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IN THE SUPREME COURT OF FLORIDA

CASE NOS.
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# ADVISORY OPINION TO THE ATTORNEY GENERAL RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION, ET AL.

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## INITIAL BRIEF OF THE FLORIDA BOARD OF REGENTS IN OPPOSITION TO INITIATIVES

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## BACKGROUND

Pursuant to Article XI, Section 3 of the Florida Constitution, the Florida Civil Rights Initiative organization has proposed four related initiative amendments to Article I of the Florida Constitution for placement on the ballot in the next general election. Three of the proposed amendments are essentially identical, but separately address the broad areas of public education (the "education amendment"), public contracting (the "contracting amendment"), and public employment (the "employment amendment") by changing a few words, as indicated in bracketed language below:

## PROPOSED FLORIDA CONSTITUTIONAL AMENDMENT

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

Summary:

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

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

(1) The state shall not treat persons differently based on race, color, ethnicity, or national origin in the operation of public education [contracting] [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 government 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 the then existing Florida education [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 initiative (the "combined amendment") combines these three subjects of public education, contracting, and employment, and adds the element of

sex to the prohibited bases for different treatment, as follows (differences underlined):

> Title: END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT
>
> Summary:
>
> Amends Declaration of Rights, Article 1 of the Florida Constitution, to bar ~~state and local~~ government ~~bodies~~ from treating people differently based on race, sex, color, ethnicity, or national origin in ~~the operation~~ &public education, employment, or contracting, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that threat 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.
>
> ADD SECTION 26 TO ARTICLE 1, 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 o~~f public employment,~~ public education, or public contracting.
>
> . . . .
>
> (3) This section does not affect any law or government action that does not discriminate against, or grant preferential treatment to, any person or group on the basis of race, sex, color, ethnicity, or national origin.
>
> (4) This section does not affect any otherwise lawful classification that: (1) 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.

. . . .

> (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 the then existing Florida antidiscrimination law.

. . . .

Under the authority of Article IV, Section 10 of the Florida Constitution and Section 16,061, Florida Statutes (1999), the Attorney General petitioned this Court for an advisory opinion as to whether the initiative petitions comply with Article XI, Section 3 of the Florida Constitution and Section 10 1.16 l(l), Florida Statutes (1999). Pursuant to Article IV, Section 10, and Article V, Section 3(b)( 10) of the Florida Constitution, this Court entered orders on December 2, 1999, inviting interested parties to file briefs.

This brief is submitted on behalf of the Florida Board of Regents, created pursuant to Section 240.205, Florida Statutes (1999). The Board of Regents is responsible for the statewide rules governing the State University System, including the planning and physical development of the system, reviewing and evaluating instructional research and service programs at the universities, coordinating program development, and monitoring fiscal performance of the universities. See $240.209, Fla. Stat. (1999). In addition, the Board of Regents is responsible for adopting a system-wide strategic plan establishing the goals and objectives of the State University System. Id. One of the specific statutory goals

for the Board of Regents is to maintain "access to state universities by qualified students regardless of financial need." § 240.209(5)(a), Fla. Stat. (1999).

## SUMMARY OF THE ARGUMENT

The proposed amendments violate the single-subject rule because they include multiple subject matters and affect multiple areas of government. First, they all broadly joined together the separate subjects of discrimination and preferences. Second, they alter the functions of different branches of state government, as well as different levels of state and local governments. Third, the broad subject matters of the proposals (public education, employment, contracting) create a number of unforeseeable and unpredictable collateral effects. Fourth, the proposed amendments combine two separate classifications, race and national origin, forcing the voter into an all or nothing choice, Each one of these defects is fatal.

The titles and summaries are misleading and confusing because they do not accurately communicate the true purpose of the amendments. By joining together the distinct subjects of discrimination and preferences, the titles and summaries cloud the proposals' true purpose of abolishing governmental preferences. The titles and summaries fail to apprise the voters of changes the proposals will make to existing constitutional provisions and of the creation of a new legal remedy for violations of the proposals. Finally, the summaries create ambiguities by twice using language different from the language used in the actual text of the proposed amendments. Again, each one of these defects is fatal to the proposals.

## ARGUMENT

1.

**THE PROPOSED AMENDMENTS PROHIBITING GOVERNMENT FROM TREATING PERSONS DIFFERENTLY BASED ON RACE VIOLATE THE SINGLE-SUBJECT RULE OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION.**

### A. Introduction

The Florida Constitution reserves to the people the right to propose an amendment or revision to any portion or portions of their constitution through a people's initiative process. This initiative process is subject to a single rule of restraint imposed upon the drafter of an initiative proposal: the amendment or revision "shall embrace but one subject and matter directly connected therewith.“’ Art. XI, § 3, Fla. Const. (the "single-subject rule"). The initiative process was placed in the Florida Constitution "to allow the citizens . . . to propose and vote on singular changes in the functions of our governmental structure." See Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984). The initiative process cannot be used to effect multiple changes in state government or law, nor can it be used to implement a fundamental revision of the Florida Constitution. See People's 699 So. 2d 1304, 1307 (Fla. 1997); Restricts Laws Related to Discrimination, 632 So. 2d

[1] All emphasis is supplied unless otherwise noted.

1018, 1022 n.6 (Fla. 1994) (Kogan, J., concurring).[2] Constitutional revisions may only be proposed through one of the other appropriate amendment procedures. Id.; Fine, 448 So. 2d at 995 (McDonald, J., concurring).

The framers of Florida's Constitution intended the initiative process to be the most restrictive and most difficult method of amending the constitution. See Evans v. Firestone, 457 So. 2d 135 1, 1358 (Fla. 1984) (McDonald, J. concurring); Fine, 448 So. 2d at 994 (McDonald, J., concurring). Recognizing that the initiative procedure is the only method of amending the Florida Constitution in which the people of Florida are not represented in the process of drafting a proposed amendment, the authors of Article XI imposed the single-subject rule only on this particular amendment procedure.[3] Fine, 448 So. 2d at 988. This constitutional safeguard is designed to eliminate the danger that the drafter of an initiative amendment may seek passage of an unpopular measure by including it with a more popular one in the same proposed

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[2] "In re Advisory Opinion to the Attorney General" or similar language will be omitted from all such citations.

[3] The other four constitutional amendment processes all contain a legislative drafting process. See Save Our Everglades, 636 So. 2d 1330, 1339 (Fla. 1994). First, an amendment to an individual section or a revision of one or more articles, including the whole, may be proposed by a joint resolution agreed to by a three-fifths vote of each house of the Legislature. Art. XI, § 1, Fla. Const. Second, a revision of the constitution may be proposed by a periodically convened constitution revision commission. Id. § 2. Third, a revision of the constitution may be proposed by a specially convened constitutional convention. Id. § 4. Last, a revision of the constitution concerning taxation or the state budgetary process may be proposed by a periodically convened taxation and budget reform commission. Id. § 6.

amendment. Id.; Restricts Laws Related to Discrimination, 632 So. 2d at 1019-20; Evans, 457 So, 2d at 1354. Since the voter is faced with an "all-or-nothing" decision, this tactic, commonly known as "logrolling," forces the voter into a situation where a vote must be made for a disfavored part of an amendment in order to secure passage of another favored part of the amendment. See Tax Limitation, 644 So. 2d 486, 490 (Fla. 1994); Save Our Everglades, 636 So. 2d at 1339; Restricts Laws Related to Discrimination, 632 So. 2d at 10 19-20. To protect voters against the use of such ploys, this Court requires strict compliance with the single-subject rule. See Fine, 448 So. 2d at 989.

In addition to the dangers of logrolling, an initiative proposal is not subject to the refinements made possible through the mechanisms of amendment, public debate, and legislative vote that are all integral parts of the other constitutional amendment procedures. See Evans, 457 So. 2d at 1357 (Over-ton, J., concurring); Fine, 448 So. 2d at 988-89. The procedures involved in the other means of constitutional amendment insure that a proposed amendment is carefully drafted to avoid unintended collateral effects on other aspects of Florida government and law and to harmonize the proposed amendment with both the state and federal constitutional systems. See Rights of Citizens To Choose Health Care Providers, 705 So. 2d 563, 565 (Fla. 1998); Restricts Laws Related to Discrimination, 632 So. 2d at 1022 (Kogan, J., concurring).

Because these protective mechanisms do not exist in the initiative process, the single-subject rule fills this void by requiring the drafter of a proposed initiative amendment to direct and focus the electorate's attention on "a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution." Fine, 448 So. 2d at 988. Absent such a requirement, this Court, rather than the drafters of a proposed amendment, would be left to deal with the unanticipated collateral effects of an adopted amendment without the traditional aids to judicial construction (such as legislative history) necessary for this purpose. Id. at 989. Without the single-subject rule, this Court would be granted sweeping discretionary authority to essentially redraft substantial portions of the constitution, a result counter to the very premise of a people's initiative. Id.

In determining whether the single-subject rule is violated by a proposed amendment, this Court has principally considered four factors, all of which must be examined with an eye towards the purposes of the single-subject rule. First, the Court determines whether the amendment performs, alters, or substantially affects multiple, distinct functions of government, as opposed to only a single function. See People's Property Rights Amendments, 699 So. 2d at 1307-08; Save Our Everglades, 636 So. 2d at 1340; Restricts Laws Related to Discrimination, 632 So. 2d at 1020; Evans, 457 So. 2d at 1354; Fine, 448 So. 2d at 990. In analyzing this first factor, the Court looks to determine whether the amendment affects a function of more than one

branch of government, whether it affects multiple functions of a single branch, or whether it affects a function performed by more than one level of government – i.e., state, or county, municipal. See Save Our Everglades, 636 So. 2d at 1340; Restricts Laws Related to Discrimination, 632 So. 2d at 1020; Evans, 457 So. 2d at 1354; Fine, 448 so. 2d at 990-92. Moreover, merely expressing the subjects of an amendment in a broadly worded phrase, as the amendments attempt here, will not pass judicial scrutiny. "[E]nfolding disparate subjects within the cloak of a broad generality does not satisfy the single subject requirement." Evans, 457 So. 2d at 1353; see also Restricts Laws Related to Discrimination, 632 So. 2d at 1020.

Second, this Court considers whether the amendment will substantially affect other sections of the constitution. See People's Property Rights Amendments, 699 So. 2d at 1307; Tax Limitation, 644 So. 2d at 492-94; Restricts Laws Related to Discrimination, 632 So. 2d at 1020; Evans, 457 So. 2d at 1354; Fine, 448 So. 2d at 990-92. The articles or sections of the constitution substantially affected by the proposed amendment must be expressly identified in the title or summary of the initiative proposal. Id. This is necessary not only for the public to understand the changes that a proposed initiative amendment will make to their constitution, but also to prevent unbridled discretion in judicial construction of the proposal. See Fine, 448 So. 2d at 995 (McDonald, J., concurring).

Third, the Court will determine whether the very breadth of the amendment will necessarily result in multiple unannounced or unanticipated collateral effects on a myriad of topics far removed from the amendment's stated subject matter. See Right of Citizens To Choose Health Care Providers, 705 So. 2d at 565-66; Restricts Laws Related to Discrimination, 632 So. 2d at 1022-24 (Kogan, J., concurring); Fine, 448 So. 2d at 995 (McDonald, J., concurring). The existence of such hidden effects amounts to de facto logrolling, "because the electorate cannot know what it is voting on." Fine, 448 So. 2d at 995 (McDonald, J., concurring). The impact of an amendment's "domino effect" on single-subject concerns is particularly keen when such collateral effects could disrupt other important aspects of Florida government or law. See Restricts Laws Related to Discrimination, 632 So. 2d at 1022-24 (Kogan, J., concurring). The initiative process cannot be used to substantially alter '"part of Florida's legal machinery regardless of the consequences to the rest of our governmental system." Id. The drafters of a proposed amendment cannot ask the voters to vote on a proposal that appears to do only one thing, but which also results "in other consequences that may not be readily apparent or desirable to the voters." Id.

Last, the Court will examine whether the proposed initiative actually asks the voters multiple questions, instead of just one. For example, a proposed amendment that asks voters to approve the amendment's effects on more than one classification is

invalid. This forces voters to cast an all-or-nothing vote with regard to all of the proposed classifications in the amendment. See Restricts Laws Related to Discrimination, 632 So. 2d at 1019-20 (amendment violated single-subject rule as it asked voters to vote "yes" or "no" on ten different classifications); Fine, 448 So. 2d at 990-92 (amendment violated single-subject rule as it asked voters to impose limitations on three different revenue categories taxes, user fees, and revenue bonds). The single-subject rule prevents voters from being trapped in such a predicament. See Restricts Laws Related to Discrimination, 632 So. 2d at 1020.

On the drafters of an initiative amendment rest "[t]he decisions which determine compliance with the requirements" of the single-subject rule. Evans, 457 So. 2d at 1360 (Ehrlich, J., specially concurring). This Court reviews the proposed amendment for compliance with the law. See Stop Early Release of Prisoners, 642 So. 2d 724, 725 (Fla. 1994). "If drafters of an initiative petition . . . choose to violate the one-subject requirement, this Court has no alternative but to strike it from the ballot." Evans, 457 So. 2d at 1359 (Ehrlich, J., specially concurring).

### B. The Proposed Amendments Violate Article XI, Section 3.

All of the proposed amendments suffer a number of fatal flaws, because they violate the single-subject rule in several different respects:

1. Combining the subjects of discrimination and preferences.

In an apparent effort to market these proposals to Florida's voters, the proposed amendments combine the separate subjects of discrimination and preferences. This is candidly acknowledged by the title of the combined amendment: "End Government Discrimination and Preferences Amendment." Although the titles of the other three amendments tactfully disguise the inclusion of these two subject matters, it is clear that all of these amendments include both of these subjects.

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. Furthermore, current provisions in both the federal and state constitutions prohibit only racial discrimination (i.e. the deprivation of rights based on race), and do not facially address the legally distinct concept of preferences based on race. See Amend. V & XIV, U.S. Const.; Art. I, § 2, Fla. Const. Consistent with this distinction, Florida's statutory law does not provide for racial discrimination, but does provide for racial preferences in certain circumstances. See §§ 287.093-

.0947, Fla. Stat. (1999); see also § 24.113, Fla. Stat. (1999). Thus, the current state and federal constitutions, as well as Florida's statutes, treat the subjects of racial discrimination and racial preferences as distinct legal concepts.

Voters in Florida may well favor the prohibition of governmental discrimination against racial minorities (particularly since this is currently provided in the state and federal constitutions), but disfavor a general prohibition against governmental preferences for racial minorities. However, because these separate issues are joined together in each of the proposed amendments, the voters are simply not given this choice. The enfolding of these separate subject matters into a single proposed amendment is a fundamental, permeating, and fatal flaw contained in each proposal. See Restricts Laws Related to Discrimination, 632 So. 2d at 1019-20 ("subject of discrimination in the proposed amendment is an expansive generality that" inherently contains multiple subjects).

2. Substantially altering functions of different branches of government and different levels of government.

The amendments deal with a broad area of discrimination based on race or national origin, and, therefore, substantially alter or perform legislative, executive, and judicial functions, as well as affect different levels of government. The proposed amendments clearly perform a legislative function by abrogating the Legislature's affirmative action programs such as minority business enterprise laws contained within Chapter 287. See §§ 287.093 1-.0947, Fla. Stat. (1999); see also

§§ 24.113; 255.102; 288.702-.714 (small and minority business assistance act); 337.125-. 139; 760.80 (minority representation on boards, commissions, councils, and committees), Fla. Stat. (1999).

In addition, the amendments substantially alter or perform executive functions related to all state agencies, because the executive branch retains broad discretion in contracting and employing personnel that is guided by executive policies and rulemaking. This is evidenced by the Governor's recent Executive Order dealing with precisely these issues among the state executive agencies. See Executive Order No. 99-28 1, attached as App. 1.

Furthermore, because public contracting and public employment are broad and undefined terms with no limitations, and "state" is defined to include all governmental instrumentalities, the judicial branch would necessarily be included, and its powers to contract and employ would be substantially affected by the employment, contracting, and the combined amendments. Moreover, most governmental efforts to encourage or facilitate minorities to become judges apparently would be forbidden by these amendments. In addition, to the extent that the judicial branch, including The Florida Bar, was involved in programs or services affecting the education of the public, the public education amendment would also encompass the judicial branch. Therefore, all of the proposed amendments substantially alter or perform functions of multiple branches of

government, contrary to this Court's requirements under the single-subject rule. See People's Property Rights Amendments, 699 So. 2d at 1308; Tax Limitation, 644 So. 2d at 494-95; Restricts Laws Related to Discrimination, 632 So. 2d at 1020.

Not only do the proposed amendments substantially alter or perform the functions of different branches of government, but the initiatives also have a very distinct and substantial effect on different levels of governments, by affecting not only state government but also each local government entity. Indeed, all of the amendments specifically define "state" to include "any city, county, district, public college or university, or other political subdivision or government instrumentality of or within the state." Therefore, on the face of these initiatives, there is no question that they intend to directly affect each local government entity within the entire state. Indeed, the fact that these amendments will have a substantial effect on local governments is evident by the recent adoption by five (5) counties of resolutions in support of local affirmative action programs.[4]

These very distinct and substantial effects on local governments, in addition to the widespread effects on all state government, have been expressly prohibited by this Court as a single-subject violation. Id.; Restricts Laws Related to Discrimination, 632 So. 2d at 1020. Moreover, these limitations on local

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[4] The five (5) counties adopting the resolutions in support of affirmative action are Miami-Dade, Leon, Hillsborough, Palm Beach, and Alachua.

government directly impact their broad home rule powers contained in Article VIII of the Florida Constitution. As this Court has stated, an initiative that substantially affects existing constitutional provisions must identify the provisions it is affecting. See Tax Limitation, 644 So, 2d at 493. The proposed amendments here completely fail to give any such identification of the constitutional provisions they are affecting.

3. Including a broad subject matter that overlaps and conflicts with other subjects and creates unforeseen consequences.

The initiatives also violate the single-subject rule in another manner, because they each join together multiple subjects and topics in one initiative, forcing the voter to choose from multiple subject areas. Critically, the broad subject areas of public education, contracting, and employment are completely undefined. Apparently recognizing in the "combined amendment" that public education, contracting, and employment unquestionably covered three subjects, as well as addressing both the issues of race and sex discrimination, the proponents evidently attempted to correct their facial violation of the single-subject rule by dividing these matters into the three separate amendments and by eliminating sex discrimination. However, any separation that the proponents attempted through the three additional amendments is purely artificial. For example, with regard to a university professor's new contract, this one situation would be covered by the amendments dealing with public education, public contracting, and public

employment, as well as by the combined amendment. Thus, regardless of which amendment a voter chose, he would unavoidably affect the circumstances of a university professor's contract.'

Due to the ambiguous and vague nature of these subject matters, there is obviously much overlap and corresponding confusion as to what areas are covered by each amendment. For example, a voter may want government preferences prohibited only as to state university admissions. However, because all "public education" is broadly included within that particular initiative, the voter would be required to accept the abrogation of affirmative action in both the hiring of university professors, as well as in the letting of university contracts for goods and services. Hence, contrary to the intent of the single-subject rule, the voter would be forced into making an all or nothing choice. See Save Our Everglades, 636 So. 2[d] at 1339-40; Restricts Laws Related To Discrimination, 632 So. 2[d] at 1020.

The use of the overlapping and ambiguous terms of "'public education," "contracting," and "employment" serves to confuse the voter and to give the illusion that these areas are separate and easily defined. However, because there is no definition of what is involved in "public contracting," many "public

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[5] The very breadth of the education amendment gives rise to several unanticipated collateral effects. For example, the broad scope of this proposal could presumably prohibit a university from even supporting a minority recruitment program.

employment" situations would logically be a subcategory of "public contracting." Thus, a voter wishing to abrogate affirmative action only in state contracting for goods and services would not be able to accomplish that by voting for the contracting amendment, because this amendment would also include many employment contracts. The existence of such hidden effects amounts to de facto logrolling, "because the electorate cannot know what it is voting on." Fine, 448 So. 2d at 995 (McDonald, J., concurring).

Similarly, a voter who did not wish to affect public education at all could inadvertently accomplish exactly that by approving the contracting amendment, because that amendment would affect a university's ability to hire professors. Therefore, the subject matter within each of these broad areas (education, contracting, employment) is confusing, overlapping, and contains multiple subjects. Because the proposed amendments are "vague and fail to completely inform voters of the impact," they confusingly present complex, interrelated subject matters in a prohibited "all or nothing" manner. See Right Of Citizens To Choose Health Care Providers, 705 So, 2d at 565-66.

4. Combining two distinct classifications: race and national origin.

The proposed amendments violate the single-subject rule by creating at least two separate classifications, forcing voters to accept an all or nothing proposition as to both of these classifications. These classifications are (1) race and (2)

national origin. On their face, these classifications have nothing to do with each other, as national origin (i.e. whether a person is from Russia or Germany) has no connection to race. Furthermore, forcing the voter to accept both of these classifications violates the purpose of the single-subject requirement, since some voters may well wish to eliminate governmental affirmative action or preferences based on race, but may not wish to effect any changes for preferences based on national origin. Indeed, many voters may wish that Florida continue to give Florida residents (or at least Americans) preferences in public education, contracting, and employment. However, under these broadly inclusive amendments, all of which address national origin, governmental preferences based on national origin would be prohibited."

In Restricts Laws Relating To Discrimination, 632 So. 2d at 1020, this Court made clear that inclusion of separate classifications within one proposed amendment violated the single-subject rule. As this Court noted, "a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and family status." Id. Similarly, voters facing these amendments may support protection from unequal treatment based on race, but may oppose such protection based on national origin,

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[6] For example, Section 287.092, Florida Statutes (1999), currently gives certain foreign companies preferences if they employ over 200 persons in Florida. This

Footnote continued on next page

which is facially unrelated to race. By the inclusion of these two categories within all of the amendments, each of the amendments defies the purpose of the single-subject limitation, and should be stricken from the ballot.[7]

Footnote continued from previous page

preference would appear to be prohibited by the proposed amendments.

[7] The combined amendment includes a classification based on sex, in addition to the three areas of education, contracting, and employment, causing it to be even more in violation of the single-subject rule.

## II.

**THE TITLES AND SUMMARIES OF THE PROPOSED AMENDMENTS ARE MISLEADING AND AMBIGUOUS, VIOLATING SECTION 101.161, FLORIDA STATUTES.**

### A. Introduction

Pursuant to Section 101.161 (1), Florida Statutes (1999), only the title and summary of a proposed constitutional amendment actually appear on the election ballot presented to voters. As a result, Section 10 1.16 l(l) requires that the drafter of a proposed amendment set forth in clear and unambiguous language the chief purpose of the proposal in its title and summary. See Term Limits Pledge, 718 So. 2d 798, 803 (Fla. 1998); Save Our Everglades, 636 So. 2d at 1341; Askew v. Firestone, 42 1 So. 2d 15 1, 154-55 (Fla. 1982). Section 101.161 insures that the ballot title and summary will not mislead the voter as to the amendment's purpose and will give the voter sufficient notice of the single issue contained in the amendment to allow the voter to cast an intelligent and informed vote. Id.

To avoid misleading the voting public, the drafter must ensure that the summary and title provide the electorate with fair notice of the "true meaning, and ramifications, of an amendment." Askew, 421 So. 2d at 156; see also Restricts Laws Related to Discrimination, 632 So. 2d at 1020-21. The voter "must be able to comprehend the sweep of each proposal from a fair notification in the proposition

itself that it is neither less nor more extensive than it appears to be." Askew, 421 So. 2d at 155 (quoting Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976)). Voters cannot be asked to vote on a proposal that appears to do one thing, but that will actually result "in other consequences that may not be readily apparent or desirable to the voters." Restricts Laws Related to Discrimination, 632 So. 2d at 1023 (Kogan, J., concurring). Thus, the summary must communicate the collateral effects of a proposed amendment, particularly when these effects could affect other important aspects of Florida government or law. Id. at 1022 .

In communicating the true meaning and effect of a proposed amendment, the drafter of the summary and title must make clear how the proposed amendment will change the existing state of affairs. See Wadhams v. Board of County Comm'rs, 567 So. 2d **414, 416** (Fla. 1990); Evans, 457 So. 2d at 1355; Askew, 421 So. 2d at 155-56. The summary and title must expressly state any substantial modification or significant collateral effects on other existing portions of the constitution. See Term Limits Pledge, 718 So. 2d at 803-04 (summary stated that initiative "affected" Secretary of State's powers, but failed to inform voters of a newly created power covering election pledges); **Stop** Early Release of Prisoners, 642 So. 2d at 726-27 (Fla. 1994) (summary made no mention of essential elimination of constitutionally created parole and probation commission); Askew, 421 So. 2d at 155-56 (summary indicated that amendment would create a new limitation on former state legislator's

ability to appear before state government bodies, while text actually amended then-existing constitutional prohibition to create an exception to allow such appearances). Where appropriate, the summary must also point out the scope of the current laws that will be affected, and whether the amendment constricts or expands existing governmental authority. See Restricts Laws Related to Discrimination, 632 So. 2d at 1022.

Moreover, the drafter must ensure that the ballot title and summary accurately reflect the contents of the amendment itself. See Stop Early Release of Prisoners, 642 So. 2d at 726-27 (summary stated that amendment would "ensure" that state prisoners serve at least 85% of their sentence, while text made clear that this would not be true in cases of pardon and clemency); Save Our Everglades, 636 So. 2d 1341-42 (text indicated that sugar industry would bear full cost of Everglades clean up, while summary stated that sugar industry would only "help" pay for the clean up); Evans, 457 So. 2d at 1355 (summary stated that amendment would "establish" citizen's rights in civil action, including allowance of full recovery of economic damages, when in fact amendment only addressed limiting right to recover non-economic damages). The summary must also use clearly defmed terms that are not subject to ambiguity, and must be consistent with the actual text. See Right of Citizens to Choose Health Care Providers, 705 So. 2d at 566; Stop Early Release of

Prisoners, 642 So. 2d at 727-28 (Overton, J., specially concurring); Smith v. American Airlines, Inc., 606 So. 2d 618, 620-21 (Fla. 1992).

Finally, the summary and title should be an "accurate and informative synopsis of the meaning and effect of the proposed amendment," not an opportunity for the drafter to engage in "political rhetoric" that advocates the adoption of the amendment. See Save Our Everglades, 636 So. 2d at 1341-42; Evans, 457 So. 2d at 1355. The drafter of the summary and title must also avoid emotional language designed to sway voters or language which seeks to convey a false sense of urgency, as such tactics may mislead a voter as to the contents and purpose of a proposed amendment. Id.

### B. The Title and Summary of Each Amendment Violate The Requirements of Section 101.161(1).

The titles and summaries of the proposed amendments are misleading and ambiguous for a number of distinct reasons:

1. Misleading voters as to the true purpose of the amendments.

The title and summary of each amendment is a carefully crafted example of "political rhetoric" intended to evoke an emotional response from the voters without informing the voters of the true consequences of the amendments. See id. Indeed, the titles of the three amendments dealing with public education, contracting, and employment are couched in such a fashion that virtually no voter could possible disagree with the subject matter of the title. These titles provide:

Amendment To Bar Government From Treating People Differently Based On Race In Public Education [Contracting] [Employment].

Members of the voting public will undoubtedly be shocked to discover that their government is treating people differently based on race. The clear inference in this title is that the government is somehow treating people unfairly based on their race and that the government discriminates against minorities. This subtle use of the language in the title, as well as in the summary, is a classic example of Orwellian "double-speak." 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." Save Our Everglades, 636 So. 2d at 1341 (quoting Askew, 421 So. 2d at 156). In short, the titles and summaries are intended to require an affirmative vote by evoking an emotional reaction against the government's unequal treatment or mistreatment of people based on race, without conveying the central purpose of the amendments.

Instead of addressing the issue that is at the heart of these amendments, i.e. the abolition of affirmative action and preference programs in favor of minorities, the titles and summaries are aimed at eliciting a positive vote in reaction to the negative implication that the government is discriminating against people based on

race. Indeed, the concepts of affirmative action and preferential treatment are only mentioned in the summaries of the proposed amendments as to what the "programs" could be "called." Therefore, even though the summaries do at least reference affirmative action and preferential treatment programs, these oblique references do not fairly offset the emotional appeal of the title, and the initial part of the summary, which are provocatively aimed at barring government from discriminating against people based on race.[8]

2. Failing to inform of changes to existing constitutional provisions.

The titles and summaries are further misleading because they fail to inform the voter that the Florida Constitution currently prohibits the state from depriving any person of a right based on race or national origin. See Art. I, § 2, Fla. Const. The import of the titles and the summaries is that government is currently able to discriminate against minorities, such as blacks and Hispanics, and that the proposed amendments will eliminate this type of discrimination, as well as any preferential or affirmative action programs.

The true purpose of the amendments is to eliminate government actions that favor minorities, yet this true purpose is disguised in both the titles and the summaries. The titles and summaries all fail to identify that they are amending

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[8] The combined amendment's title is likewise designed to evoke a similar emotional response by ending "governmental discrimination."

Article I, Section 2, the basic rights in the Florida Constitution. That provision currently provides, "No person shall be deprived of any right because of race, religion, national origin, or physical disability." The amendments alter the existing constitutional provision, which prohibits deprivation of rights based on race, to one that prohibits any different treatment based on race, a far broader prohibition that also includes racial preferences. As there is an existing provision in the constitution that is being altered by the proposals, the proposals must identify the affected provision, See Tax Limitation, 644 So. 2d at 492-94.

By failing to identify the existing constitutional provisions affected by these amendments, the proponents falsely imply that the amendments are written on a "clean slate" and that "there is no existing constitutional provision imposing" a different restriction, See Term Limits Pledge, 718 So. 2d at 803 (quoting Limited Political Terms, 592 So. 2d 225, 228 (Fla. 1991)). The problem "lies not with what the summary says, but, rather, with what it does not say." Term Limits Pledge, 718 So. 2d at 804 (quoting Askew, 421 So. 2d at 156). Because the titles and summaries do not identify the multiple areas of the constitution affected by the amendments, including basic rights under Article I, Section 2, and local

governments’ home rule powers under Article VIII, the titles and summaries are incomplete and misleading.’

3. Failing to inform voters of the creation of remedies for violations of the new provisions.

In addition, all of the summaries completely fail to mention that a remedy is created by each of the amendments for violation of the proposed amendments. This remedy is based on the adoption of existing Florida employment discrimination laws or education discrimination laws. The combined amendment incorporates “existing Florida antidiscrimination law.” None of the summaries for any of the proposed amendments includes any notice that this new remedy is created under Florida law for violation of these provisions. The creation of a distinct cause of action is certainly a substantial change to the existing state of affairs, and the voters must be placed on notice that these remedies are created. See Askew, 421 So. 2d at 155-56. Because the summaries fail to include this vital information, they are misleading.

[9] Because the education amendment applies to all areas of public education, it also affects the state’s duties under Article IX, Section 1 of the Florida Constitution, requiring the state to make adequate provisions for the education of all children residing within the state. All of the proposals also affect Article 1, Section 6 of the Florida Constitution, dealing with collective bargaining rights of employees.

4. Creating ambiguities by discrepancies between terminology used in the summaries and the texts.

The summaries are also confusing and misleading because they refer to government "programs," including all such programs "'whether the program is called 'preferential treatment,' 'affirmative action,' or anything else." The summaries similarly refer to "programs" in the next to the last sentence, dealing with limits on the amendments. However, in the bodies of each of the amendments, there is no mention of governmental "programs" anywhere. Rather, the limitation section in the actual amendments refers to "any law or government action." Thus, the summaries and the texts create a disparity between governmental "programs" and "law or governmental action." The definition of these different terms is not apparent from the summaries or the texts of the proposed amendments, and leaves the voter unclear as to what is actually contained in the proposed amendments.

In Tax Limitation, 644 So. 2d at 495, this Court held that a summary was misleading when the summary contained the word "owner" and included natural persons and businesses, yet the text of the proposed initiative was silent as to the meaning of the term "owner" and included no reference to businesses. Thus, because there was a disparity between the terms used in the summary and those used in the text of the initiative, the summary was inherently misleading and ambiguous. Id.; see also People's Property Rights Amendments, 699 So. 2d at 1308-09.

The summaries here are further confusing and misleading because they state that only “state and local government bodies” are affected by the amendments. However, the definition of “state” within the text of the amendments includes a much broader definition that includes public universities, as well as any “governmental instrumentality.” This broad definition must include the judicial branch, since it is a “governmental instrumentality of or within the state.” However, from the face of the sumrnaries, neither the judiciary nor state universities would reasonably appear to be included within “state and local government bodies.“”

Because of the discrepancy between these terms, one contained in the summary and a different one in the body of the amendment, all of the proposed amendments are confusing and misleading. As this Court observed in Right of Citizens to Choose Health Care Providers, 705 So. 2d at 566, a ballot summary improperly contained the word “citizens” while the language of the amendment contained “every natural person.” This Court held:

> This discrepancy between “natural person” and “citizens” is material and misleading. This divergence in terminology is ambiguous in that it leaves voters guessing whether the terms are intended to be

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[10] The combined amendment’s sumrnary adds another discrepancy by omitting “state and local” when describing “government,” even though the text of this proposal defines “state” to include local governments.

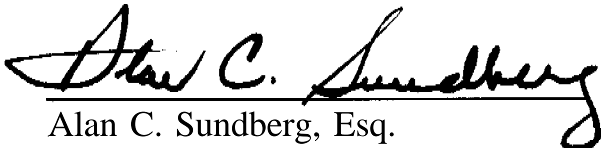
> synonymous or whether the difference in terms was intentional.

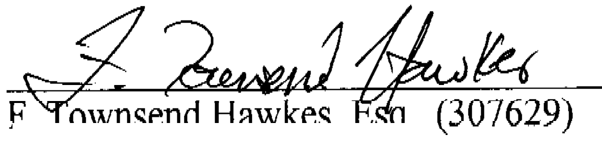
Id. Likewise, the discrepancies in terminology between the summaries and the texts illustrated above leaves the voter confused as to the scope of these amendments and whether these differences are intentional. As such, this ambiguity violates Section 10 1.16 1, and causes the amendments to be fatally defective.

## CONCLUSION

Based on the foregoing, the proposed amendments all violate the single-subject rule by containing multiple subject matters and affecting multiple functions and levels of government, and violate Section 101.16 1 by containing misleading and ambiguous titles and summaries. Accordingly, this Court should direct that these proposed amendments be removed from the ballot.

Respectfully submitted,





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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. Mail to the persons listed below this 22nd day of December, 1999, and that the style of print of this Initial Brief is proportionately spaced, 14 point Times New Roman.

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Florida Secretary of State
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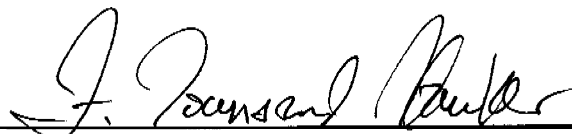

F. Townsend Hawkes

IN THE SUPREME COURT OF FLORIDA

CASE NOS.
97, 086
97, 087
97, 088
97, 089

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# ADVISORY OPINION TO THE ATTORNEY GENERAL RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION, ET AL.

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## APPENDIX TO INITIAL BRIEF OF THE FLORIDA BOARD OF REGENTS IN OPPOSITION TO INITIATIVES

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## INDEX TO APPENDIX

1. Executive Order No. 99-28 1

# STATE OF FLORIDA

## OFFICE OF THE GOVERNOR
## EXECUTIVE ORDER NUMBER 99-281

WHEREAS, the Florida Constitution provides that all natural persons, female and male alike, are equal before the law and that no person shall be deprived of any right because of race or national origin; and

WHEREAS, Florida's government has a solemn obligation to respect and affirm these principles in its policies relating to employment, education and contracting; and

WHEREAS, the use of racial and gender set-asides, preferences and quotas is generally inconsistent with the obligation of government to treat all individuals as equals without respect to race or gender; and

WHEREAS, the use of racial and gender set-asides, preferences and quotas is considered divisive and unfair by the vast majority of Floridians, produces few, if any, long-term benefits for the intended beneficiaries, and is of questionable legality; and

WHEREAS, the laudable goal of increasing diversity in Florida's government and institutions of Higher Education, and in the allocation of state contracts, can and should be realized without the use of racial and gender set-asides, preferences and quotas; and

WHEREAS, the obligation of Florida's government to root out vestiges of discrimination can and should likewise be accomplished without resort to remedies involving the use of racial and gender set-asides, preferences and quotas.

NOW, THEREFORE, I, JEB BUSH, as the Governor of the State of Florida, by virtue of the authority vested in me by the Constitution and laws of the State of Florida, do hereby promulgate the following executive order effective immediately:

Section 1: Non-Discrimination in Government Emplovment.

(a) It is the policy of my Administration to provide equal opportunity to all qualified Floridians, to prohibit discrimination in employment because of race, gender, creed, color or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each Executive Agency and the Office of the Governor. This policy of equal opportunity applies to every aspect of employment policy and practice in my Administration.

(b) It is the policy of my Administration to seek out employees for hiring, retention and promotion who arc of the highest quality and ethical standards, and who reflect the full diversity of Florida's population.

(c) Unless otherwise affirmatively required by law or administrative rule, neither the Office of the Governor nor any Executive Agency may utilize racial or gender set-asides, preferences or quotas when making decisions regarding the hiring, retention or promotion of a *state* employee. Any law or administrative rule requiring or allowing the use of racial *or* gender set-asides, preferences or quotas in hiring, retention *or* promotion shall be brought to the attention of my General Counsel by any affected Executive Agency no later than December 3 1, 1999.

Section 2: Non-Discrimination in State Contracting.

(a) It is the policy of my Administration to provide equal state contracting opportunities to all qualified businesses, to prohibit discrimination in contracting because of race, gender, creed, color or national origin, and to promote the full realization of equal contracting opportunities through a positive, continuing program in each Executive Agency and the Office of the Governor. This policy of equal contracting opportunities applies to every aspect of contracting policy and practice in my Administration.

(b) Unless otherwise required by law or administrative rule, neither the Office of the Governor nor any Executive Agency may utilize racial or gender set-asides, preferences or quotas when making state contracting decisions. Any law or administrative rule requiring or allowing the use of racial or gender set-asides, preferences or quotas, *or* artificial, arbitrary goals in state contracting shall be brought to the attention of my General Counsel by any affected Executive Agency no later than December 3 1, 1999.

(c) The Department of Management Services and the Minority Business Advocacy and Assistance Office at the Department of Labor & Employment Security are hereby ordered to develop an implementation strategy for all other aspects of my Equity in Contracting Plan by January 3 1, 2000, and to present that plan to my Office of Policy and Budget for appropriate action.

Section 3: Non-Discrimination in Higher Education.

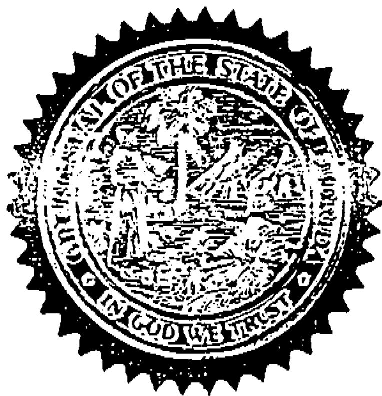
(a) It is the policy of my Administration to support equal educational opportunities for all qualified Floridians, to prohibit discrimination in education because of race, gender, creed, color or national origin, and to promote the full realization of equal educational opportunities throughout the State.

(b) I hereby request that the Board of Regents implement a policy prohibiting the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education, effective immediately.

(c) The Office of Policy and Budget is hereby ordered to develop an implementation strategy for all other aspects of my Equity in Education Plan by December 3 1, 1999.

Section 4: No Legal Cause of Action.

Nothing in this Executive Order shall be construed to create a cause of action or any legal remedy not otherwise provided for by law.




IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of the State of Florida to be affixed at Tallahassee, the Capitol, this 9th day of November, 1999.

Jeb Bush

GOVERNOR

ATTEST:

Kathe[redacted] Harris

SECRETARY OF STATE

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DIVISION OF ELECTIONS
TALLAHASSEE, FL