each instance the provisions state that remedies available for violations shall be the same as are otherwise available for violations of "then existing" Florida law. Such provisions simply establish that remedies available for discrimination by prohibited preference

shall be the same as then provided by law for discrimination by deprivation of rights. The provisions, by reference to "then existing" law, clearly leave to the appropriate legislative body the authority to establish or amend what those uniform remedies shall be at any given or future time.

Such provisions clearly do not create either vagueness or single-subject violation. They are the functional or constitutional equivalent of a provision stating remedies shall be "as provided by general law," with a continuing requirement of uniformity. Such provisions have been recognized as directly related to the subject of such a proposal, and therefore proper. Advisory Opinion to the Attornev General - Limited Marine Net Fishing, 620 So. 2d 997, 999 (Fla. 1993). It is equally clear that the seventy-five word limit imposed on such a summary does not require the explanation therein of every such detail, ramification, or feature. Advisorv Opinion to the Attorney General re Prohibitinq Public Fundinq of Political Candidates' Campaiqns, 693 So. 2d 972, 975 (Fla. 1997); Advisorv Opinion to the Attornev General re Limited Casinos, 644 So. 2d 71, 75 (Fla. 1994).

Various opponents have also tried to draw a single subject or summary violation from the fact that each of the proposals before the Court concludes with the proviso that

> [t]his 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.

With all due respect to the sincerity of opponents' argument, the second sentence above is simply recognition of the established and existing supremacy of federal law where conflict, if any, may arise, and the last sentence is a standard severability proviso. No decision of this Court has been cited wherein such provisions were held to be either constitutionally proscribed or misleading. See, Ray v. Mortham, 24 Fla. L. Weekly S412 (Fla. Sept. 2, 1999).

Opponents have also argued that great confusion will exist in the law, and the voters' minds, as to the scope of operation and application of controlling federal law. In this effort or argument, opponents have referenced or cited instances and decisions where federal law may permit (but not require) minority-based preferences and others where such preferences may be required under federal criteria.

First, in response, it is clear that such challenges based on federal law are not to be entertained and are not justiciable in proceedings such as these. Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991). Where such challenges are not to be entertained, they cannot provide a "back door" vehicle for challenge on the basis that some court may in the future have to determine the presence and extent of conflict with federal law in some application, and the voting public does not presently know how that case will be decided.

As to the principles of application under the language of the various proposals, there is no confusion. Where federal law requires that a preference be afforded to a minority, then federal law will control. If federal law authorizes or permits, but does not require, that a preference be afforded to a minority, then the proposals herein and prohibitions of same will prevail as to actions of Florida governmental entities, with the exception that the proposals do 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.

The requisite guidance is clearly provided and available to future courts, and to a public which is "presumed to have a certain amount of common sense and knowledge." Advisorv Opinion to the Attornev General re Tax Limitation, 673 So. 2d 864, 868 (Fla. 1996). Article XI, Section 3, Florida Constitution, does not require that an amendment and its summary must be so certain and clear that no court need ever be called upon to determine its validity in any circumstance or application before the voters will be allowed to express their will by ballot. Section 101.161, Florida Statutes, clearly does not impose such a standard in its requirement of a seventy-five word explanation "of the chief purpose of the measure."

Various opponents have also argued that the proposed amendments would modify the "Right to Work" provision of the existing Florida Constitution, which provides in Article I:

§ 6. Right to work

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike,

The proposed amendments clearly do not intrude upon the first or third sentence of Article I, Section 6, Florida Constitution. The right to work regardless of membership or non-membership in a labor union is not impacted, nor is the prohibition of any right to strike by public employees.

At most, the proposed amendments would interact with the collective bargaining guarantee of the second sentence, in that public employers would be proscribed from entering into a contract which called for discrimination in the form of preferences based on race, sex, color, ethnicity, or national origin, just as they presently would or should be proscribed from such contracts which call for discrimination in the form of deprivation of rights based on such factors. That the right of collective bargaining might in this respect vary from that involving purely private parties is not a novel concept. See, State v. Florida Police Benevolent Association, Inc., 613 So. 2d 415, 417 (Fla. 1992) ("Public employee bargaining is not the same as private bargaining."). Moreover, this Court has recognized that a proposed amendment will not fail simply because it interacts with another, existing constitutional provision. Advisory Opinion to the Attorney General

Fee on Everglades Sugar Production, 681 So. 2d 1124, 1128 (Fla. 1996).

Opponents have also argued that the three proposals to be considered in Case Nos. 97,086; 97,087; and 97,088 somehow represent tacit recognition by proponents that the broader proposal in Case No. 97,089 is violative of "one-subject" restrictions. This is not so.

What the three separate proposals represent is an "abundance of caution" by proponents who are faced with a body of case law which at least on its surface appears to demonstrate an increasing, though sometimes inconsistent, lack of confidence in the ability and entitlement of the people to consider, and approve or disapprove, amendments to their Constitution which have not first been "massaged" by public officials and influenced by special interest groups and lobbyists who hold sway with such officials.

FCRI is of the view, and urges, that the amendment proposed in Case No. 97,089 meets all requisite criteria. As treated in the Initial Brief of FCRI, and in the following subsection, the proposal meets all proper requirements of Article XI, Section 3, Florida Constitution, and section 101.161, Florida Statutes. It is respectfully urged that the people of Florida are entitled to have it placed on the ballot and themselves approve or reject it.

The three narrower proposals to be considered in Case No. 97,086; Case No. 97,087; and Case No. 97,088 are alternative versions from which the most obvious "target" features of anticipated opposition have been removed. Thus, "sex," which is

currently a recognized characteristic under Article I, Section 2, Florida Constitution (i.e., "female and male alike"), has been removed from each of the three proposals, and public education, employment, and contracting, which constitute a limitation rather than separate subjects, have, nevertheless, been separated into discrete proposals.

These three proposals do not represent any acknowledgement that the proposal in Case No. 97,089 is defective. They represent a reasonable effort to preserve for the people of Florida their constitutional right to propose and vote upon significant changes to their Constitution even if opponents herein "carry the day" by the imposition of insurmountable burdens fatal to ballot placement and consideration by the voters of the "End Governmental Discrimination and Preferences Amendment" (Case No. 97,089).

It is respectfully urged that such an alternative effort is fully in accord with this Court's recognition of the risht of the people in Askew v. Firestone, 421 So. 2d 151 (Fla. 1982), as set forth at page 154:

> In order for a court to interfere with the right of the people to vote on a proposed constitutional amendment the record must show that the proposal is clearly and conclusively defective.

(Emphasis added.)

The opponents make clear that they consider adoption of any of the proposals herein unwise. As to some opponents, adoption by the people will restrict their governmental actions or authority by forbidding an additional form of governmental discrimination. As to

others, it will conflict with a philosophy that the constitutional guarantee of equal rights is enforceable only as to minorities, and that the wrong of present discrimination against others is a justifiable means to redress past legal wrongs to minorities.

These, however, are matters for determination of the people at the ballot box under the contemplation of Article XI, Section 3, Florida Constitution. They address the merits and wisdom of the adoption of the amendments, not their legality for ballot placement and consideration by the people. This Court has recognized time and again that this Court has neither the responsibility nor authority in such proceedings to address or rule upon the merits or wisdom of citizen initiative amendments. Advisorv Opinion to the Attornev General re Right of Citizens to Choose Health Care Providers, 705 so. 2d 563, 565 (Fla. 1998); Advisory Opinion to the Attornev General re Tax Limitation, 644 So. 2d 486, 489 (Fla. 1994). By like measure, arguments which directly or indirectly assail the merits or wisdom of such proposals should not be considered herein.

B. The Proposed Amendment in Case No. 97,089.

FCRI has, in its Initial Brief and the preceding Point "A" addressed many arguments contained in the opponents' briefs. In the interest of brevity and economy, repetition will be omitted, or at least minimized.

The primary contentions of opponents to the "End Governmental Discrimination and Preferences Amendment" are that including "sex" with the characteristics "race," "color," "ethnicity," and "national origin" creates a one-subject violation, and that

addressing public contracting, employment, and education in a single proposal creates a like violation.

As treated earlier, and in its prior Initial Brief, FCRI respectfully submits that while "sex" is not such a correlated and overlapping factor or characteristic as the other four, it is a characteristic or factor already recognized with the others in existing Article I, Section 2, Florida Constitution (i.e., "female and male alike") for constitutional protection, and therefore presents the requisite oneness of subject called for by Article XI, Section 3, Florida Constitution.

It is further respectfully submitted that to address characteristics or factors which are already recognized for protection from discrimination (by deprivation of rights) is not prohibited "logrolling." The people of Florida have already provided the unity or commonness of objective or purpose by combining these factors in the single existing Florida constitutional provision, Article I, Section 2, which currently addresses the right to freedom from discrimination by depriving of rights. Now, by the proposed amendment, discrimination by preference based on those already recognized characteristics would be proscribed.

In short, perhaps it would constitute prohibited logrolling if some future proposal attempted to add several new and disparate factors or characterizations to the existing constitutional protection from discrimination. Indeed, that was one of the primary flaws which led to denial of ballot placement in In re Advisory

Opinion to the Attornev General - Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994). Another flaw therein was that the proposal effectively modified or amended Article I, Section 2, by the imposition of a restriction regarding deprivation of rights. The "End Governmental Discrimination and Preferences Amendment** does not suffer such flaws.

It is true that in the above-referenced opinion the Court referred to that proposal as asking ten questions by including ten classifications of people. It is equally true, however, that the Court's demonstrative example of defect focused on a forced choice between already protected classifications (race and religion) and newly proposed classifications (marital status and familial status). Id. at p. 1020.

The "ten questions" observation in the above-cited advisory opinion may have been an appropriate reflection of the Court's analysis of the proposal then before the Court, but it should not now be read so literally and expansively as to effectively amend Article XI, Section 3, Florida Constitution, and add a new, unauthorized and insurmountable burden to the people's right to amend their Constitution by the initiative process.

Article XI, Section 3, Florida Constitution, does not by its terms speak or restrict in terms of "questions." It promises that the people may revise or amend any portion or portions of the Constitution, with onlv the restriction that such proposals

> shall embrace but one subject and matter directly connected therewith.

Advisory Opinions of this Court have time and again approved for ballot placement under Article XI, Section 3, proposals that inescapably include multiple factors, officers, or activities which could have been broken out into separate proposals, and therefore asked multiple questions calling for a single yes or no answer. See, e.g., Advisory Opinion to the Attornev General re Prohibitinq Public Fundinq of Political Candidates' Campaigns, 693 So. 2d 972 (Fla. 1997); Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991). Clearly, this Court has not previously considered potential divisibility of a proposal into separate or discrete questions as being the test for, or synonymous with, the requirement of "one subject and matter directly connected therewith" under Article XI, Section 3, Florida Constitution.

In Fine v. Firestone, 448 So. 2d 984 (Fla. 1984), this Court explained that the single-subject test is whether the proposal

> 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test.'

It is respectfully submitted that the "End Governmental Discrimination and Preferences Amendment" before this Court in Case No. 97,089 fully meets this criteria and should be approved for ballot placement.

Opponents have also contended that the title and summary of the proposal are somehow deficient. One need only read the title and summary together, as is required, to establish that no such

defect is presented. Advisorv Opinion to the Attorney General re Tax Limitation, 673 So. 2d 864, 868 (Fla. 1996).

Section 101.161, Florida Statutes, merely requires that the proposal be accompanied by a title, not exceeding fifteen words, "by which the measure is commonly referred to or spoken of" and an explanatory statement, or summary, not exceeding seventy-five words "of the chief purpose of the measure." The title and summary quite clearly explain the chief purpose to be to proscribe differential treatment of people based on race, sex, color, ethnicity, or national origin in public education, employment, and contracting "whether the program is called 'preferential treatment,' 'affirmative action' or anything else."

No insufficiency or misrepresentation is present. The phrase "or anything else" does not create vagueness, but merely makes clear that preferences of the nature specifically mentioned cannot be "saved" by merely selecting and applying a new cosmetic label.

Finally, and as has been treated more fully in the Initial Brief of FCRI, the inclusion of public contracting, employment, and education does not render this proposal defective. These are terms which limit, or exempt from the application of, the proposal or amendment from universal application to all government action in Florida. These limitations are clearly set forth in the summary. This Court has recognized that such matters of limitations fall within and constitute "matter directly connected therewith'* as authorized by Article XI, Section 3, Florida Constitution. Advisorv Opinion to the Attornev General re Fish and Wildlife Conservation

Commission, 705 So. 2d 1351, 1354 (Fla. 1998); Advisorv Opinion to the Attorney General re Stop Earlv Release of Prisoners, 661 So. 2d 1204 (Fla. 1995); Advisorv Opinion to the Attorney General re Limited Casinos, 644 So. 2d 71, 73 (Fla. 1994).

It is therefore respectfully submitted that the "End Governmental Discrimination and Preferences Amendment" presented in Case No. 97,089 meets all proper and applicable requirements and should be approved for placement on the ballot and consideration by the citizens of Florida. Only by such approval may the promise and guarantee of Article XI, Section 3, Florida Constitution, be preserved and effectuated. Whether the proposed amendment should be adopted will then, properly, be a matter for the will of the people under their expressly reserved power to revise or amend their Constitution.

C. The Psaposed Amendments in Case No. 97,086; Case No. 97,087; and Case No. 97,088.

The objections of opponents to these proposed amendments have been substantially anticipated and addressed in the Initial Brief of FCRI, or addressed in preceding Sections "A" and "B" of this Answer Brief.

These three amendments separate public employment, public contracting, and public education into discrete proposals. Even though these are matters of limitation which should not be required to be separated for "one subject" analysis, the separation puts to rest any serious contention of "logrolling."

Moreover, and as discussed earlier, "sex" is excluded as a proscribed basis or classification for preference, leaving only "race, color, ethnicity, or national origin" as classifications within the proposed amendments.

FCRI will not reiterate the prior analysis demonstrating that because these classifications are already recognized in Article I, Section 2, Florida Constitution, for protection from discrimination bv deprivation of rights, the oneness of subject or purpose for protection from discriminationbypreference is thereby established and present. It is clear that the same principles apply with even greater import after the elimination of "sex" from the included characterizations.

Moreover, it is clear that the four terms or classifications of "race, color, ethnicity, and national origin" are so closely related and overlapping as to come within a single subject. Certainly the terms "race" and "color" are of this nature. It is equally clear that "ethnicity" is so closely related that its omission would provide a ready vehicle for attempted circumvention of a prohibition of preference based on race or color. "Ethnicity," in turn, is a closely related component of the term "national origin."

These four terms, therefore, are closely enough related and connected to be or constitute "component parts or aspects of a single dominant plan," as recognized in Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984), to meet the requirement of "one subject."

Various opponents have also urged that defect arises because the title or caption to each only references "race," while the text addresses "race, color, ethnicity, and national origin." Only cursory review is necessary, however, to demonstrate that in each case the summary specifically advises that the proposal extends to and includes "race, color, ethnicity, or national origin." Thus, any contended defect of title or caption is clearly without merit, because the summary and title are to be read together. Advisory Opinion to the Attorney General re Tax Limitation, 673 So. 2d 864, 868 (Fla. 1996).

Opponents have also argued that the summaries of each proposal are defective or misleading because they do not include or reference every detail, limitation, exemption from, or ramification of the proposed amendments. This Court, however, has recognized and held repeatedly that the summary is required only to state the "chief purpose of the measure" and that the statutory seventy-five word limit neither permits nor requires the inclusion or explanation of such detail, limitations, implementing means, or anticipated ramifications. Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns, 693 So. 2d 972, 975 (Fla. 1997); Advisory Opinion to the Attorney General re Limited Casinos, 644 So. 2d 71 (Fla. 1994).

For the foregoing reasons, it is respectfully submitted that no constitutional or statutory defect has been demonstrated herein. Certainly, the record does not establish that the three citizen-initiative proposals are "clearly and conclusively defective," as

would be required to interfere with the right of the people to vote on them. Askewv. Firestone, 421 So. 2d 151, 154 (Fla. 1982); Weber v. Smathers, 338 So. 2d 819, 821-822 (Fla. 1976).

The briefs of opponents herein serve to establish, once again, that to those who are part of established government and those with great influence on the current establishment, a vehicle for direct democracy and expression of the will of the citizenry is a thing to be feared and restricted to the greatest extent possible. Such a vehicle, however, is exactly what was intended with the adoption of Article XI, Section 3, Florida Constitution, in 1968, and the expansion of its authorization in 1972.

No better demonstration of the potential and championed "insurmountable" obstacles to citizen participation could be found than is provided by review of the opposing briefs herein. It is doubtful that any citizen initiative proposal that this Court has approved over the past thirty years could run and survive the "gauntlet" of restrictions and limitations asserted by opponents.

Nevertheless, many such proposals have been approved. They have been approved because this Court has recognized that the right to propose and vote upon such amendments or revisions is a specifically reserved and fundamental constitutional right of the people of Florida which is to be preserved and fostered, not diminished and whittled away by formalistic restrictions or ever-expanding judicial limitations.

Florida Civil Rights Initiative respectfully submits that each of the three proposed amendments should be approved by this Court

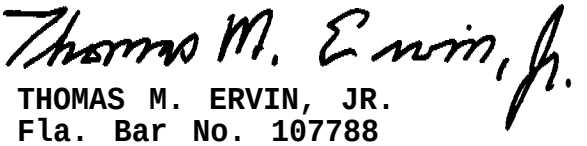
for placement on the ballot and consideration by the voters of Florida.

CONCLUSION

For the foregoing reasons, each of the four proposals before the Court should be approved as meeting the requirements of Article XI, Section 3, Florida Constitution, and section 101.161, Florida Statutes. Each addresses only "one subject and matter directly connected therewith." Each is accompanied by a good and sufficient title and summary.

The decision of whether the four proposals should be adopted and incorporated in the Florida Constitution is properly a matter now reserved to and for the people of Florida.

Respectfully submitted,



THOMAS M. ERVIN, JR.
Fla. Bar No. 107788
C. EVERETT BOYD, JR.
Fla. Bar No. 190960
of the law firm of
ERVIN, VARN, JACOBS & ERVIN
Post Office Drawer 1170
Tallahassee, Florida 32302
(850)224-9135
(850)222-9164 - FAX

COUNSEL FOR FLORIDA CIVIL RIGHTS INITIATIVE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 11th day of January, 2000, to the following:

ATTORNEY GENERAL, STATE OF FLORIDA:

The Honorable Robert A. Butterworth
Attorney General
State of Florida
The Capitol
Tallahassee, FL 32399-1050

COUNSEL FOR THE FLORIDA BOARD OF REGENTS:

Alan C. Sundberg, Esq.
General Counsel
Florida State University
211 Westcott Building
Tallahassee, FL 32306-1470

Gregg A. Gleason, Esq.
General Counsel
Florida Board of Regents
325 W. Gaines St.
Tallahassee, FL 32399-1950

F. Townsend Hawkes, Esq.
Michael P. Donaldson, Esq.
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
P. 0. Drawer 190
Tallahassee, Fl 32302

COUNSEL FOR THE FLORIDA CHAPTER OF THE NATIONAL BAR ASSOCIATION:

Darryl Parks, Esq.
Parks & Crump
521 East Tennessee Street
Tallahassee, FL 32308

Thomasina H. Williams, Esq.
Williams & Associates, P.A.
Brickell Bay View Centre, Suite 1830
80 S.W. Eighth Street
Miami, FL 33130

COUNSEL FOR FLORIDA CONFERENCE OF BLACK STATE LESIGLATORS:

Parker D. Thomson, Esq.
Thomson, Muraro, Razook & Hart
One S.E. Third Avenue
Miami, FL 33131

Randall C. Berg, Jr., Esq.
Peter M. Siegel, Esq.
JoNel Newman, Esq.
Florida Justice Institute, Inc.
200 South Biscayne Boulevard
Miami, FL 33131-2310

COUNSEL FOR FLORIDIANS REPRESENTING EQUITY AND EQUALITY:

Joseph W. Hatchett, Esq.
Mark Herron, Esq.
Akerman, Senterfitt & Eidson, P.A.
301 S. Bronough St., Suite 200
Tallahassee, FL 32301

COUNSEL FOR THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS:

Barbara R. Arwine, Esq.
Thomas J. Henderson, Esq.
Diane L. Gross, Esq.
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave., N.W., Suite 400
Washington, DC 20005

Matthew D. Slater, Esq.
Marcilynn A. Burke, Esq.
Emily Ryo, Esq.
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

David M. Lipman, Esq.
David M. Lipman, P.A.
5901 S.W. 74th Street
Miami, FL 33145

Thomas M. Cronin, Jr.
Attorney

CERTIFICATE OF SIZE AND STYLE OF TYPE

I HEREBY CERTIFY that the font used in the body of this brief is 12-point Courier, a font that is not proportionately spaced.

Thomas M. Lemon, Jr.
Attorney