

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

DOCKET NO. 2004-CE-2182

FORUM FOR EQUALITY PAC, ET AL
Plaintiffs-Appellees

VERSUS

THE HONORABLE W. FOX McKEITHEN, ET AL
Defendants-Appellants

ON CIVIL APPEAL FROM
THE NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

HONORABLE WILLIAM A. MORVANT
JUDGE, PRESIDING
SUIT NO. 524,948, Sec. "23"

INTERVENORS/APPELLANTS' ORIGINAL BRIEF

Filed on Behalf of

HON. HEULETTE "CLO" FONTENOT, State Senator, HON. JOHN J. HAINKEL, JR.,
State Senator, HON. A.G. CROWE, State Representative, HON. STEVE J. SCALISE, State
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STATEMENT OF JURISDICTION

This Honorable Court has appellate jurisdiction in this matter in accordance with Article V, Section 10 of the Louisiana Constitution.

STATEMENT OF THE CASE

The case on appeal presents a challenge to the content of a proposed constitutional amendment that would define and protect the traditional paradigm for marriage in the State of Louisiana. Constitutional Amendment No. 1, also known as House Bill 61 and Act No. 926 of the 2004 Regular Session of the Louisiana Legislature, proposes to add Article XII, Section 15 of the Constitution of Louisiana, to read as follows:

§ 15. Defense of Marriage

Section 15. Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

The proposed amendment was first approved and placed on the ballot by a wide margin of legislators (119 to 19) in the 2004 Regular Session of the Legislature of Louisiana. By joint resolution and pursuant to constitutional guidelines, the Legislature specified Saturday, September 18, 2004, as the date of the statewide election on this proposal. The election was duly held, and the outcome was a landslide. As presented to the court below (Evidence record, D-4) the Secretary of State's official election results show, the measure was ***approved by 77.78% of the electorate*** (619,908 votes for; 177,067 against).

Several of the plaintiffs participating herein brought pre-election challenges to Amendment No.1. None of those three cases were successful. On October 1, 2004, plaintiffs filed this Petition Objecting to Election Upon Proposed

Constitutional Amendment and a request for stay of its effect. Their petition included six counts: I) fatal irregularities in the election in Orleans Parish; II) a fatally defective Election Code; III) violation of Louisiana's Declaration of Rights; IV) multiple objectives of a single amendment; V) violation of a prefiling requirement; and VI) lack of a statewide election. Defendants filed Exceptions of *Res Judicata* and No Cause of Action, as well as opposition memoranda to plaintiffs' Petition. Intervenors filed a Petition to Intervene and opposition memoranda to plaintiffs' Petition.

ACTION OF THE TRIAL COURT

Trial was held, pursuant to La. R.S. 18:1409, on October 5, 2004, before the Hon. William A. Morvant of the Nineteenth Judicial District Court. On October 6, 2004, final judgment was signed (Appendix 1), and for the Reasons for Judgment stated from the Bench (Appendix 2), the court: 1) granted the Petition for Intervention; 2) granted defendants' Exception of *Res Judicata* as to Count VI against all plaintiffs; 3) declined as unnecessary to rule upon Counts I, II, III and V; 4) granted judgment in favor of all plaintiffs and against all defendants and intervenors/defendants on Count IV, invalidating the September 18, 2004 election, and declaring Amendment No.1 unconstitutional and in violation of Article XIII, Section 1(B) of the Constitution of Louisiana; and 5) stayed the effect and issuance of any proclamation of Amendment No.1, to permit this appeal. Defendants and intervenors jointly filed a Motion and Order for Suspensive Appeal on October 7, 2004, which was signed that same day.

SPECIFICATION OF ERRORS

1. The trial court erred when it invalidated the September 18, 2004 election, and declared Amendment No.1 unconstitutional and in violation of Article XIII, Section 1(B) of the 1974 Constitution of Louisiana. (Record, p. 106)
2. The trial court erred when it declined to rule upon Counts I, II, III and V in favor of defendants and intervenors. (Record, p. 105)

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it failed to rule that the proposed Amendment No.1 confines itself to a single, permissible object.
2. Whether the trial court erred when it failed to grant judgment against plaintiffs on Count I, and rule that any election irregularities experienced in Orleans Parish were insufficient to invalidate the statewide election.
3. Whether the trial court erred when it failed to grant judgment against plaintiffs on Count II, and rule that the Louisiana Election Code sufficiently provides for the conduct and regulation of all elections.
4. Whether the trial court erred when it failed to grant judgment against plaintiffs on Count III, and rule that Amendment No.1 does not violate the Louisiana Declaration of Rights.
5. Whether the trial court erred when it failed to grant judgment against plaintiffs on Count V, and rule that Amendment No.1 did not violate the prefiling requirement.

MAY IT PLEASE THE COURT:

LAW AND ARGUMENT

The trial court erred when it invalidated the September 18, 2004 election, and declared Amendment No. 1 unconstitutional as a violation of Article XIII, § 1(B) of the 1974 Constitution of Louisiana. The court failed to recognize that Amendment No. 1 consists of only one object. The trial court further erred when it declined to rule in favor of defendants and intervenors upon Counts I, II, III, and V of plaintiffs’ petition. Accordingly, the decision below must be reversed, its stay lifted, and judgment rendered in favor of all appellants, to allow Amendment No. 1 to be duly proclaimed as law.

I. AMENDMENT NO. 1 IS CONFINED TO ONE LEGITIMATE AND NECESSARY OBJECT.

The trial court misunderstood the purpose and effect of Amendment No. 1, and thus its ruling—in favor of plaintiffs on their Count IV—is based upon a faulty premise. The court summarized its analysis as follows (emphasis added):

As I look at this case, it’s simply about compliance with the provisions of article XIII, section 1, of the Louisiana constitution of 1974 relative to the amendments to that constitution. . . .At most, **it contains only two objects**, those being same-sex marriages and same-sex civil unions or domestic partnerships. [Record, p. 222]

. . . **I feel [the third sentence of Amendment No. 1] constitutes a separate and distinct object** which, under the provisions of article XIII, section 1.(B), require[s] a separate amendment or proposal to address that object. [Record, p. 225]

Intervenors/Appellants show that the court erred in finding more than one object, and that Amendment No. 1 does in fact fully comply with Article XIII, § 1(B).

Pursuant to the first requirement of Article XIII, § 1(B), Amendment No. 1 bears “a title containing a brief summary of the changes proposed.” As its name clearly implies, the amendment regards the “*Defense of Marriage*” in Louisiana. Simply put, the “Defense of Marriage” is the amendment’s title AND its sole object. The single, legitimate, and necessary objective of Amendment No. 1 is to

protect marriage from *all perceived threats*. That is what the Legislature and the people intended, and that is why Amendment No. 1 was drafted precisely as it was.

A. SENTENCE THREE IS ESSENTIAL TO THE AMENDMENT’S SINGLE OBJECT.

In its final form, Amendment No. 1 (proposed Art. XII, § 15) reads simply:

§ 15. Defense of Marriage

Section 15. Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

In finding the third sentence above problematic, the trial court failed to recognize that provision as an essential component of the amendment’s objective. The legislation must be understood in its proper context.

1. The Catalysts for Amendment No. 1.

The creation of Amendment No. 1 was prompted by current events. As the Legislature convened for its 2004 Regular Session in March, state leaders were observing an alarming cultural trend in other states and across the globe: the institution of traditional marriage was under increasing assault. A brief review of this history is important to explain why Amendment No. 1 consists of a single, permissible object.

Beginning in the early 1990s, legal demands for same-sex “marriage” were brought to state courts in both Alaska and Hawaii. In Hawaii, the court ruled that homosexual couples must be allowed to marry.¹ The decision created a backlash there, and the people voted to amend their state constitution (HI. CONST. Art. I, § 23) to effectively overturn the ruling. The case also compelled Congress to pass the federal Defense of Marriage Act (DOMA) in 1996, which defines marriage as a

¹ In *Baehr v. Lewin*, 852 P.2d 44 (Hi. 1993), the court held that there was no fundamental right to same-sex “marriage” in Hawaii, but also held that the homosexuals’ claim of sex discrimination was subject to a strict scrutiny test, with the burden of proof on the state. After remand and a trial, the trial court ruled in 1996 that Hawaii’s marriage laws violated the state’s Equal Rights Amendment.

legal union between one man and one woman for purposes of all federal laws, and provides that states need not recognize a marriage from another state if it is between persons of the same sex.²

Confirming the overwhelming national consensus in favor of protecting traditional marriage, thirty-eight other states, including Louisiana, soon passed their own Defense of Marriage Acts (DOMAs). Some of these were in the form of constitutional amendments, but others were only state statutes—that remained vulnerable to attack on state constitutional grounds.

In 1999, the advocates of same-sex marriage scored their first major victory. In *Baker v. State*, 744 A.2d 864 (Vt. 1999), the Vermont Supreme Court ruled that same-sex couples are entitled to the same benefits and protections as married couples, but held that there is no fundamental right to same-sex “marriage.” The court thus compelled the legislature to create *an equivalent to marriage*, that it called “civil unions.” “Civil union” partners are treated as, and bestowed with the same benefits and protections of, “spouses” for purposes of Vermont law.³

Meanwhile, overseas, other new varieties of “*faux* marriages” were being instituted. In 1999, France created the *pactes civils de solidarite* (PaCS), a marriage-like legal status that allows persons of the same or opposite sex to pledge mutual support and receive benefits without the obligations and formalities of marriage. In 2001, the Netherlands became the first country to legalize same-sex marriages, and Belgium did the same in early 2003.⁴

² The legislative history reflects a congressional concern about the effect that legalizing same-sex “marriage” in Hawaii would have on other states, federal laws, the institution of marriage, traditional notions of morality, and state sovereignty. H.R. Rep. No. 104-664 at 1-18 (1996), reprinted in 1996 U.S.C.C.A.N. 2905-23. DOMA was signed into law by President Clinton and codified at 1 U.S.C. § 7, and 28 U.S.C. § 1738C.

³ As Yale Law Professor William N. Eskridge, Jr., summarizes, Vermont’s law “allows same-sex couples to create ‘civil unions’ whereby they can obtain all the state benefits and obligations of marriage—but without the name.” See William N. Eskridge, Jr., *The Emerging Menu of Quasi-Marriage Options* (July 7, 2000) at http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/commentary/20000707_eskridge.html

In the summer of 2003, the trend then spread to this hemisphere. On June 10th, the highest court in Ontario ruled that the Canadian Charter of Rights and Freedoms provides a right to same-sex “marriage.” Sixteen days later, the U.S. Supreme Court issued its landmark ruling in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), which many interpret as declaring for the first time a constitutional right to homosexual sodomy. With the momentum provided by *Lawrence*, homosexual activists excitedly announced in the media that marriage itself would be their next conquest.

On November 18, 2003, the Massachusetts Supreme Judicial Court triggered the perfect storm. On that date, it handed down its decision in *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003), in which four judges ruled that same-sex couples have a constitutional right to marry under the Massachusetts equal protection and due process clauses. The court altered the centuries-old definition of marriage “to [now] mean the voluntary union of two persons as spouses, to the exclusion of all others.” On May 17, 2004, Massachusetts began issuing the first legal same-sex marriage licenses in U.S. history.

Not to be outdone, Mayor Gavin Newsom of San Francisco announced on February 12, 2004, that he would begin issuing same-sex marriage licenses of his own at City Hall. As thousands of homosexual couples rushed to San Francisco to get “married,” several renegade local officials in New York, New Mexico, and Oregon began offering the same service. Legal actions by private parties and the state attorneys general were ultimately required to restore order to the chaos and enjoin the illicit same-sex “marriage” ceremonies in each jurisdiction.⁵

2. The Object of Amendment No. 1 is to Defend Marriage.

⁴ A study released March 1, 2004, indicated that divorce risks are considerably higher in same-sex “marriages” than in opposite sex marriages, which has a detrimental effect on children. Gunnar Andersson, Turid Noack, Haral Weedon-Fekjar, *Divorce Risk Patterns in Same-Sex “Marriages” in Norway and Sweden*.

⁵ The Alliance Defense Fund, counsel for intervenors/appellants herein, also served as counsel in several of those actions. *See, e.g., Lockyer v. City & County of San Francisco*, consolidated with *Lewis v. Alfaro*, ___ Cal. Rptr. 3d ___, 2004 WL 1794627 (Cal., Aug 12, 2004).

With this as its setting, the 2004 Regular Session of the Louisiana Legislature convened in March. Legislators were painfully aware of the numerous and developing threats to traditional marriage, and many felt a sense of urgency to do all within their power to protect the institution. They wanted to defend marriage *on all flanks*, and recognized that our existing DOMA provisions (*e.g.*, La. Civ. Code arts. 86, 89, 96 and 3520) would be stronger if made a part of the constitution. Louisiana sought to follow the four other states—Alaska and Hawaii (1998), Nebraska (2000), and Nevada (2002)—where amendments protecting traditional marriage had already been overwhelmingly approved by the people.⁶

The challenge was for legislators to draft concise, but all-inclusive, language *to accomplish their objective of defending marriage*. They needed to ensure that with just one short paragraph they could protect marriage in this state against the numerous equal and impending threats on the horizon, including: same-sex "marriages" like those contracted in Massachusetts; French *pactes civils de solidarite* (PaCS) and other European-recognized varieties of "faux marriages;" Vermont-style "Civil Unions;" and other forms and counterfeits that may yet be identified or created.

3. An Adequate Defense of Marriage Required Four Sentences.

By necessity, the drafters of Amendment No. 1 included four essential sentences. In light of current events, the Legislature knew it had to defend marriage against: redefinition, as legal challenges in Alaska and Hawaii had attempted (ADDRESSED BY SENTENCE ONE); lawless acts by public officials (*e.g.*, San Francisco's Mayor) and decisions by courts interpreting our existing constitution (*e.g.*, Massachusetts ruling in *Goodridge*) (ADDRESSED BY SENTENCE TWO); other alternative, legally recognized arrangements that would rival marriage (*e.g.*, PaCS,

⁶ Since the Session, Missouri has passed its own amendment (71% in favor) on August 3, 2004, and eleven other states (AR, GA, KY, MI, MS, MT, ND, OH, OK, OR and UT) are scheduled to vote on similar amendments on November 2, 2004.

"faux marriages," Vermont-style "Civil Unions," and others) (ADDRESSED BY *SENTENCE THREE*); and lastly, recognition of unions in violation of the above from other states (ADDRESSED BY *SENTENCE FOUR*). The Legislature's sole objective—to defend marriage—could not be adequately accomplished without the inclusion of all four sentences above, and sentence three is an inseparable component of this objective.

Read and understood in its context, this makes perfect sense. There is no ambiguity in the language of sentence three, and this is the best evidence of its intent: "*A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.*" (Emphasis added.) Because "marriage" is repeated here, this clarifies what other types of relationships are meant and proscribed. The trial court erred in its finding that "this appears to be a catchall provision applying to all other situations or contracts other than same-sex marriage." (Record, p. 225) Sentence three clearly does not apply to "all other situations or contracts." Any layperson can read the proposed amendment and discern that sentence three specifically prohibits any new "**legal status**" (created and recognized by law) that looks like "**marriage**" (already defined in the preceding sentence one as the union of one man and one woman). In fact, well over 600,000 laypersons did just that on September 18th.

It is important to note that sentence three would *not* on its face proscribe such arrangements as employers providing health benefits to whomever they see fit, and the making and enforcement of private contracts, estate planning documents, donations *inter vivos* and *mortis causa*, and other private property arrangements between homosexual and/or heterosexual persons.

On the other hand, it is clear that after the passage of Amendment No. 1, no new statutorily-created parallel or counterfeit to marriage in Louisiana will be allowed. Any legal animal that is "*identical*" or "*substantially similar*" to

marriage will be prohibited. Because a Vermont-style “Civil Union,” for example, is “*a comprehensive legal status parallel to civil marriage for all purposes under Vermont state law,*”⁷ no such paradigm could exist here. All counterfeits and challengers of traditional marriage were perceived by the Legislature and the overwhelming majority of voters as equal threats. It is the people’s right to amend their constitution to add the appropriate protections offered by Amendment No. 1.

A simple analogy is useful to explain the error of the trial court’s reasoning. Assume, for example, that the Legislature desired to create a constitutional amendment to define what money is (and what it looks like). According to the logic of the court below, the Legislature could not—in that same amendment—also exclude counterfeits. It is silly to suggest in this scenario that lawmakers would need to create a separate amendment to cover and proscribe counterfeit money. These elements are each a logical part of *one objective*. So it is with the components of Amendment No. 1.

4. The State Can and Should Pursue the Important Object of Amendment No. 1.

The State of Louisiana, her people, and their governmental institutions have a strong interest in preserving and defending the institution of marriage. The United States Supreme Court has historically affirmed that this interest must be honored. *Reynolds v. United States*, 98 U.S. 145 (1878), involved a First Amendment Free Exercise of Religion Clause challenge to a federal law banning

⁷ For an accurate description of this legal status, see *A Historic Victory: Civil Unions for Same-Sex Couples--What’s Next!*, at http://archive.aclu.org/issues/gay/civil_union_publ.html:

What is a Civil Union? A civil union is a comprehensive legal status parallel to civil marriage for all purposes under Vermont state law. As of July 1, 2000, a same-sex couple from any state . . . may apply to Vermont town clerks for a civil union license, have that license “certified” by a judge, justice of the peace or willing member of the clergy, and then receive a civil union certificate. This process parallels Vermont law on entering into a civil marriage. . . . According to the Vermont civil union law, spouses in a civil union will enjoy the same state law protections and responsibilities as are available to spouses in a marriage. Thus, under Vermont law, all legal rights which apply to “family,” “immediate family,” “dependent,” and “next of kin” also apply to spouses in a civil union. The civil union law is supposed to be “construed broadly in order to secure eligible same-sex couples the option of a legal status with the benefits and protections of civil marriage...” Vermonters who enter into a civil union with a same-sex partner will be treated as married for purposes of the laws of Vermont. They will go from being “legal strangers” to being “legal next of kin” as described above.

bigamy, in what was then the Territory of Utah. The Court found the statute constitutional because the legislature had a compelling interest in preserving conventional marriage consisting of one man and one woman. *Id.* at 165. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citing *Reynolds*).

In *Lawrence*, Justice O'Connor recognized that this same interest justifies preservation of traditional marriage against attacks by same-sex couples, and "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 123 S. Ct. at 2487-88 (O'Connor, J., concurring). The following analysis demonstrates some of the many reasons why Louisiana has not only a reasonable, but a compelling interest in preserving traditional, opposite-sex marriage.

The public interest in marriage and family originates in the belief that the foundation for political society is in family organization. *See* A.E. Hoebel, *THE LAW OF PRIMITIVE MAN*, 3-45 (1945). *See also* Paul J. Bohannon, *The Differing Realms of the Law*, 67 *AM. ANTHROPOLOG.* 33-42 (1965). That is, the state evolves out of and depends for its stability upon stable families. Both historically and structurally, marriage is the foundation of society. This truth has been recognized by the United States Supreme Court, which has observed that marriage is a relationship that is "older than the Bill of Rights – older than our political parties, older than our school system," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Indeed the Court regards "[m]arriage, as creating the most important relations in life, as having more to do with the morals and civilization of a people than any other institution. . . ." *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In

fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.

Reynolds, 98 U.S. at 165-66.

Traditional, opposite-sex marriage is particularly important to democratic society because it is the “seedground for democracy.” Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation* 24 HARV. J. L. & PUB. POL’Y. 771, 780 (2001). See also Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472-484 (1983) (“it is primarily through family bonds that both children and parents learn the attitudes and skills that sustain an open society”).

Traditional marriage has proven to be the safest repository of democratic values including tolerance, respect for others, and the balanced values of responsible individualism and commitment to the community. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 JOURNAL OF LAW & POLITICS 581, 596 (1999). Opposite-sex marriage is a mediating institution that nurtures the values of unselfishness and liberty.

[R]eflection on the heterosexual norm directs our attention to certain social necessities: the continuation of human life, the place of difference within community, the redirection of our tendency to place our own desires first. These necessities cannot be supported by rational calculations of self interest alone; they require commitments that go well beyond calculations of personal satisfaction. Having and rearing children is among the most difficult of human projects. Men and women need all the support they can get to maintain stable marriages in which the next generation can flourish. Even marriages that do not give rise to children exist in accord with, rather than in opposition to, this heterosexual norm.

The Ramsey Colloquium, *The Homosexual Movement*, 41 First Things 15, 17-18 (1994).

Opposite-sex marriage is a uniquely beneficial arrangement, providing equity and security for individuals, family, and society. The security and stability

of marriage as compared to same-sex relationships is indisputable.⁸ Opposite-sex marriage also fosters the value of equality. This is due in large part to the way in which the different sexes compliment one another.⁹

Marriages between one man and one woman are more likely than other types of families to have limited amounts of strife, the maximum amount of nurturing, the maximum amount of support, guidance, and leadership, and a very strong, intimate bond between parents and child. “Traditional marriage enriches the individuals who enter into it as well as their children and society generally. This effect satisfies even a strict test of liberal legitimacy because many benefits of marriage are not metaphysical but empirically verifiable. Married people live longer and enjoy better physical and psychological health and greater wealth.” Dent, 15 JOURNAL OF LAW & POLITICS at 605.

These unique, invaluable contributions made to society by opposite-sex marriage necessitate and even compel the State to take steps to preserve it. Support of families that require unselfishness from their members is vital in a society where the focus on self is forever increasing. “[M]arriage and the family are institutions necessary for our continued social well-being and, in an individualistic society that tends to liberation from all constraint, they are fragile institutions in need of careful and continuing support.” The Ramsey Colloquium,

⁸ An extensive survey of sexual practices found that for married couples, “a vast majority are faithful while the marriage is intact.” Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 89 (1994). “Among married people, 94 percent had one partner in the past year.” *Id.* at 101. And the average marriage is long lasting. Sixty-seven percent of marriages last ten years, and 50 percent last more than twenty years. Matthew D. Bramlett et al., *First Marriage Dissolution, Divorce, and Remarriage: United States*, Advance Data No. 323 (Nat’l Center for Health Statistics) (May 31, 2001). However, investigators discovered that only 15 percent of homosexual men and 17.3 percent of homosexual women had ever had relationships that lasted more than 3 years. Only a few had stayed together for more than 10 years (4 out of 252 men and 1 out of 138 women). Marcel T. Saghir, M.D. and Eli Robins, M.D., MALE AND FEMALE HOMOSEXUALITY: A COMPREHENSIVE INVESTIGATION 57, Table 4.13; 225, Table 12.10 (1973).

⁹ Human society requires that we learn to value difference within community. In the complementarity of male and female we find the paradigmatic instance of this truth. . . . [It] invites us to learn to accept and affirm the natural world from which we are too often alienated. Moreover, in the creative complementarity of male and female we are directed toward community with those unlike us. In the community between male and female, we do not and cannot see in each other mere reflections of ourselves. In learning to appreciate this most basic difference, and in forming a marital bond, we take both difference and community seriously. The Ramsey Colloquium, 41 FIRST THINGS at 17-18.

41 FIRST THINGS at 17. Same-sex couples simply do not perform the same functions or provide the same benefits for society as conventional opposite-sex marriages. In view of the unique contributions that opposite-sex marriage makes to society, the State has a compelling interest in endorsing and preserving it to the exclusion of same-sex marriage which, as is demonstrated below, actually undermines opposite-sex marriage.

The fact that traditional heterosexual marriage has in recent years been ravaged by divorce does not detract from the many benefits it provides our society and the need for government to promote it.

Marriage and the family - Husband, wife, and children, joined by public recognition and legal bond - are the most effective institutions for rearing of children, the directing of sexual passion, and human flourishing in community. Not all marriages and families “work,” but it is unwise to let pathology and failure, rather than a vision of what is normative and ideal, guide us in the development of social policy.

The Ramsey Colloquium, 41 FIRST THINGS at 17. The modern attacks on traditional marriage explained in the opening sections of this brief only serve to underscore the State’s compelling interest in protecting marriage.

a. *Marriage Counterfeits Undermine Traditional Marriage.*

As the Legislature recognized before passing Amendment No. 1, allowing same-sex “marriage” or Vermont-style “Civil Unions” would denigrate and undermine traditional, opposite-sex marriage in Louisiana. Such attacks on traditional marriage are precisely the types of “injury to a person or abuse of an institution the law protects” that the Supreme Court held government is authorized to avoid in *Lawrence*, 123 S. Ct. at 2478. The acceptance of a philosophy that marriage is no longer relevant and that all “intimate” relationships are fungible, distorts perceptions and threatens to warp the reality of marriage and family life for millions of adults and children. “To depict marriage as simply one of several

alternative ‘lifestyles’ is seriously to undermine the normative vision required for social well-being.” The Ramsey Colloquium, 41 *FIRST THINGS* at 18.

In every society some people do not or cannot marry and bear and raise children. If they are viewed as unfortunate exceptions, the norm is not impaired. Recognition of gay marriages would mutilate the norm by granting, for the first time in history, equal honor to partnerships that inherently exclude the creation of life. The impact would be greater if, as seems likely, few gays elected to marry, stay married, and adopted children. Like legalizing bestiality, cloning, and baby-selling, validation of gay marriage would not cause direct, proximate harm, but it would damage society by degrading the way we see and relate to others. Traditional marriage is a public good. That is, it benefits not only married couples and their children but also generates positive externalities, or benefits to others. Men and women who marry and stay married encourage others to do likewise, to the profit of society.

Dent, 15 *JOURNAL OF LAW & POLITICS* at 598-99. *See also id.*, at 615-639 (cataloguing numerous ways same-sex “marriage” would damage traditional marriage). Advocates of same-sex marriage freely admit they want to radically change the institution of marriage.¹⁰

The State of Louisiana and its citizens have a compelling interest in preserving the integrity of the marital union by making opposite-sex marriage the exclusive form of family relationship endorsed by the government. Loss of this status would de-emphasize the importance of traditional opposite-sex marriage to society, weaken this vital institution, and place our entire democratic system in jeopardy by eroding its foundation. “[T]he main consequence of recognizing same-sex marriage would not be a shift of some people to homosexual conduct, but the change in heterosexuals no longer seeing traditional marriage as something special.” Dent, 15 *JOURNAL OF LAW & POLITICS* at 614. Even more troubling is

¹⁰ Many advocates of same-sex marriage seek not to expand traditional marriage to gays but revolutionize the institution. [citing Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *Law & Sexuality* 31 (1991)]. Prof. William Eskridge hopes gay marriage will dethrone the traditional family based on blood-relationships in favor of “families we choose.” [citing WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* at 81; KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 116 (1991)]. Michaelangelo Signorile urges activists “to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, . . . to debunk a myth and radically alter an archaic institution The most subversive action lesbians and gay men can undertake . . . is to transform the notion of ‘family’ entirely.” [Michaelangelo Signorile, *Bridal Wave*, *OUT*, Dec.-Jan., 1994, at 161. See also Franklin Kameny, *Deconstructing the Traditional Family*, *THE WORLD & I*, Oct. 1993, at 393-95.] Urvashi Vaid wants to “assimilate the straight world to the gay world.” [URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 208 (1995)]. Dent, at 616-17.

the prospect that same-sex marriage would actually reduce some of the benefits, like an optimal parenting environment, provided by traditional marriage.

The further separation of procreation from marriage implicit in legalization of same-sex marriage would send a cultural message of parental disconnection from family duties that could further diminish the level of responsibility of absent parents. . . . The potential for increased social disorder if same-sex marriage is legalized is profound.

Wardle, 24 HARV. J. L. & PUB. POL'Y. at 798. *See also* Dent, 15 JOURNAL OF LAW & POLITICS at 601 (“As social esteem for marriage and parenting declines, so does citizens’ willingness to assume these roles. Validation of same-sex marriages would accelerate this decline”).

When it passed Amendment No. 1 by a vote of 119 to 19, the Louisiana Legislature expressed its interest and fulfilled its duty to defend traditional marriage. The people affirmed this interest and approved the amendment by a landslide vote of nearly 78%. The citizenry has shown that they understand the necessity of protecting marriage by refusing to endorse relationships like same-sex “marriage,” “*faux*” marriages, and “civil unions,” that serve to undermine it. The editorial of a leading homosexual journal says it all: “[O]ur fight for legal recognition—*any* sort of legal recognition—has, in fact, already undermined ‘traditional marriage’ . . .”¹¹ There is no question that the single object and substance of the proposed amendment are appropriate as drafted.

B. ALL FOUR PARTS OF AMENDMENT NO. 1 ARE GERMANE TO ONE ANOTHER.

Few constitutional amendments consist of just one sentence. If that were a limitation, the constitution would require thousands of individual amendments. For this logical reason, there is no limitation upon how many sentences, or how many separate parts, that a proposed amendment may have. The only requirement is that the component parts all be germane to one another. The trial court erred by

¹¹ *See* Chris Cain, *Gays may ruin “traditional marriage,”* New York Blade News 14 (Aug. 3, 2001) (emphasis in original).

dismissing this “germaneness” test altogether. (Record, p. 230).

However, the jurisprudence makes this requirement clear. In *Miller v. Greater Baton Rouge Port Comm’n.*, 225 La. 1095, 74 So.2d 387 (La. 1954), taxpayers brought suit to permanently enjoin the Port Commission from issuing any new bonds under the constitutional amendment that established the Commission. The Louisiana Supreme Court upheld the amendment, in spite of its complexity, and explained:

The establishment of the Port and its administration is a single plan and only one object has been dealt with. As pointed out in *Graham v. Jones*, 198 La. 507, 3 So.2d 761, **where an amendment may be logically viewed as parts of a single plan, it may be submitted as one amendment.** Where an act of the Legislature or an amendment to the Constitution embodies a single plan and every provision therein is **germane** to that plan, it is not violative of the Constitution. Similar amendments have been approved in the cases of *Hotard v. New Orleans*, 213 La. 843, 35 So.2d 752 (La. 1948); and *Orleans Parish School Board v. New Orleans*, La.App., 56 So.2d 280.

Miller, 225 La. At 1105, 74 So.2d at 390 (emphasis added).

In *Hotard*, the constitutional amendment in question was one exceptionally long set of provisions, authorizing the city of New Orleans to establish and maintain railroad passenger stations, and, as an incident thereto, to eliminate certain grade crossings of tracks entering the station or stations. Again, the Louisiana Supreme Court was not bothered by the breadth of the provision:

The [amendment] covers nearly five pages of the Constitution; but all of its provisions relate to the one purpose of authorizing the city, acting through the Public Belt Railroad Commission, to construct, maintain and operate one or more passenger stations, and, as an incident thereto, to eliminate grade crossings.

Hotard, 213 La. at 852-53. In fact, the Court found that it would have been unworkable to present the amendment otherwise:

The provisions of the amendment are so interrelated that it would not have been feasible to submit each one of them to the voters as a separate and independent amendment of the Constitution. If they had been so submitted, and if the voters had voted for some of the propositions and against others, the purpose of the amendment might have been defeated. In fact, a careful reading of the amendment reveals that it would have been practically if not actually impossible for the voters to vote upon the adoption or rejection of each provision separately.

Id., at 853 (emphasis added).

The proposed Amendment No. 1—which is compromised of only four

simple sentences—is far less complex and voluminous than those amendments that were upheld in *Miller* and *Hotard*. As in *Hotard*, however, the provisions are so interrelated that it would not have been feasible or practical to present them separately. Such would have defeated the clear and stated purpose of the amendment—to protect traditional marriage from all perceived threats. There is no question that all four sentences of the proposed Article XII, § 15 are germane to one another, and “cover matters necessary to be dealt with in some manner.” *Graham v. Jones*, 198 La. 507, 3 So.2d 761 (La. 1941) (citing *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549, 554.). For this reason, the trial court erred in granting judgment on Count IV for the plaintiffs/appellees.

In arguing that the four elements of Amendment No. 1 are not germane to one another, counsel for plaintiffs/appellees have cited some outrageous examples and shown that they fail to understand the purpose and effect of the proposed amendment. For example, in a radio interview from Baton Rouge October 6, 2004, which included intervenors/appellants’ undersigned counsel, plaintiffs/appellees’ attorney John Rawls, and Attorney General Charles Foti, Mr. Rawls told the audience: “This [Amendment No. 1] would be like the Legislature trying to pass an amendment to ban all abortions in the state, but then including in the proposed amendment a measure to raise taxes.” Of course, abortion and tax law are two different subject matters entirely, and are certainly not germane to one another. However, as this Honorable Court will recognize, the facts of the present case are clearly distinguishable from plaintiffs/appellees’ examples.

C. THE LAW CAN NEVER ALLOW EVERY INDIVIDUAL VOTER HIS OWN PERSONAL PREFERENCES.

The trial court acknowledged its failure to understand intervenors’ suggestion that few laws (or constitutional amendments) make *everyone* happy. (Record, p. 231). Yet, this is an important point.

The trial court’s decision was based in part upon the testimony of plaintiffs’ witness, Mr. William Schultz, who represented that he was “forced to vote against one of his strongly held beliefs” at the ballot box on September 18, 2004. (He testified that he is opposed to same-sex “marriage,” but in favor of Vermont-style “Civil Unions.”) (Record, p. 231).

The problem for plaintiffs/appellees is that no proposed amendment is—or could reasonably be—required to satisfy every individual voter. Just because some small minority of the electorate disagrees with the language, or one or more provisions, of a constitutional amendment proposed by the Legislature, does not mean that the amendment has multiple objects. A total of 796,975 people voted on September 18, 2004, and there were perhaps that many different ideas and opinions regarding the issue of Amendment No. 1. As with every law, various individuals and groups might have preferred it be worded differently, or be more or less comprehensive. Those opinions have no bearing on whether the amendment was lawfully presented. It is the *Legislature* (pursuant to Article XIII, § 1) and not the courts, which has the right and authority to draft and propose an amendment.

Intervenors/appellants have suggested they could produce hundreds of persons still disgruntled over their choices provided by the recent vote on “The Stelly Plan” [Act 88 of the 2002 Regular Session, amending Article VII, § 4(A) and adding § 2.2]. Thousands of Louisianians—including *Mr. Schultz, as he admitted on cross examination*—had a desire on that election day in 2002 to vote *for* the permanent exemption of household food, utilities, and prescription drugs from the state sales tax—but an equally earnest desire to vote *against* changing the income tax brackets to raise the tax on higher income earners. They could not do both, but the proposed amendment was not subject to legal challenge on that basis. Because we may like some parts of a law, and abhor other parts of it, does not make the law unconstitutional.

II. TRIAL COURT SHOULD HAVE RULED AGAINST PLAINTIFFS ON THEIR *COUNT I*.

Appellants acknowledge that on the morning of September 18, 2004—to everyone’s frustration—there were indeed some well-documented delays in the delivery of voting machines to several precincts in Orleans Parish.¹² However, these delays and all related complications thereto are *wholly insufficient* grounds, pursuant to the crystal clear provisions of the Louisiana Election Code, to invalidate the otherwise legitimate statewide election. Counsel for plaintiffs/appelles know this, but they have been forced to set forth a frivolous and imaginative argument anyway. A review of the applicable law explains why.

A. AN INSUFFICIENT NUMBER OF VOTERS WERE AFFECTED.

The procedure for objecting to an election is established by the Louisiana Election Code, Chapter 9, “Contests and Challenges” (LSA-R.S. 18:1401, *et seq.*). Since plaintiffs acknowledged that “this suit is brought pursuant to Louisiana Revised Statutes 18:1401, *et seq.*,” (Petition, ¶12), the trial court should have begun its analysis there. In relevant part, LSA-R.S. 18:1401 states, in paragraph C (all emphasis added):

A person in interest may bring an action contesting any election in which any proposition is submitted to the voters *if he alleges that except for irregularities or fraud in the conduct of an election the result would have been different.*

This explains the plaintiffs/appellees’ presentation of their meritless Count I. If they did not at least make an *allegation*—however half-hearted and illogical it may be—that “except for the irregularities” the outcome of the election would have been different, then they would have no cause of action to bring this suit under the Election Code at all.

It is clear that their argument holds no weight. Part II of Chapter 9 (LSA-R.S. 18:1432 through 18:1434) sets forth the guidelines for “Court Determinations

¹² Evidence produced by defendants at trial showed that the problems were eventually corrected in each location by early afternoon.

of Election Contests.” It includes the detailed provision that must govern the Court’s analysis in this case, LSA-R.S. 18:1432, which reads (emphasis added):

A. *If the trial judge in an action contesting an election determines that: (1) it is impossible to determine the result of election, or (2) the number of qualified voters who were denied the right to vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote, or (3) the number of unqualified voters who were allowed to vote by the election officials was sufficient to change the result of the election if they had not been allowed to vote, or (4) a combination of the factors referred to in (2) and (3) herein would have been sufficient to change the result had they not occurred, the judge may render a final judgment declaring the election void and ordering a new primary or general election for all the candidates, or, if the judge determines that the appropriate remedy is the calling of a restricted election, the judge may render a final judgment ordering a restricted election, specifying the date of the election, the appropriate candidates for the election, the office or other position for which the election shall be held, and indicating which voters will be eligible to vote.*

B. *If the trial judge determines that an action contesting an election or objecting to candidacy was filed frivolously, he may award all costs of court, plus a reasonable attorney fee, plus damages, to the defendant.*

This specific burden on the plaintiff in an election contest is inescapable, and trial courts must apply this statutory standard strictly. In *Adkins v. Huckaby*, 775 So.2d 206 (La. 2000), the Supreme Court clarified that since the adoption of the Election Code in 1978, the standard supplied by LSA-R.S. 18:1432 controls and “the Legislature has expressed its solemn will from which the courts of this State may not derogate.” *Id.* at 222, n.21. Most recently, in *Nugent v. Phelps*, 816 So.2d 349, 36,666 (La. App. 2 Cir. 4/23/02), writ denied 815 So.2d 850, 2002-1153 (La. 5/10/02), the Second Circuit refused to nullify a police chief election because, after subtracting the illegally cast votes, the difference was calculated to be insufficient to change the election result or make it impossible to determine. The court explained:

. . . [A] party contesting an election still must show at least that because of fraud or irregularities, the outcome of the election is impossible to determine. Thus, it is the effect of the irregularity on determining the outcome, rather than the fact of an irregularity by itself, that guides us in these matters.

Id. at 357.

The result in the present case must be the same. As the Secretary of State’s official election statistics show, the per vote margin of victory for Amendment No.

1 on September 18, 2004, was **442,841** (reflecting 619,908 for, and 177,067 against). There are only 305,374 total registered voters in all of Orleans Parish—and 84,857 of them actually cast a ballot on September 18, 2004. Thus, even assuming *arguendo* that ALL of the remaining 220,517 persons who were eligible to vote, actually desired to vote against the proposed amendment—but were prevented from doing so because of the machine delivery delays and related complications—that is STILL LESS THAN HALF the number of votes that would have been necessary to change the outcome of the election.¹³

The numbers do not lie. The election machine mishap in Orleans Parish was a great frustration, but it did not in any way prevent the opponents from defeating the proposed amendment. To the contrary, the amendment easily passed at many of the affected precincts in Orleans. Discontent with an election’s results does not entitle one to have it overturned. The jurisprudence is clear that even the showing of particular of irregularities is not enough for a challenger to meet his burden. “It is virtually impossible to conduct an election without some irregularities and illegalities taking place, but where conducted in good faith, free of fraud or intention of wrongdoing, full faith and credit will be given the result.” *Beard v. Henry*, 199 So. 468, 471 (La.App. 2 Cir. 1940).

B. THE PROPOSED AMENDMENT APPLIES TO THE ENTIRE STATE.

The most creative argument set forth by the plaintiffs is the suggestion that if there were a sufficient number of “disenfranchised voters” in Orleans Parish to change the election result in that parish alone, that fact would be enough to nullify the proposed amendment. The argument is nonsensical.

To accept it, the Court would have to first agree with the plaintiffs/appellants’ unfounded assertion that the “one, and only one, immediate

¹³ However, it is important to note that of the 84,857 votes that were cast in Orleans Parish, the proposed amendment DID PASS by a margin of 46,357 (or, 55%) for, and 38,500 (or, 45%) against. (Record, p.____).

and direct effect to the proposed constitutional amendment . . . [is that] it automatically abolishes and invalidates Defendant City of New Orleans’ Domestic Partner Registry Ordinance.” (Plaintiffs’ Brief, p.4, Record, p.____). Then, the Court would be required to agree that the requirements of LA. CONST. Art. XIII, Sec. 1(C) are somehow applicable because this proposed amendment, affecting only the residents of the City of New Orleans, would have to be ratified by a majority of voters in the City. With that premise, if plaintiffs/appellees could prove that a sufficient number of Orleans Parish voters did not participate on September 18, 2004, they might have enough to meet their burden to show a possible change in the election result or the impossibility of concluding its outcome. The Court must reject these arguments outright.

First, by its design and on its face, the proposed amendment directly affects and plainly applies to the entire State of Louisiana. The institution, recognition, and definition of marriage is—quite obviously—a matter of statewide concern. In fact, the Louisiana Constitution, Civil Code, and our entire body of laws make this expressly clear.¹⁴ There is no basis in law or fact for the plaintiffs/appellees’ assertion that the proposed amendment “directly affects” only the residents of New Orleans.

There is also no basis for the plaintiffs/appellees’ conclusion the proposed constitutional amendment “automatically abolishes and invalidates Defendant City

¹⁴ For example, LA CONST Art. 6, § 9, entitled “Limitations of Local Governmental Subdivisions,” clearly establishes that “[n]o *local* governmental subdivision shall . . . enact an ordinance governing private or civil relationships.” (Emphasis added.) As another example, La. C.C. art. 86 defines the marital relationship. “Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law.” The Comments to Art. 86 state unequivocally that it is intended to protect “the traditional marital unit” as a matter of *statewide* concern:

LEGISLATIVE INTENT-TRADITIONAL MARRIAGE

House Concurrent Resolution No. 124 of the 1996 Regular Session provides:

* * *

‘ . . .that the Legislature of Louisiana expresses the sense of the legislature regarding the traditional marital unit and the traditional definition of marriage in the state of Louisiana.’

of New Orleans' Domestic Partner Registry Ordinance.” (Record, p. ___). Because the amendment does not specifically mention domestic partnerships or any registry of any sort, it would be left to a later court to interpret and apply the amendment to determine its potential effect on any municipal registry ordinance. This would only happen after a trial on the matter, and *if* specific cause of action is ever brought. Since no such case has been brought or suggested here, the issue is not properly before this Honorable Court.

III. TRIAL COURT SHOULD HAVE RULED AGAINST PLAINTIFFS ON THEIR *COUNT II*.

Advancing yet another creative theory in this suit, plaintiffs/appellees argue in Count II that the Louisiana Election Code is somehow “fatally defective” because it did not provide them with a statutory procedure to adjudicate their challenge to this proposed constitutional amendment prior to the election. On this basis, they boldly request that this Court void the election results and declare the Election Code itself unconstitutional. The trial court should have denied these requests.

The Election Code is complete and sufficient in its present form. Adopted by the Legislature pursuant to the single-sentence mandate of LA. CONST. ART. XI, § 1, the Election Code (Title 18 of the La. Revised Statutes) does indeed provide “for the conduct of all elections.” These provisions have been affirmed many times in our jurisprudence.

The constitutional grant of this power in a single sentence indicates the constitutional intent that the Legislature have broad powers to legislate the conduct, when and how, of the election process. Our Louisiana Constitution is unlike the Federal Constitution. Legislation not constitutionally prohibited is allowed the Legislature.

Hurd v. McKeithen, 28,371 (La.App. 2 Cir. 10/31/95), 663 So.2d, 537, 541, *writ denied*, 95-2650 (La. 11/2/95), 664 So.2d 404, *Citing Aguillard v. Treen*, 440 So.2d 704 (La. 1983); *Swift v. State*, 342 So.2d 191 (La. 1977).

The present Election Code, which was enacted in 1976 and became effective on January 1, 1978, has served Louisiana well for nearly three decades. In the exercise of those “broad powers to legislate the conduct, when and how, of the election process,” the Legislature has contemplated and created specific rules and procedures to govern the proposal and ratification of constitutional amendments. (See LA. CONST. ART. XIII). There *are*—by design and necessity—less provisions restricting the adoption of a constitutional amendment than there are provisions applicable other types of elections. The reason is clear. The Louisiana Supreme Court has long held that “it is an elementary proposition of constitutional law, that the Constitution may be amended by the people in whole or in part.” *Police Jury of Parish of Washinton v. All Taxpayers, Property Owners and Citizens of Industrial District No.1 of Parish of Washington*, 278 So.2d 474, 478 (La. 1973). Citing cases going back nearly one hundred years, the Court affirmed: “There is, in fact, ***no limitation*** upon the power of the people of Louisiana to amend their Constitution in any respect, **providing that the amendment does not conflict with the Constitution of the United States.**” *Id.* (emphasis added).

Plaintiffs/Appellees proclaim that if they “lose on this point then the Courts of Louisiana are powerless to protect the Constitution of Louisiana from amendments that are unconstitutional and/or illegal in content, form and method of approval.” (Plaintiffs’ Brief, p.6, Record, p.____). This is a hollow proclamation. If an amendment is unconstitutional in its ***content*** (*i.e.*, if it conflicts with some provision of the federal Constitution), it can be challenged and struck at any time. The ***form*** and ***method of approval*** of constitutional amendments are specifically governed by LA. CONST. ART. XIII, § 1.

When reviewing a state statute that is alleged to be unconstitutional, the court must presume the statute is constitutional, and where possible, the court should give such laws an interpretation of constitutionality. *Moore v. RLCC*

Technologies, Inc., 95-2621, 668 So.2d 1135, 1140 (La. 1996). “The party attacking the statute has the burden of establishing by clear and convincing evidence that the statute is unconstitutional.” *Allain v. Martco Partnership*, 828 So.2d 587, 595 (La.App. 1 Cir. 2002) (citing *State v. Atterberry*, 95-0391, 664 So.2d 1216, 1224 (La.App. 1 Cir. 1995)).

Because Count II of the petition lacks any merit, plaintiffs/appellees cannot possibly meet the requisite burden to show that the Election Code statutes are unconstitutional. The rules governing the proposal and ratification of constitutional amendments are comprehensive and sound. The Election Code is consistent with its enabling constitutional provision, LA. CONST. ART. XI, § 1, and it cannot be held infirm.

IV. TRIAL COURT SHOULD HAVE RULED AGAINST PLAINTIFFS ON THEIR *COUNT III*.

In their third Count, plaintiffs/appellees argue that the proposed amendment would violate a pre-existing guarantee of the Louisiana Constitution. Yet, contrary to their novel interpretations of the 1974 Louisiana Declaration of Rights, LA. CONST. ART. I, a plain reading of the Declaration clearly shows that the trial court should have ruled against the plaintiffs on this Count. Plaintiffs’ entire argument on Count III can be summarized by the following paragraph from page 10 of plaintiffs’ original brief (Record, p. ___):

This proposed constitutional amendment would create a new Section 15 in Article XII that would alienate and violate rights now in Article I. In attempting to do so, it violates the third sentence of Article I, Section 1, and the [1974 Constitutional Convention] Delegates’ clear intent that nothing outside of Article I, even something elsewhere in the Constitution, can alienate or violate any right in Article I.

The glaring problem with this argument is that Article I *does not include any right to same-sex “marriage,”* nor any right not to be discriminated against on the basis of homosexuality or any of its incidents.

A. LOUISIANA’S EQUAL PROTECTION CLAUSE DOES NOT CREATE A RIGHT TO SAME-SEX “MARRIAGE.”

The equal protection clause of the Louisiana Constitution, Article I, § 3, allows for the prohibition of same-sex marriage. It reads, simply:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

There is an express and important difference between the language of the second and third sentences of § 3. While no law may *ever* constitutionally discriminate against a person because of his/her race or religion, § 3 specifically *allows* for other types of “discrimination” in situations where the law in question is not “arbitrar[ly, capricious[], or unreasonabl[e].” For the reasons explained in this brief, the proposed amendment fails none of those three tests.

Reference to the topics of public debate and the understanding, explanations, and discussions of the delegates at the Constitutional Convention of 1973, are valuable aids in ascertaining the intent and meaning of our constitution’s provisions. They are entitled to authoritative weight, and should not be shunned or lightly dismissed, especially as to any provision that is not entirely clear and unambiguous in its application. *See City of New Orleans v. Bd. Of Comm’rs of Orleans Levee District*, 93-0690 (La. 7/5/94), at pp. 14-18, 640 So.2d 237, 247-248; *New Orleans Firefighters Association et al. v. Allstate Ins. Co. et al.*, 97-2885 (La. 4/14/98) at pp. 18-21, 712 So.2d 46, 60-62; *Succession of Lauga*, 624 So.2d 1156, 1164-1165 (La. 1993); *Radiofone, Inc. v. City of New Orleans et al.*, *supra*, at p. 6, 630 So.2d at 698.

While Article I, § 3, is in no way ambiguous, the debate at the Constitutional Convention on its language is instructive. The transcripts of that debate show that the delegates clearly acknowledged their intention that homosexuals would not be

allowed the same protections under state law as traditionally married couples. Delegate Arnette, in pointing out to the Convention that there were a number of classes of individuals that would not be protected under the committee's explicit-listing proposal (which was ultimately adopted in substance with the addition of the words *arbitrarily, capriciously, and unreasonably*), explained: "[H]omosexuals, you are not protecting them in any way whatsoever..." VI *Records of the La. Const. Conv. of 1973* (hereinafter simply "*Records of CC '73*"): *Convention Transcripts, 38th Days Proceedings, August 29, 1973*, at p. 1024.

By specific design of its authors, there is no provision of the 1974 Louisiana Constitution which would prohibit the people of Louisiana from prohibiting same-sex "marriage," "*faux*" marriages, Vermont-style "Civil Unions," or any other form—so long as these laws are not arbitrary, capricious, or unreasonable.

B. AMENDMENT NO. 1 SUPPORTS THE LA. DECLARATION OF RIGHTS.

The proposed amendment is *not* "arbitrary, capricious, or unreasonable" for the same reasons that it actually *further*s the Louisiana Constitution's Declaration of Rights. Article I, § 1, entitled "Origin and Purpose of Government," explains the foundational principles of our state government. It reads:

All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.

Contrary to the plaintiffs/appellees' assertions, Amendment No. 1 *advances* and *supports* these principles. It has allowed the people of Louisiana to express "their will alone" on the subject of the definition of marriage, and provided them with an opportunity to "promote the happiness and general welfare" of this state "for the good of the whole."

IV. TRIAL COURT SHOULD HAVE RULED AGAINST PLAINTIFFS ON THEIR *COUNT V*.

The trial court further erred when it failed to rule in favor of defendants and intervenors on Count V of plaintiffs' petition. In that count, plaintiffs/appellees allege that Amendment No. 1 violates the "pre-filing" requirement of Article XIII, § 1. They claim that because the amendment was altered in the legislative process, it was actually transformed into another proposed amendment all together. This claim has no merit.

Because every proposed amendment must garner a two-thirds vote in each house of the Legislature on a joint resolution to pass, a certain amount of revision, negotiation, and amendment is necessary and anticipated. The limit is that any proposed amendment must be enacted "pursuant to all of the procedures and formalities required for passage of a bill except submission to the governor." Article XIII, § 1(A). The procedures and formalities required for the passage of a bill are governed by Article III, §15. Subsection (A) provides, in pertinent part: "The legislature shall . . . propose no constitutional amendment except by a joint resolution introduced during that session, which shall be processed as a bill." Subsection (C) then states, "No bill shall be amended in either house to make a change *not germane* to the bill as introduced." (Emphasis added).

Our courts apply the "germaneness" test very broadly. For example, in *Jones v. Bd. of Ethics for Elected Officials*, 605 So.2d 1064 (La. 1992), a piece of legislation that began as a bill to allow licensed physicians to be appointed to boards of commissioners of hospital service districts, turned into something much different. The bill was amended and revised extensively during its journey through the legislative process, and ultimately had little to do with physicians and hospital service districts. Instead, in its final form, the measure established an exception to the Code of Governmental Ethics for the regulation of lobbying activities.

The Court summarized its analysis as follows:

The narrow issue before us is whether the amendments to Senate Bill 1040 which added provisions to the Code of Governmental Ethics concerning the regulation of lobbying were germane to the bill as introduced which provided an exception to the Code of Governmental Ethics pertaining to physicians serving on the boards of commissioners of hospital service districts.

Jones, supra, 605 So.2d at 1066. It concluded that the amendment was indeed germane both, seemingly unrelated, measures concerned the same general policy regarding the rules, service, and lobbying guidelines for private persons who serve on for public boards.

In the present case, the germaneness analysis is much simpler. The pre-filed form of Amendment No. 1 originally sought to amend the constitution by adding a new Article I, §27, defining marriage as consisting only of the union one man and one woman and providing:

Neither this constitution nor state law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

In its final, proposed form, Amendment No. 1 was changed only slightly to add a new Article XII, §15, which reads:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

Because the original and final forms of Amendment No. 1 are nearly identical in substance, they are quite obviously germane. For this reason, the trial court should have ruled on this Count in favor of defendants and intervenors.

CONCLUSION

For all of the reasons set forth herein, it is clear that the trial court erred when it invalidated the September 18, 2004 election, and declared Amendment No.1 unconstitutional and in violation of Article XIII, Section 1(B) of the 1974

Constitution of Louisiana. It is likewise clear that the plaintiffs/appellees' case lacks merit on every count, and that the trial court further erred when it declined to rule upon Counts I, II, III and V in favor of defendants and intervenors. There is no question that Amendment No. 1 was appropriately drafted, passed by the Legislature, and approved by nearly seventy-eight percent of the voters of Louisiana. The trial court must be reversed so that the people's will is respected, and Amendment No. 1 allowed to be duly approved and recognized as law.

Dated: October 12, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that a copy of the foregoing pleading has been served upon all counsel of record, via facsimile, and by placing the same in the U.S. Mail, postage prepaid and properly addressed, on this 12th day of October, 2004.

J. Michael Johnson