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

AMENDED CONSOLIDATED INITIAL BRIEF OF
THE FLORIDA CHAPTER OF THE NATIONAL BAR ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Other

Other (cont'd) **Pape**

CERTIFICATION AS TO FONT SIZE AND STYLE

Pursuant to this Court's Administrative Order In Re: Briefs Filed in the Supreme Court of Florida, undersigned counsel for the Florida Chapter of the National Bar Association hereby certifies that both its original and this Amended Consolidated Initial Brief are reproduced in a font that is 14-point proportionately spaced Times New Roman type.

STATEMENT OF THE CASE AND OF THE FACTS

In this case, the Court is asked to consider whether four separate initiative petitions seeking to amend the Florida Constitution comply with the requirements of Article XI, §3, of the Florida Constitution, and § 10 1.16 1 of the Florida Statutes.

A group calling itself the Florida Civil Rights Initiative has submitted to the Florida Secretary of State four separate initiative petitions which seek to amend the Florida Constitution, one with respect to public education (Case No. 97,086), a second with respect to public employment (Case. No. 97,087), a third with respect to public contracting (Case No. 97,088), and a fourth which combines public education, employment and contracting (Case No. 97,089). On October 26, 1999, the Secretary of State submitted the four petitions to the Florida Attorney General.

Pursuant to Article IV, § 10, of the Florida Constitution, and § 16.06 1, of the Florida Statutes, on November 23, 1999, the Attorney General submitted the petitions to this Court, and requested an advisory opinion as to whether the petitions comply with the requirements of Article XI, $3, of the Florida Constitution, and § 10 1.16 1 of the Florida Statutes. In the course of doing so, the Attorney General pointed out numerous deficiencies in the petitions which indicate that each of them is invalid, and should be stricken from the ballot.

On December 2, 1999, this Court then entered a series of Orders consolidating the four cases involving the petitions, inviting interested parties to file briefs on or before December 22, 1999, ordering that answer briefs be filed on or before January 11, 2000, and scheduling oral argument in the cases for March 6, 2000.

The Florida Chapter of the National Bar Association submits this Consolidated Initial Brief as an interested party who opposes each of the petitions.[1] The Florida Chapter of the National Bar Association represents the professional interests of over 900 Black lawyers, judges, law professors and law students who reside throughout the State of Florida, and is committed to advancing the cause of equal justice for all people throughout the State of Florida.

Founded in 1925, at a time when Black lawyers were not permitted to join the American Bar Association, the National Bar Association is the nation's oldest and largest bar association for people of color. The Florida Chapter of the National Bar Association has been an affiliate of the National Bar Association for almost 30 years.

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[1] 'The Florida Chapter of the National Bar Association hereby adopts by reference the arguments of the Attorney General, and those of all other interested parties who oppose the petition initiatives, as to why each of the proposed amendments is invalid, and should be stricken from the ballot.

SUMMARY OF THE ARGUMENT

With the exception of the change in subject matter, each of the three petitions addressing public education, public employment, and public contracting are identical, and prohibit treating persons differently on the basis of race, color, ethnicity or national origin. The fourth petition combines public education, public employment, and public contracting into a single proposal. It prohibits discrimination against or granting preferential treatment to any individual or group in these areas based upon race, color, ethnicity or national origin, and adds sex as a protected class.

Each of the proposed amendments fails to meet the two tests necessary to remain on the ballot. They violate the single-subject requirement imposed on petition initiatives, and their titles and summaries are misleading. The proposals affect the executive, legislative and judicial functions of government, at both the State and local levels. They also affect existing sections of the Constitution and other State laws, but fail to identify those laws so that voters may consider the impact of the proposed amendments on existing laws and, thereby, cast informed ballots. Additionally, the ballot titles and summaries use terminology not found in the text of the proposed amendments themselves, and fail to inform voters of the expansive reach of the proposed amendments.

ARGUMENT

EACH OF THE PETITION INITIATIVES MUST BE STRICKEN FROM THE BALLOT.

In reviewing an initiative petition, this Court does not consider the merits of a proposed amendment. Advisor-v Opinion to the Attorney General -- Right of Citizens to Choose Health Care Providers, 705 So.2d 563,565 (Fla. 1998) (striking proposed amendment from the ballot because it addressed more than a single subject, and its summary was misleading); see also Advisor-v Opinion to the Attorney General -- Restrict Laws Related to Discrimination, 632 So.2d 10 18, 10 19 & n. 1 (Fla. 1994) (striking proposed amendment from the ballot because it addressed more than a single subject, and both its title and summary were misleading). As this Court has explained, it does not have jurisdiction to rule on the constitutionality of a proposed amendment which it reviews pursuant to the request of the Attorney General, in accordance with § 16.061, of the Florida Statutes. Restrict Laws Related to Discrimination, 632 So.2d at 1019 &n. 1.

Rather, this Court's review of an initiative petition is limited to two inquiries: (1) whether the proposed amendment addresses only a single subject, as required by Article XI, §3, of the Florida Constitution, and (2) whether the ballot title and summary of the proposed initiative are sufficiently clear and unambiguous, as required by § 10 1.61, of the Florida Statutes. Choose Health Care Providers, 705

So.2d at 565; Advisory Opinion to the Attorney General -- People's Property Rights, 699 So.2d 1304, 1306 (Fla. 1997) (striking three different proposed amendments from the ballot because they addressed more than a single subject, and their titles and summaries were misleading); Advisory Opinion to the Attorney General -- Save Our Everglades, 636 So.2d 1336, 1339 (Fla. 1994) (striking proposed amendment from the ballot because it addressed more than a single subject, and both its title and summary were misleading); Restrict Laws Related to Discrimination, 632 So.2d at 1019.

The text, title and summary of each of the proposed amendments before the Court in these consolidated cases "incorporate[] numerous defects that have proven fatal to other proposed amendments." Choose Health Care Providers, 705 So.2d at 565. Although ostensibly labeled as simply addressing one issue, each of the proposed amendments changes multiple government functions, at multiple levels of government, and fails to alert voters that it impacts existing sections of the Florida Constitution, and other laws. The initiative petitions are, therefore, invalid. Choose Health Care Providers, 705 F.2d at 565-66. The petitions are invalid for the additional reason that their titles and summaries do not accurately describe the scope of the proposed amendments. Choose Health Care Providers, 705 So.2d at 566; People's Property Rights, 699 So.2d at 13 12; Save Our Everglades, 636 So.2d 134 l-

42; Restrict Laws Related to Discrimination, 632 So.2d at 102 1.

A. EACH OF THE INITIATIVES ADDRESSES MORE THAN ONE SUBJECT, IN VIOLATION OF ARTICLE XI, SECTION 3, OF THE FLORIDA CONSTITUTION.

Article XI, Section 3, of the Florida Constitution, governs the amendment of the Constitution by petition initiative. It incorporates a single-subject requirement, and provides, in pertinent, part as follows:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment, except those limiting the power of government to raise revenue, **shall embrace but one subject and matter directly connected therewith.**

(Emphasis added).

In addition to the petition initiative procedure used in these consolidated cases, the Florida Constitution may be amended or revised by any one of three methods -- by the Florida Legislature, by Constitutional Convention, or by Constitution Revision Commission.[2] The single-subject requirement applies only to amendment by petition initiative. In the case of each of the other procedures for amending the Constitution, any proposed amendment is subject to public debate and discussion of the intent and likely ramifications of a proposed amendment **before** the ballot language is finalized.

[2]See Florida Constitution Article XI, §1 (Proposal by Legislature); §2 (Revision Commission); and §4 (Constitutional Convention).

The public is afforded an opportunity to actually shape the substantive content of the proposed amendment. Save Our Everglades, 636 So.2d 1339, quoting, Fine v. Firestone, 448 So.2d 984,988 (Fla. 1984).

A constitutional amendment proposed through the petition initiative process is not, however, subject to the rigors of public discourse which are inherent in each of the other three procedures for amending the Constitution. Id. The language of a proposed amendment is drafted without public comment, and may be done by anyone including, as in this case, a group led by a non-resident of Florida.

In the absence of the public deliberative process, the single-subject requirement is designed to serve as a "rule of restraint" against unbridled and far-reaching changes in the Constitution by way of petition initiative. People's Property Rights, 699 So.2d at 1307; Save Our Everglades, 636 So.2d 1339.

The single-subject limitation on petition initiatives also serves to protect voters from a practice known as "log-rolling," whereby separate issues are cloaked under a broad general umbrella and voters are forced to accept a portion of the proposed amendment which they oppose in order to enact a separate portion of the proposal which they favor. People's Property Rights, 699 So.2d at 1307; Choose Health Care Providers, 705 So.2d at 566; Save Our Everglades, 636 So.2d at 1339; Restrict Laws Related to Discrimination, 632 So.2d at 1019-20.

In considering whether a proposed constitutional amendment violates the single-subject requirement, this Court must consider whether the proposal affects separate functions of government, and how it affects other provisions of the Florida Constitution. Restrict Laws Related to Discrimination, 632 So.2d at 1020. See also Peonle's Property Rights, 699 So.2d at 1307 & n. 1 ("if a proposed amendment changes more than one governmental function, then it violates the single-subject requirement"); Save Our Everglades, 636 So.2d at 1340.

This Court has explained that:

> it is imperative that an initiative identify the provisions of the Constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations.

Choose Health Care Providers, 705 So.2d at 565-66.

The public education, public employment, and public contracting proposals are worded the same in prohibiting the treatment of persons differently on the basis of race, color, ethnicity or national origin. The full text of the proposed public education amendment reads as follows:

> ADD SECTION 26 TO ARTICLE I, FLORIDA CONSTITUTION AS FOLLOWS:
>
> 1) The state shall not treat persons differently based on race, color, ethnicity, or natural 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.

The full text of the proposed amendment on public employment reads as follows:

> 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.

The full text of the proposed amendment on public contracting reads as follows:

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 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.

The fourth proposed amendment combines the subjects of public education, public employment and public contracting, and adds sex to race, color, ethnicity and national origin as protected classes. The full text of the combined proposal reads as follows:

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 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.

This Court has previously considered the validity of a petition initiative which sought to amend the Constitution related to discrimination, and found the proposal defective. See Restrict Laws Related to Discrimination, supra. The proposals presently before the Court are invalid for many of the same reasons as the proposed amendment in Restrict Laws Related to Discrimination.

The proposed amendment in Restrict Laws Related to Discrimination prohibited state and local governments from enacting anti-discrimination laws, except those designed to protect persons based upon their "race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status." 632 So.2d at 1019. The Court concluded that by grouping together these ten different classifications, the proposed amendment asked voters essentially ten different questions, but required them to give one all or nothing answer. As such, the proposal violated the single-subject requirement. Id.

While the proposed amendments before the Court in these consolidated cases do not include quite as many different classifications as the proposed amendment in Restrict Laws Related to Discrimination, the proposals here are, nevertheless, classic examples of prohibited log-rolling. In the case of the public education, public employment and public contracting petitions, they ask the voters four different

questions -- the first with regard to race, the second with regard to color, the third with regard to ethnicity, and the fourth with regard to national origin -- but would force the voters to give a single answer. Since it combines public education, public employment, and public contracting, and adds sex to the four classifications found in the other petitions, the consolidated fourth petition would force the voters to give one all or nothing answer to **fifteen** different questions.

Thus, in voting on either the public education, public employment or public contracting proposals, a voter who, for example, feels strongly that there is a compelling need to preserve the flexibility to treat persons differently based upon their race as a means of remedying the lingering vestiges of past discrimination, but who feels that there is no basis to treat persons differently based upon their national origin, would nevertheless be required to accept that latter part of the proposal -- which he opposes -- in order to secure the former part of the proposal -- which he supports. Likewise, a voter voting on the combined petition who feels that there is a compelling need to grant preferential treatment to women in public contracting, but not to grant them such treatment in public education would be forced to vote in favor of the amendment, and accept the parts of the proposal which she opposes in order to secure the protection of the parts of the proposal which she supports. Placing voters in such a predicament defeats the purpose of the single-subject requirement,

and renders each of the proposed amendments in this case invalid. Restrict Laws Related to Discrimination, 632 So.2d at 10 19-20; Save Our Everglades, 636 So.2d at 1341.

Similar to the proposed amendment before the Court in Restrict Laws Related to Discrimination, the subject of the proposed amendments in these consolidated cases -- treating persons differently, discriminating against them or granting them preferential treatment based upon specified characteristics-- is "an expansive generality that encompasses both civil rights and the power of all state and local government bodies." Restrict Laws Related to Discrimination, 632 So.2d at 1020.

The proposed amendments define the term "state" to include "any city, county, district, public college or university, or other political subdivision or governmental instrumentality of or within the state" and, thereby, "encroach[] on the home rule powers and on the rulemaking authority of executive agencies and the judiciary." Restrict Laws Related to Discrimination, 632 So.2d at 1020.

The proposed amendments "affect multiple branches of government and multiple functions performed by different levels of government." People's Property Rights, 699 So.2d at 1308. broad spectrum of executive and legislative bodies, ranging from the Florida Board of Education, consisting of the Governor and Cabinet, which supervises the operation of Florida's public school

system; to local school boards, which administer the day-to-day operations of individual school districts; to the Florida Minority Business Advocacy and Assistance Office, created by $287.0945 1, Fla. Stat., to assist minority and women owned businesses in procuring State contracts; to quasi-judicial state and local agencies which adjudicate violations of State and local anti-discrimination laws, such as the Florida Commission on Human Relations, which was created pursuant to the Florida Civil Rights Act of 1992, §§760.01-760.11, Fla. Stat., to the Miami-Dade County Equal Opportunity Board, which was created pursuant to Chapter 11 A of the Miami-Dade County Code --just to name a few. See People's Property Rights, 699 So.2d at 1310-11, 1312.

The proposals in these consolidated cases go even beyond the scope of the proposal in Restrict Laws Related to Discrimination, however. According to their express terms, the proposals in these cases are "not necessarily limited to the state [and local governments] ." See Individual Proposed Amendments at ¶6 & Combined Proposed Amendment at ¶7. The proposed amendments also contemplate reaching private entities that have partnered with state and local government entities.

In addition, the proposed amendments affect several existing constitutional provisions, but fail to mention any of them. See e.g. People's Property Rights, 699 So.2d at 13 12 & n.6. The proposed amendments would not simply "add" new sections

to Article I of the Florida Constitution, they would actually modify Article I's existing Section 2, which deals with the basic rights of all natural persons, and expressly prohibits depriving any such person of any right because of the person's race.[3]

Both the proposed amendment on education and the combined proposed amendment would also conflict with Article IX, § 1, concerning education, which provides as follows:

> Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

The proposed amendments which address education would, for example, preclude treating persons differently based upon the specified characteristics even where such difference in treatment is warranted by "the needs of the people." Thus,

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[3]Article I, §2, provides as follows:

> **Basic rights.** All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

for example, schools would be prevented from utilizing special programs to assist students of a different national origin for whom English is a second language. The proposed amendments would constitute a material change in existing law which should be, but is not, brought to the voters' attention in the text of the proposed amendments. See e.g. People's Property Rights, 699 So.2d at 13 12 & n.6.

Furthermore, the proposed amendments refer only to the "operation" of public education, employment or contracting, without defining their intended scope. Article IX, § 1, for example, refers to the "establishment, maintenance **and** operation" of public schools, "institutions of higher learning and other public education programs." (Emphasis added). Are the two proposed amendments on education intended to also encompass the "establishment" and "maintenance" of public elementary and secondary schools, as well as colleges and universities, similar to the existing constitutional provision on education? Are the other proposed amendments intended to encompass the "establishment" and "maintenance" of public employment and public contracting programs at all levels of government, as well as the "operation" of such programs?

In the absence of any mention in the proposed amendment of Article I, §2, regarding race, and Article IX, § 1, regarding education in particular, the voters are not warned that they should consider the interplay between the proposed amendments

and existing constitutional provisions in deciding whether to vote for or against the ballot initiatives.[4]

The proposed amendments in these consolidated cases must be stricken from the ballot for a myriad of other reasons. The individual proposals use the term "persons," and are ambiguous as to whether they are intended to apply only to natural persons, or are intended to apply to both natural persons and corporate entities. See People's Property Rights, 699 So.2d at 1308-09 (finding ballot title's use of the word "people" misleading because it was unclear whether the word "owner" used in the summary was intended to be limited to natural persons, or to also apply to corporate entities).[5]

Each of the proposed amendments also expressly states that it applies to "action taken after [its] effective date," but fails to tell voters when it would take affect, if approved. See Individual Proposed Amendments at ¶¶2, 4 & Combined Proposed Amendment at ¶¶2, 5. Furthermore, the proposed amendments could be interpreted to apply only to affirmative steps taken to treat persons differently, to discriminate

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[4]The use of the term "public education" in the proposed amendment is also ambiguous, in that it is not clear whether the term is intended to include public education or awareness programs directed at a particular racial or ethnic group which, for example, may be at higher risk for certain health conditions, such as sickle cell anemia or hypertension.

[5]The use of the term "party" in paragraph 7 does not clarify this ambiguity.

against, or to grant preferential treatment based upon the specified characteristics, and not to apply to any failure to act which may have the same result.

The courts have articulated two different theories for analyzing discrimination claims, disparate treatment and disparate impact. Under the disparate treatment theory, a particular law or practice is subject to attack because it expressly treats persons differently, based upon a protected characteristic. Under the disparate impact theory, the central inquiry is whether persons of a protected class are adversely affected by a particular law or practice which is facially neutral. See e.g. Griggs v. Duke Power Co., 401 U.S. 424, 43 1 (1971) (federal law prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); The Florida State University v. Sondel, 685 So.2d 923 (Fla. 1st DCA 1996) (applying federal case law to claims brought under the Florida Civil Rights Act of 1992). The proposed amendments in these consolidated cases would prompt a dramatic change in anti-discrimination law by prohibiting only blatant discrimination, and not more subtle, yet equally damaging, forms of discrimination.

The proposed amendments' impact on the judicial branch of government is also evident in paragraph 4 of the individual proposals and paragraph 5 of the combined proposal, which state that the proposed amendment would not invalidate any "court order or consent decree that is in force as of the effective date of [the amendment]."

By focusing on existing "court orders," rather than existing causes of action, these provisions would in effect apply the proposals retroactively. A party whose cause of action accrued prior to the enactment of the proposed amendments might have, for example, obtained a temporary injunction, which by definition is of limited duration. If the proposed amendments pass, the party would be precluded from obtaining a permanent injunction, under circumstances in which it would otherwise have been entitled to one.

In such an event, the practical effect of the proposed amendments would be to deny a party the constitutional right to access to the courts. This example illustrates how, unbeknown to the voters, yet another existing provision of the Florida Constitution -- Article 1, §21 -- is implicated by the proposed amendments.[6]

The federal funding exemption found in paragraph 5 of the individual proposed amendments and paragraph 6 of the combined proposed amendment is also problematic, and would alter multiple functions of government, at various levels. It would create a fragmented system of public education, public employment, and public contracting, with one segment consisting of programs eligible for federal funds, and

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[6]Article I, §21, provides as follows:

> Access to **courts.** The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

the other segment consisting of programs not eligible for federal funds -- all of which would be within the same agency.' Under the proposed amendments, the former group would be permissible, while the latter group would be unconstitutional, even though both groups of programs have a legitimate reason for treating persons differently or granting preferential treatment to the protected classes, and are otherwise exactly the same.

If approved by the voters, the proposed amendments would constitute an anomaly in that they would be the only provisions of the Florida Constitution which specifically refer to available remedies. While the proposed amendments state that the "remedies available for violations . . . shall be the same . . . as are otherwise available for violations of then existing Florida . . . discrimination law," they fail to tell voters what the current laws and available remedies are. See Individual Proposed Amendments at ¶7 & Combined Proposed Amendment at ¶8. In the absence of this information, voters cannot make an informed decision about whether to cast their ballots in favor of or against the respective proposed amendments. See e.g. Restrict Laws Related to Discrimination, 632 So.2d at 1021.

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[7]The proposal's use of the term "federal programs" also calls into question whether state or local programs which receive federal funding, but are not a part of a specific federal program, would be exempt from the proposed amendment.

In referring to "existing Florida . . . discrimination law," the proposed amendments also raise the question, but fail to provide an answer, as to how they are different from existing law on this subject, and what their respective purposes are in view of the fact that there is already law which protects against discrimination.

The severability provision found in paragraph 8 of the individual proposed amendments and paragraph 9 of the combined proposed amendment also creates an uncertainty for voters because it applies only in the event that a portion of the proposed amendments is found to violate federal law. The severability provision would not be invoked with respect to portions of the proposals found to violate state law, which may be more restrictive than federal law.

In summary, each of the proposed amendments is fraught with defects which demonstrate that it violates the single-subject requirement, and should be removed from the ballot.

B. BOTH THE BALLOT AND TITLE OF EACH OF THE INITIATIVES ARE MISLEADING, AND VIOLATE SECTION 101.161, OF THE FLORIDA STATUTES.

Section 101.161(1), of the Florida Statutes, requires that the ballot title and summary of a proposed constitutional amendment state the chief purpose of the proposal in "clear and unambiguous language."* The purpose of this requirement is to provide voters with fair notice of the true meaning and ramifications of a proposed amendment. Choose Health Care Providers, 705 So.2d at 566; People's Property Rights, 699 So.2d at 1307; Save Our Everglades, 636 So.2d at 1341; Restrict Laws Related to Discrimination, 632 So.2d at 1020.

Thus, the Court's inquiry at this juncture is to determine whether the language of the ballot title and summary of each proposal is misleading to the public. Id. In this case both the ballot title and summary of each of the proposals are misleading.

The ballot title for the petition initiative on education reads as follows:

> AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION.

'Section 10 1.16 1 (1), Fla. Stat., provides, in pertinent part, as follows:

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

The summary of the proposed education amendment reads as follows:

> 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.

The ballot title for the petition initiative on employment reads as follows:

> AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EMPLOYMENT.

The summary of the proposed employment amendment reads as follows:

> 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.

The ballot title for the public contracting initiative reads as follows:

> AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC CONTRACTING.

The summary of the proposed contracting amendment reads as follows:

> 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 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, color, ethnicity, or national origin. Exempts actions needed for federal funds eligibility.

Finally, the ballot title for the combined initiative reads as follows:

> END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT.

The summary of the proposed combined amendment reads as follows:

> Amends Declaration of Rights, Article I of the Florida Constitution, to bar government from treating people differently based on race, sex, color, ethnicity, or national origin in the operation of 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.

In each case, the ballot title and summary are deficient in several respects. The individual summaries each imply that the government is currently treating people differently based upon their race, and the combined summary implies that the government is currently treating people differently based upon other classifications,

as well, without justification, and that such difference in treatment necessarily constitutes discrimination, In fact, there are circumstances in which it would be justifiable, and even necessary, to treat persons differently to remedy the lingering vestiges of past discrimination. The ballot titles and summaries fail to warn voters that the broad sweep of the proposed amendments would prohibit any and all such remedial action. Restrict Laws Related to Discrimination, 632 So.2d at 102 1 (ballot summary was not accurate and informative where it failed to state that the proposed amendment would "curtail the authority of government entities . . . to enact or adopt any law in the future that protects a group from discrimination").

Furthermore, both the title and summary of each of the ballot initiatives are misleading in that they refer only to the "government," whereas the proposed amendments themselves expressly state that their scope "is not necessarily limited to, the state . . . or [a] governmental instrumentality of or within the state." See Individual Proposed Amendments at ¶6 & Combined Proposed Amendment at ¶7. Thus, the ballot titles fail to explain to voters that the proposed amendments extend to private entities that have partnered with governmental entities. "The omission of such material information is misleading and precludes voters from being able to cast their ballots intelligently." Restrict Laws Related to Discrimination, 632 So.2d at 102 1 .[9]

[9]This language is also ambiguous in that the individual ballot titles refer only to "government," but the individual summaries refer to state and local "government

Both the ballot titles and summaries of the individual initiatives also use the term "people," implying that the individual proposed amendments are intended to apply only to natural persons. However, the individual proposed amendments themselves use the term "persons," which includes both natural persons and corporate entities. See People's Property Rights, 699 So.2d at 1308-09 (finding ballot title's use of the word "people" misleading because it was unclear whether the word "owner" used in the summary was intended to be limited to natural persons, or to also apply to corporate entities). "This divergence in terminology is ambiguous in that it leaves voters guessing whether the terms are intended to be synonymous or whether the difference in terms was intentional." Choose Health Care Providers, 705 So.2d at 566.

Additionally, the individual ballot titles are misleading in that they refer only to race, when the text of the individual proposed amendments is not limited to race. Each of the individual proposed amendments also encompasses "color, ethnicity, [and] national origin." See Individual Proposed Amendments at ¶¶1,3.

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bodies." The term "government" could be interpreted to apply only to the state itself, a city or a county. Yet, the term "government bodies" could be construed to mean only agencies, commissions or other creations of the state, a city or a county, rather than the state, a city or a county itself. Choose Health Care Providers, 705 So.2d at 566 (an impermissible ambiguity exists where voters are left to guess whether two different terms which are used interchangeably are intended to mean the same thing, or whether the difference in terminology is significant).

Both the ballot title and summary of each of the initiatives are further lacking in that they fail to mention existing constitutional provisions that would be impacted if the proposed amendment is adopted. For example, the titles and summaries imply that the respective proposed amendments create a new right not to be treated differently based upon race, when Article I, §2, of the Florida Constitution already provides that "[n]o person shall be deprived of any right because of race... ." The affect of the proposals would be to amend this existing constitutional provision, and to impact both Article I, §2 l's right to access to courts, and, in the case of the public education initiative, Article IX, §1. However, neither the ballot title nor the summary of any of the initiatives alerts voters to these consequences of the amendments.

Finally, each of the proposed ballot summaries invokes the code words "preferential treatment," and "affirmative action," even though neither phrase is found within the text of the proposed amendments. As this Court found in Save Our Everglades, such terminology "more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." 636 So.2d at 1342. Such emotionally charged terminology, which means different things to different people, has no place in a ballot summary.

CONCLUSION

WHEREFORE, the Florida Chapter of the National Bar Association requests that this Court strike each of the proposed amendments from the ballot.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Consolidated Initial Brief was served on the following, by FEDEX overnight delivery, on the 29th day of December, 1999:

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