IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Judith R.T. O'Kelley, Charles R.T. O'Kelley, St. Johns Missionary Baptist Church, Rabbi Scott Saulson, Reverend Timothy McDonald III, Senator David Adelman, Representative Tyrone Brooks,	)	
Plaintiffs,	)	**CASE NO. 2004 CV 93494**
vs.	)	
Sonny Perdue, in his official capacity as Governor of the State of Georgia,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs respectfully submit this Memorandum in support of their motion for judgment on the pleadings, which motion requests entry of a judgment declaring that Amendment One: (i) unconstitutionally covers multiple subjects; and (ii) was unconstitutionally presented through misleading ballot language that described only one of the multiple subjects addressed by the amendment.

INTRODUCTION

At issue in this case is the constitutionality of the amendment to the Georgia Constitution contained in Senate Resolution ("SR 595"), which appeared on the November 2, 2004 ballot as Amendment One to the Georgia Constitution ("Amendment One"). Amendment One is unconstitutional because: (i) it covers multiple subjects in violation of the well-established single-subject rule set forth in the Georgia Constitution,

see Ga. Const. Art. 10, § I, ¶ II; and (ii) the ballot language through which it was presented to the electorate was affirmatively misleading in violation of due process standards, *see* Ga. Const. Art. 1, § 1, ¶ 1.

FACTUAL AND PROCEDURAL HISTORY

The operative facts are not in dispute. On March 31, 2004, the Georgia House of Representatives approved SR 595, previously adopted by the Senate, which proposed an amendment to the Georgia Constitution that appeared on the November 2, 2004 ballot as Amendment One. Amendment One purports to accomplishes at least four separate objectives:

(1) Excluding same-sex couples from marriage;

(2) Prohibiting recognition or creation of legal "unions between persons of the same sex";

(3) Barring courts from recognizing certain judgments, acts and records from other states and jurisdictions, and;

(4) Divesting courts of jurisdiction to "rule on . . . rights arising out of such relationship."[1]

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[1] The actual language of Amendment One provides:

> (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.
>
> (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.

Despite the multiple subjects covered by Amendment One, the ballot language through which Amendment One was presented to the voters called for a vote on the following single question: "Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?" Contrary to the actual facts, the language through which Amendment One was presented to the voters suggested that the only subject of the amendment was creating a constitutional definition of marriage to include only the union of opposite-sex couples.

In *O'Kelley, et. al. v. Cathy Cox, in her official capacity as Secretary of State of Georgia,* Civil Action File No. CV-04-91122 ("*O'Kelley I*"), Plaintiffs Judith R.T. O'Kelley, Charles R.T. O'Kelley, St. John's Missionary Baptist Church, Rabbi Scott Saulson, Reverend Timothy McDonald III, Senator David Adelman, and Representative Tyrone Brooks ("Plaintiffs"), the same named Plaintiffs as in this case, filed suit against Cathy Cox, in her official capacity as Secretary of State on September 16, 2004, seeking to enjoin her from placing SR 595 on the November 2, 2004 ballot.

After hearing oral arguments on the merits on September 24, 2004, this Court asked the parties for supplemental briefing on the applicability of *Gaskins v. Dorsey*, 150 Ga. 638, 104 S.E. 433 (1920). On September 29, 2004, the Court entered a Final Order dismissing Plaintiffs' Complaint without prejudice on the sole ground that the *Gaskins* case deprived the Court of authority to grant any relief until after an election to ratify a proposed constitutional amendment had taken place. Accordingly, the Court did not address the merits of the constitutional violations raised in Plaintiffs' Complaint. On October 26, 2004, the Supreme Court affirmed this Court's dismissal of Plaintiffs' Complaint seeking pre-election relief, while holding that "the amendment in question

certainly can be challenged in the event that it is 'enacted' by virtue of approval by the voters." *O'Kelley v. Cox,* No. S05A0236, 2004 WL 2381798, at *2 (Ga. Oct. 26, 2004).

SR 595 appeared on the November 2, 2004 ballot as Amendment One. On November 9, 2004, Cathy Cox, in her official capacity as Secretary of State of Georgia, certified the results of the election ratifying Amendment One. Consistent with the Supreme Court's ruling in *O'Kelley I*, Plaintiffs have refiled their case in this Court post-election, raising the same core legal issues as were raised in *O'Kelley I.*

ARGUMENT AND AUTHORITY

I. JUDGMENT ON THE PLEADINGS STANDARD.

In deciding a motion for judgment on the pleadings, the court must determine whether the undisputed facts appearing from the pleadings entitle the movant to judgment as a matter of law. *Rolling Pin Kitchen Emporium, Inc. v. Kaas*, 241 Ga. App. 577, 578, 527 S.E.2d 248, 249 (1999).

Judgment on the pleadings in a declaratory judgment action is appropriate in a case where, as here, the constitutionality of an amendment to the Georgia Constitution can be determined "based upon the allegations of the complaint admitted by the defendant[] and based upon facts which, though not admitted, are deemed to be judicially known." *Carter v. Burson*, 230 Ga. 511, 516, 198 S.E.2d 151, 154 (1973) (reviewing judgment on the pleadings granted in a declaratory judgment action brought to challenge an amendment to the Georgia Constitution). Plaintiffs respectfully request that the Court grant their Motion for Judgment on the Pleadings because there are no disputed issues of fact and because Plaintiffs are entitled to judgment as a matter of law for the reasons stated herein.

II. AMENDMENT ONE VIOLATES THE SINGLE-SUBJECT RULE.

Georgia was the first state in the nation to adopt a "single-subject rule." *See Cady v. Jadine*, 185 Ga. 9, 10, 193 S.E. 869, 870 (1937).[2] As embodied in the Georgia Constitution, the single-subject rule provides that "[w]hen more than one amendment is submitted at the same time, they shall be submitted as to enable the electors to vote on each amendment separately . . . ." Ga. Const. Art. 10, § I, ¶ 2.[3] The language used is mandatory. *See Mead v. Sheffield*, 278 Ga. 268, 269, 601 S.E.2d 99, 100 (2004) ("'Shall' is generally construed as a word of command."). Accordingly, adherence to the single-subject rule is an absolute constitutional prerequisite to the presentation of any proposed amendment to the electorate.

"The obvious purpose of this constitutional provision is to prevent combinations by which different and distinct matters of proposed legislation are presented as one measure, whereby each of them gains strength and support which it would not have if it were presented solely upon its own merits and voted upon separately." *Carter v. Burson*, 230 Ga. 511, 519-20, 198 S.E.2d 151, 156 (1973); *see also Rea v. City of LaFayette,* 130 Ga. 771, 61 S.E. 707, 708 (1908) (holding that resolution to issue bonds for water, electricity and education purposes unconstitutionally combined multiple subject matters); *Brown v. State*, 79 Ga. 324, 4 S.E. 861, 862 (1887) (holding act unconstitutional when it contained two different subject matters).

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[2] Recognizing the wisdom of this rule, at least 41 states have followed Georgia's lead. *See Lutz v. Foran* 262 Ga. 819, 826 n.2, 427 S.E.2d 248, 254 n.2 (1993) (Sears, J. dissenting) (citations omitted).

[3] Georgia courts have "analogized the provisions of the Constitution respecting the inhibition against submitting more than one question at a time to the vote of the people to the constitutional inhibition against multiple subject matter legislation." *Carter v. Burson,* 230 Ga. 511, 518-19, 198 S.E. 2d 151, 156 (1973).

As discussed in more detail below, Amendment One violates the single-subject rule by including at least four separate subjects. The inclusion of these multiple subjects forced many voters to cast a vote contrary to their views on some subjects in order to cast a vote that was consistent with their views on other subjects. For example, a voter (such as Plaintiff Reverand McDonald) who supported Amendment One's definition of marriage, but who opposed the prohibition against recognition of civil union rights was left in a quandary, because a vote to support the restrictive definition of marriage necessarily required a simultaneous vote to prohibit recognition of civil union rights. Due to this impermissible combination of subject matters, it was impossible for such a voter to cast a vote fully consistent with his or her beliefs. Instead, the voter was required to sacrifice one belief in favor of the other. The Georgia Constitution's single-subject rule is designed to protect voters from such a Hobson's choice.

A. Amendment One Impermissibly Combines Four Separate Objectives.

Parts of a proposed constitutional amendment are considered a "single subject" only when they are germane to the accomplishment of a single objective "and nothing more." *Carter v. Burson,* 230 Ga. 511, 520, 198 S.E. 2d 151, 156 (1973); *Goldrush II v. City of Marietta,* 267 Ga. 683, 685, 482 S.E.2d 347, 352 (1997) (holding that regulation of a particular subset of alcoholic beverage sales is germane to regulation of alcoholic beverage sales generally); *Wall v. Bd. of Elections of Chatham County,* 242 Ga. 566, 570, 250 S.E.2d 408, 412 (1978) (upholding proposed amendment "where the initial question was whether something should be done and the additional questions were merely incidental to the accomplishment of it"); *Clark v. State,* 240 Ga. 188, 240 S.E.2d 5

(1977); *Sears v. State,* 232 Ga. 547, 208 S.E.2d 93 (1974); *Crews v. Cook,* 220 Ga. 479, 480, 139 S.E.2d 490, 492 (1964).[4]

The Supreme Court has made plain the policy behind the single-subject rule:

> Each proposition submitted to the voters should stand or fall upon its own merits, without, on the one hand, receiving any adventitious aid from another and perhaps more popular one . . . . ***No voter should be compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves*** . . . . When he is thus compelled, if he votes at all, there is something closely akin to coercion when his ballot is cast.

Rea, 130 Ga. at 772, 61 S.E. at 708 (emphasis added).

Because of its strong commitment to preventing legislative "log-rolling," even when the Georgia Supreme Court has rejected single-subject challenges, it has done so only after carefully concluding that the amendment did not violate the purpose of the rule. For example, in *Carter v. Burson,* 230 Ga. at 518-19, 198 S.E.2d at 155-56, the

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[4] While Georgia law alone supplies the answer to the question before this Court, it is worth noting that the single-subject rule has an impressive history and that Georgia is no outlier in requiring adherence to the rule. In *Rea*, the Supreme Court based its holding on similar bans against multiple issues in a single question from other states, including Illinois, Iowa, Missouri, Washington, Ohio and Kansas. *See id.* at 772, 61 S.E. at 708; *see also Solomon v. N. Shore Sanitary Dist.*, 269 N.E.2d 457, 462-63 (Ill. 1971) (noting that attempts to obtain the approval of several distinct and separate projects by one proposition on a ballot are void); *City of Leavenworth v. Wilson*, 76 P. 400, 401-02 (Kan. 1904) (holding that the purchase of waterworks or the erection of new ones were two distinct measures that could not be voted upon as a single issue without depriving voters of "the liberty of choice"); *Hensly v. City of Hamilton*, 2 Ohio Cir. Dec. 114 (1888) (stating that voters were improperly denied the option to vote for or against the purchase and construction of gas facilities separately, forcing a vote for both measures or against both measures); *Board of Supervisors v. Miss. & Wabash R.R. Co.*, 21 Ill. 338, 373 (1859) (holding that "log-rolling" a vote on two separate roads by combining them on the ballot as a single issue did not allow for each road to be voted on separately and was inherently unfair to voters); *accord Blaine v. City of Seattle*, 114 P. 164, 166-67 (Wash. 1911); *State ex rel. City of Bethany v. Allen*, 85 S.W. 531, 531-32 (Mo. 1905); *Gray v. Mount*, 45 Iowa 591, 596 (1877). Many other states have followed the lead of the *Rea* Court and its predecessors, creating a substantial body of law that prohibit multiple subject referenda that force voters to answer two questions with only one answer. *See, e.g., Regner v. Bayless*, 16 P.3d 209, 210 (Ariz. 2001) (citing requirement of the Arizona Constitution that if more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately); *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984) (holding that the Florida Supreme Court would require strict compliance with the single-subject rule in the initiative process for constitutional change, because the constitution is the basic document that controls the most important and sensitive governmental functions); *Solomon*, 269 N.E.2d at 462 (1971) (noting that attempts to obtain the approval of several distinct and separate projects by one proposition on a ballot are void).

Court rejected a single-subject challenge to an amendment that asked whether to abolish the name and office of State Treasurer on the grounds that there was no reason to believe that a voter who supported the abolition of the State Treasurer position would nonetheless support leaving the term "State Treasurer" in some clauses of the Constitution. *Id.* at 518-19, 198 S.E.2d at 155-56. While it did not find a violation under those particular circumstances, the *Carter* Court quoted 343 words from, and expressly reaffirmed its holding in *Rea*. *Id.* at 519-20, 198 S.E.2d at 156 (quoted above).

By linking separate topics about which many Georgia voters have conflicting views, Amendment One frustrates the "obvious purpose" of the single-subject rule. *Rea*, 130 Ga. at 773, 61 S.E. at 708. Violating the rule and its "obvious purpose," Amendment One is constitutionally unsound and should be declared as such.

1. Prohibiting Recognition of Other Unions Between Same-Sex Couples is a Different Subject than Defining Marriage.

Subsection (a) of Amendment One accomplishes a single objective concerning a single subject; it defines marriage as the union between a man and a woman. Subsection (b), however, addresses different and additional subjects. First, it prevents the state from recognizing any "union between persons of the same sex . . . as entitled to the benefits of marriage." This sweeping language addresses civil unions, reaching a separate subject from the definition of marriage.

Under established Georgia case law, "marriages" and "civil unions" are *not* the same. The Georgia Court of Appeals has held expressly that a civil union is different from marriage. In *Burns v. Burns*, 253 Ga. App. 600, 560 S.E.2d 47 (2002), a divorced man and woman entered into a consent visitation order that denied visitation rights to any party cohabiting with another adult outside of marriage. When Ms. Burns and her female

partner entered into a civil union in Vermont, her former husband filed a contempt motion alleging that she was not married to her partner and thus was in violation of the visitation restriction. Ms. Burns denied the contempt, contending that she was in fact married by virtue of her Vermont civil union.

Expressly recognizing a legal distinction between a Vermont civil union and marriage, the Court of Appeals rejected this argument, accepting the Vermont legislature's finding that "a system of civil unions does not bestow the status of civil marriage." *Id.* at 601, 560 S.E.2d at 48-49. Reviewing the statutory prohibition against same-sex marriage in Georgia, the Court of Appeals affirmed the trial court's finding that "a 'civil union' is not a marriage."[5] *Id.* at 601, 560 S.E.2d at 48.

Moreover, the text of Amendment One itself makes clear that separate subjects are addressed through the objectives accomplished in subsections (a) and (b). Subsection (a) provides that only couples of the opposite sex can be legally "married"– a status that conveys a host of critical legal and social information.

Subsection (b) addresses a significant and qualitatively different objective. By providing that "[n]o union between persons of the same sex shall be recognized as entitled to the *benefits* of marriage," subsection (b) treads on entirely different territory. Rather than simply reserving the legal status of "marriage" only to opposite-sex couples,

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[5] Other courts have reached similar conclusions when faced with similar issues. *See Knight v. Schwarzenegger*, No. 03AS05284, 2004 WL 2011407, at *5 (Cal. Super. Ct. Sept. 8, 2004) (holding that "[i]n the end, although [marriage and domestic partnership] now share many, if not most, of the same functional attributes they are inherently distinct"); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) (holding that "the dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous"). Moreover, the only type of relationship regulated by any of *Georgia's* marriage statutes is marriage itself, and none of these statutes mentions or purports to regulate civil unions. *See, e.g.*, O.C.G.A. § 19-3-1 (establishing the "essentials of marriage); O.C.G.A. § 19-3-3.1 (prohibiting marriage between persons of the same sex); O.C.G.A. § 19-3-1.1 (invalidating "common-law" marriages); O.C.G.A. § 19-3-6 ("Marriage is encouraged by the law."). Nowhere in the marriage statutes are civil unions mentioned. The reason for this statutory silence is clear: under Georgia law, civil unions are a different subject matter than marriage.

subsection (b) purports to prohibit the General Assembly in the future from extending to same-sex couples *any* of the rights and obligations that may also be described as among the "benefits of marriage."[6] Whether this objective is worthy or unworthy, it is a manifestly *different* objective than those accomplished by creating a constitutional definition of marriage. And, importantly, it is an objective about which many Georgia voters have a sharply different view than the view they hold about creating a constitutional definition of marriage. *See* Verified Complaint at ¶¶ 8-13; *see also* n. 7, *infra*.

For example, if a future General Assembly desired to provide for medical decision-making by certain same-sex partners, *i.e.*, decision-making rights analogous to the medical decision-making rights afforded to spouses in O.C.G.A. § 31-36A-6, no one would suggest that those partners were "married" as a result of the mere conferral of those rights. Indeed, such a suggestion would be absurd, both as a matter of common sense, and in the face of subsection (a), as a matter of law. Subsection (b), however, purports to impose a barrier to the conferral of such rights (assuming that these rights are properly considered among the "benefits of marriage"). In doing so, it addresses an entirely separate subject than the definition of marriage. As a result, Amendment One is constitutionally defective.

It is no answer to this defect for the Defendant to suggest (as was suggested in *O'Kelley I*) that the effects of subsection (b) are somehow "implied" by subsection (a) and that, in essence, subsection (b) is mere surplusage. Indeed, established rules of

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[6] Under Georgia statutory law, there are numerous legal incidents of marriage that, at least arguably, constitute some of the "benefits of marriage." *See, e.g.*, O.C.G.A. § 31-36A-6 (providing spouses with the right to make health care placement decisions on behalf of one another); O.C.G.A. § 53-2-8 (providing the spouse of an intestate decedent the right to a portion of the decedent's estate); O.C.G.A. § 53-2-8 (providing that spouses cannot be compelled to testify against one another.).

contruction in this State mandate the opposite conclusion. *See, e.g., Tolbert v. Maner*, 271 Ga. 207, 208, 518 S.E.2d 423, 425 (1999) (holding that courts must "avoid[] constructions that make any part of the statute mere surplusage"); *State v. Lockett*, 259 Ga. App. 179, 180, 576 S.E.2d 582, 584 (2003) (holding that courts must "avoid constructions which result in surplusage and meaningless language").

In summary, Subsection (a) of Amendment One legally defines marriage as only the union of opposite-sex couples. Subsection (b), however, purports to the bar the legal benefits, if any, that the General Assembly in the future might otherwise afford to the union of same-sex couples. Because (i) the Georgia Court of Appeals has ruled as a matter of law that a civil union is different from a marriage under Georgia law, and (ii) different and far-reaching objectives are accomplished by subsection (b) of Amendment One that are not addressed by subsection (a), Amendment One encompasses multiple subjects and accomplishes multiple objectives in violation of the single-subject rule of the Georgia Constitution.

2. Stripping Georgia Courts of Jurisdiction is a Different Subject than Defining Marriage.

Civil unions and the rights that the General Assembly would otherwise remain free to afford such unions are not the only additional subjects addressed by Amendment One. Subsection (b) of Amendment One also purports to modify the jurisdiction of the courts of this State. This jurisdictional modification is conceptually distinct from, and extends far beyond, the creation of a constitutional definition of marriage.

The Georgia Constitution grants to the Superior Courts of this State subject matter jurisdiction over "all cases, except as otherwise provided in this Constitution" and otherwise defines the jurisdiction of Georgia courts. Ga. Const. Art. 6, § IV, ¶ 1; *see*

also, e.g., Ga. Const. Art. VI, § I, ¶ 4. (providing grant of power to order specific types of relief); Ga. Const. Art. VI, § V, ¶ 3 (providing for jurisdiction of the Court of Appeals).

Subsection (b) of Amendment One modifies the foregoing constitutional provisions by stripping Georgia courts of subject matter jurisdiction to rule on *any* of the parties' respective rights "arising as a result of or in connection with" certain same-sex relationships, as follows: "The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship."

Even if the words "such relationship" are read narrowly, so as to address only relationships "treated as a marriage" under the laws of another jurisdiction, the objective accomplished by this jurisdictional stripping provision is wholly different from the objective accomplished by the constitutional definition of marriage established by subsection (a). Consider the hypothetical example of a same-sex couple ("Party A" and "Party B") formerly married under the laws of the State of Massachusetts, but who obtain a divorce under the laws of that jurisdiction. Assume further that the divorce decree provides for the division of certain property, awarding ownership of funds in a certain bank account to Party A. After the decree, Party A and Party B (who were never married under Georgia law) are not married under the laws of *any jurisdiction.* Nevertheless, if Party B absconds to Georgia with the funds in the bank account at issue, Party A may be unable to invoke the jurisdiction of the Georgia courts to obtain a Georgia judgment against Party B, given that the judgment appears to be a "right[] arising as a result of or in connection with such relationship."

Shutting the courthouse door to Party A accomplishes a wholly different objective than mandating that Parties A and B were never married in the eyes of Georgia law (a point never at issue). The single-subject rule does not permit both of these objectives to be accomplished in the guise of a single amendment.

Altering the constitutionally established jurisdiction of the courts is not only a serious matter, but is also an unequivocally different subject from "constitutionalizing" the definition of marriage already contained in existing statutory law. While the Georgia Constitution certainly permits the jurisdiction of the Georgia courts to be modified through the amendment process, this modification still must comply with the single-subject rule. Because Amendment One links a sweeping jurisdictional modification with the distinct topic of the definition of marriage, it violates the single-subject rule and is unconstitutional.

3. Barring the State from Giving Effect to Acts and Judgments of Other States is a Different Subject than Defining Marriage.

Subsection (b) of Amendment One also provides that the State "shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction." Again, this provision is wholly distinct from creating a constitutional definition of marriage.

Georgia courts recognize foreign judgments absent fraud or lack of personal jurisdiction. *See Davis v. Smith*, 5 Ga. 274 (1848); *Johnson v. Equicredit Corp.*, 238 Ga. App. 380, 517 S.E.2d 353 (1999); O.C.G.A. § 9-12-130 to -138. Indeed, "such a judgment is *res judicata* between the parties." *Sundman v. Faris*, 254 Ga. App. 185, 186, 561 S.E.2d 442, 444 (2002).

Even when based on an act or transaction not permissible in Georgia, a foreign "judgment is nevertheless entitled to full faith and credit" in Georgia courts. *Cannon v. Cannon*, 244 Ga. 299, 299, 260 S.E.2d 19, 20 (1979) (holding that a judgment based on North Carolina contract was entitled to full faith and credit even though the underlying contract contravened Georgia public policy); *see also Hargreaves v. Great Bay Hotel & Casino*, 182 Ga. App. 852, 852, 357 S.E.2d 305, 305 (1987) (holding that an out-of-state judgment based on a gambling debt is entitled to full faith and credit even though "it is against the public policy of the State of Georgia to enforce such a debt").

Subsection (b) of Amendment One purports to constitutionally repeal the longstanding principle that all valid judgments from other states must be given credit by Georgia courts. Similar to the withdrawal of subject matter jurisdiction, this is a wholly different proposition from defining marriage in this State. Therefore, Amendment One violates the single-subject rule.

B. Amendment One Confronted Voters With an Unconstitutional Dilemma at the Voting Booth.

Through its disregard of the single-subject rule, Amendment One presented an unconstitutional dilemma to Georgia voters who favor restricting marriage to opposite-sex couples, but who nevertheless disfavor the other effects of subsection (b). Due to the unconstitutional linkage of these separate topics, Georgia voters were forced either to vote to support all of the subjects or to oppose them entirely.

The Supreme Court has consistently reaffirmed that the single-subject rule's fundamental purpose is to prevent "log-rolling," or compelling voters to endorse a proposition they oppose in order to enact another proposition which they support. *See Carter,* 230 Ga. at 519, 198 S.E.2d at 156; *Am. Booksellers Ass'n v. Webb*, 254 Ga. 399,

329 S.E.2d 495 (1985) (discussing constitutional prohibition against omnibus or "log-rolling" bills that secure passage of several measures no one of which could succeed upon its own merits).

The coercion that results from such a legislative "tying arrangement" is inappropriate even when the two linked propositions might at first appear to be tangentially related. *Rea,* 130 Ga. at 772, 61 S.E. at 708. For example, in *Rea,* a municipality could not ask its voters in a single resolution to approve bonds both for improving public schools and for investing in infrastructure. *Id.* at 777-78, 61 S.E. at 710. While both parts of the resolution related at some level to the subject of incurring public debt, providing adequate accommodations for public schools might have been so popular as to force voters to accept other infrastructural improvements that they disapproved. *Id.*

Without doubt, the General Assembly has the authority to present more than one question to the voters, if it does so properly.[7] As the Georgia Supreme Court has recognized:

> [T]wo or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together to stand or fall upon a single vote.

Id. at 776, 61 S.E. at 709 (citation omitted).

Here, Amendment One presents precisely the same problem condemned by the Supreme Court in *Rea*. Amendment One forced many voters to endorse a result they oppose (*e.g.*, barring same-sex couples from potential future access to civil union rights),

[7] Indeed, the General Assembly was presented with, but rejected, the opportunity to correct the single-subject rule infirmity of the Proposed Amendment by deleting subsection (b). *See* Verified Complaint at ¶ 13.

in order to enact another proposition they support (limiting marriage to opposite-sex couples).[8] By voting "yes" on the Amendment, such a voter was "compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves." *Rea,* 130 Ga. at 772, 61 S.E. at 708. Alternatively, by voting "no" the voter was compelled, "in order to vote against the proposition which he desires to defeat, to vote also against the one which commends itself to the approval of his judgment." *Id.*; *see also* Verified Complaint at ¶¶ 8-13. The unconstitutional linkage of the assorted subject matters addressed by Amendment One thus strikes at the very core of the ability of a citizen to vote his or her conscience, completely, freely and without contradiction. The single-subject rule is expressly designed to protect the Georgia citizens and voters from such harm, and it is the right of every Georgia citizen to be free from governance by a constitutional amendment passed in violation of that rule.

III. THE BALLOT LANGUAGE BY WHICH AMENDMENT ONE IS TO BE PRESENTED TO THE VOTERS CANNOT WITHSTAND EVEN MINIMAL JUDICIAL SCRUTINY AND VIOLATES DUE PROCESS

The language through which Amendment One was presented to the electorate affirmatively disguised the sweeping impact of the amendment and thus denied Georgia voters the due process right to a fair and meaningful vote. Because the ballot language selected by the General Assembly referenced only the portion of Amendment One creating a constitutional definition of marriage, it did not reflect that Amendment One actually incorporates *four distinct changes* to the Georgia Constitution.

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[8] While the sanctity of the constitutional rights at stake in this case do not depend upon the number of people affected by their invasion, statistical data suggests that between 15% and 55% of voters oppose marriage by same-sex couples but are in favor of civil union rights. *See, e.g.,* http://www.pollingreport.com/civil.htm (compiling recent polling data revealing that Americans view marriage differently from legal unions which provide economic and social benefits for same-sex couples).

The integrity of the ballot is of the utmost importance to the validity of an election. Courts have consistently acknowledged the importance of ballots themselves in complying with constitutional voting requirements. As recently as this fall, in the case of *Mead v. Sheffield*, the Georgia Supreme Court reaffirmed that when a vote is marred by "'an essential prerequisite to the holding of a valid election, such as . . . the contents of the ballot itself, the election is, of course, invalid.'" 278 Ga. at 270, 601 S.E.2d at 101 (quoting *State v. Carswell*, 78 Ga. App. 84, 88, 50 S.E.2d 621, 624 (1948)); *see also Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

When a proposed constitutional amendment is presented for a vote, Georgia law generally grants the General Assembly authority to choose the language that appears on the ballot. *See* Ga. Const. Art. X, § I, ¶ II. Historically, the Georgia General Assembly enacted legislation empowering the Governor to draft ballot language, subject to the requirement that the ballot language be sufficient to allow the voters "to intelligently pass upon any such proposed amendment." 1939 Ga. Laws 305, 306 (repealed by 1962 Ga. Laws 618). The language of this delegating legislation, requiring that ballot language allow voters to vote "intelligently," triggered heightened judicial review of ballot language. *See, e.g., Seago v. Richmond County*, 218 Ga. 151, 126 S.E.2d 657 (1962) (finding ballot language insufficient). In 1962, however, the General Assembly repealed the delegating legislation, restoring its own responsibility for ballot language and in the process deleting the legislated requirements for ballot language sufficiency. Even so, ballot language must comport with underlying constitutional requirements.

Georgia courts thus continue to review ballot language to ensure that it meets "the requirement that the language be adequate to enable the voters to ascertain on which amendment they are voting." *Sears v. State,* 232 Ga. 547, 555, 208 S.E.2d 93, 99 (1974); *see also e.g. id.* at 556, 208 S.E.2d at 100 ("[T]he ballot language here in issue shows itself upon examination to be adequate . . . ."); *Carter*, 230 Ga. at 522, 198 S.E.2d at 157 ("The language which was printed on the ballots in this case was clearly sufficient to identify the amendment which the electorate was called upon to ratify or reject."); *Donaldson v. Department of Transp.*, 262 Ga. 49, 51-52, 414 S.E.2d 638, 640 (1992) (determining that the amendment at issue was sufficiently identified and otherwise observing that "a careful comparison of the amendment and the ballot language reveals that the ballot language at issue here is not inaccurate or 'affirmatively misleading' . . ."). Courts reviewing ballot language will defer to the General Assembly's designated language so long as the language comports with basic constitutional requirements. *See, e.g., Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997); *McLennan v. Aldredge*, 223 Ga. 879, 159 S.E.2d (1968).

In *Sears v. State*, although conducting only minimal judicial review, the Supreme Court suggested the General Assembly's discretion in drafting ballot language should not be unfettered. While ultimately upholding the ballot language at issue, the Supreme Court decried the use of the ballot as a tool of propaganda. *Sears,* 232 Ga. at 555-56, 208 S.E.2d at 100 (recognizing that, when choosing ballot language " the legislature . . . exposes itself to the temptation . . . to interject its own value judgments . . . and thus [can] propagandize the voters in the very voting booth, in denigration of the integrity of the ballot").

More recently, in the 1992 case of *Donaldson v. Department of Transportation*, the Supreme Court went further in expressing its view that ballot language should accurately convey the purpose and effect of a proposed amendment: "[W]e believe that the legislature should in every instance strive to draft ballot language that leaves no doubt in the minds of the voters as to the *purpose and effect* of each proposed constitutional amendment . . . ." *Donaldson*, 262 Ga. at 51, 414 S.E.2d at 640 (emphasis added). Although the majority found the challenged ballot language sufficient to identify the amendment at issue, the Supreme Court's language demonstrates its belief that the General Assembly should choose language that accurately informs voters of a proposed amendment's purpose and effect.[9]

Even under the applicable minimal judicial review, the ballot language selected by the General Assembly to present Amendment One warrants judicial intervention. The General Assembly has gone too far. While it is true enough that the ballot language allowed voters to ascertain that they were voting on an amendment concerning the definition of marriage, the ballot language was manifestly insufficient to indicate that voters were also voting on an amendment that purports to: (i) affect the recognition of civil unions and inhibit the General Assembly in the future, if it desired, from conferring

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[9] While the method of choosing ballot language varies from state to state, most states recognize that ballot language can at some point become so inadequate or misleading as to compromise fundamental due process requirements. *See, e.g., Nesbitt v. Myers*, 73 P.3d 925 (Or. 2003) (striking ballot language because it failed to identify the second subject in Amendment One); *Fla. Ass'n of Realtors, Inc. v. Smith*, 825 So. 2d 532, 540 (Fla. 1st DCA 2002) (striking ballot language because it "would not fairly, clearly, and unambiguously advise voters of the substance of the proposed constitutional amendment"); *Broadwell v. Grice (In re Title, Ballot Title & Submission Clause, & Summary Pertaining to the Proposed Initiative Designated "Governmental Business")*, 875 P.2d 871, 875-77 (Colo. 1994) (holding that ballot language referencing "consumer protection" and "open government" was improper because it was "misleading inasmuch as it emphasizes a single aspect of the Initiative that is distinct from and unrelated to the much broader intent of the Initiative"); *Smith v. American Airlines, Inc.*, 606 So.2d 618, 621 (Fla. 1992) (striking ballot language because it failed to advise voters that taxes on the property at issue could increase by as much as fifteen times the current rate); *Say v. Baker*, 322 P.2d 317, 320 (Colo. 1958) (striking ballot language because the phrase "Freedom to Work" contained in the ballot title and submission clause constituted a catch phrase).

certain benefits on same-sex couples; (ii) restrict the jurisdiction of the Georgia courts; and (iii) deny full faith and credit to certain judgments and acts of other states.

Moreover, the ballot language chosen by the General Assembly enhanced the probability of ratification by minimizing and disguising Amendment One's true consequences. While *Sears* and *Donaldson* call for highly deferential review concerning the "ascertainment" or "identity" of a given amendment, the Supreme Court has never endorsed the proposition that the General Assembly may abuse the amendment process through ballot language comprised of half truths (or in this case, quarter truths). The General Assembly's power to select ballot language is not and cannot be absolute. The affirmatively misleading ballot language through which Amendment One was presented to Georgia voters cannot survive even deferential review.

CONCLUSION

Amendment One is constitutionally defective because it violates both the single-subject rule and due process. Until Amendment One, the courts in Georgia have never been confronted with a circumstance in which the General Assembly *both* violated the single-subject rule *and* described only one component of an omnibus constitutional amendment. This perfect storm of electoral unconstitutionality cannot be indulged.

Addressing the pure questions of law raised by this case, this Court should declare that Amendment One violates the single-subject rule and is constitutionally deficient as a result of the language by which it was presented to the voters on the ballot. Alternatively, in the event that this Court should conclude that a severability analysis is applicable to constitutional amendments in Georgia (a question not yet decided by the Georgia courts), this Court should sever subsection (b), the effects of which were not identified on the ballot, as extraneous to and distinct from the central and stated purpose of Amendment One, *i.e.*, the definition of marriage.[10]

Respectfully submitted this 6TH day of December, 2004.

[Signatures appear on following page.]

[10] *See Ray v. Mortham*, 742 So.2d 1276, 1280-1281 (Fla. 1999) (applying Florida's statutory severability analysis to constitutional amendment); *State ex rel. Ohio AFL-CIO v. Voinovich*, 631 N.E.2d 582, 587 (Ohio 1994) (severing statute to cure single-subject rule violation); *Holmes v. Traweek*, 276 Ga. 296, 297, 577 S.E.2d 777, 779 (2003) (setting forth Georgia's statutory severability analysis); *But see, e.g., Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 832 (Mo. 1990) (declining to sever a constitutional amendment that violated Missouri's single-subject requirement).

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Judith R.T. O'Kelley, Charles R.T. O'Kelley, St. Johns Missionary Baptist Church, Rabbi Scott Saulson, Reverend Timothy McDonald III, Senator David Adelman, Representative Tyrone Brooks,	)	
Plaintiffs,	)	**CASE NO. 2004CV93494**
vs.	)	
Sonny Perdue, in his official capacity as Governor of the State of Georgia,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

This is to certify that the foregoing "Memorandum of Law in Support of Plaintiffs' Motion for Judgment on the Pleadings" has been served this day by facsimile transmission and by electronic mail to the following counsel of record for Defendant via the facsimile number and electronic mail address indicated below:

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This 6TH day of December, 2004.

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