

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 04-11325

DIVISION "C"
SECTION 5

DOCKET NO. IV

FORUM FOR EQUALITY PAC, a registered Louisiana political
action committee, LAURENCE E. BEST, JEANNE M. LEBLANC
and WILLIAM A. SCHULTZ

PLAINTIFFS

VS.

CITY OF NEW ORLEANS and THE HONORABLE
W. FOX MCKEITHEN, in his official capacity
as SECRETARY OF STATE OF LOUISIANA only,
and not individually

DEFENDANTS

FILED: _____

DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF PETITION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

MAY IT PLEASE THE COURT:

PLAINTIFFS' INTERESTS

"A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights." *Latour v. State*, Case No. 2000-CA-1176 at 5 (Louisiana 1/29/01), 778 So.2d 557, 560 (citation omitted). The same standard applies to deciding whether a party has standing to challenge the constitutionality of a proposed constitutional amendment. Each Plaintiff has alleged sufficient facts in the Petition to show how this proposed constitutional amendment directly affects that Plaintiff's rights.

Ordinarily the issuance of an injunction requires a showing of "irreparable injury," but there are two exceptions to that rule. Both exceptions apply here. "Irreparable injury is not a prerequisite for an injunction when the law specifically affords that remedy or when the conduct sought to be restrained is unconstitutional. *City of New Orleans v. Board of Commissioners of Orleans Levee District*, Case No. 93-C-690 at 30 (Louisiana 7/5/94), 640 So.2d 237, 253-54 (citations omitted). If the Court grants relief through the Petition Objecting to Election upon Proposed Constitutional Amendment, the requested injunction is provided by law, Louisiana Revised Statutes 18:1409. If

the Court grants relief through the Petition for Declaratory Judgment and Injunctive Relief, the Court do so by declaring that the proposed constitutional amendment violates the Constitution of Louisiana.

DEFENDANTS

Defendant City of New Orleans is a necessary party because the proposed constitutional amendment will invalidate Defendant City's Domestic Partners Registry Ordinance. The second sentence of Article 1880, Louisiana Code of Civil Procedure, states:

In a proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard.

Defendant McKeithen, as Secretary of State and not individually, is a necessary party because he is the official charged with preparing all ballots statewide. He is also a proper and necessary party pursuant to Louisiana Revised Statutes 18:1402(B)(1)(a), which states:

(B)(1) The following persons are the proper parties against whom election contests may be instituted

(a) The secretary of state, when contesting an election on any proposed amendment to the constitution;

JURISDICTION AND VENUE

This Court, as a court of general jurisdiction, has jurisdiction over this controversy in Declaratory Judgment. Venue is proper in this Parish because the municipality contiguous with this Parish is a necessary party. Admittedly, Defendant McKeithen is also a State actor and has an equal right under Louisiana Revised Statutes 13:5104(B) to be sued in his Parish. Our Supreme Court resolved this problem in *Underwood v. Lane Memorial Hospital*, Case No. 97-CC-1997 at 9-10 (Louisiana 7/8/98), 714 So.2d 715, 719-20, ruling that "otherwise properly cumulated actions against two political subdivisions arising out of the same transaction or occurrence may be brought in one of the two specified parishes of proper venue for *either* of the political subdivisions, but in no other parish." (Footnote omitted) (italics by the Supreme Court).

COUNT I

(Violation of Louisiana Declaration of Rights)

a. A Constitution Cannot Eliminate Rights

This case seeks to overturn a Supreme Court precedent. In *Police Jury of Parish of Washington v. All Taxpayers, Property Owners and Citizens of Industrial District No. 1 of Parish of Washington*, 278 So.2d 474 (La. 1973), our Supreme Court stated:

It is plain to this Court, and it is elementary proposition of constitutional law, that the Constitution may be amended by the people in whole or in part. 278 So.2d at 478.

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. *Ibid.* (Citations omitted).

In the following year our Constitutional Convention expressly rejected that position. The Delegates, including among their midst some of the smartest lawyers then in Louisiana, expressly declared that certain basic human rights can never be amended out of a our Constitution. They did so in the first two sentences of Article I, Section 1, 1974 Constitution of Louisiana, which state:

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.

Any proposed constitutional amendment which violates those two sentences cannot go into our State Constitution. The idea that the people can put anything they want, no matter how vile or hateful, into the State Constitution is anathema to the dual American constitutional principle of rule by the majority while protecting the rights of the minority.

Three examples will suffice to prove this proposition. Without regard to the Federal Constitution, could any Louisiana Court allow our State Constitution to be threatened by any of the following ballot propositions?

Homosexuals being of inherently immoral character, any occupational or professional license that requires proof of good morale character shall not be issued to any homosexual.

All statutes defining and criminalizing murder, manslaughter or homicide shall not apply if the alleged victim is a homosexual.

The book of Genesis shall be the required text and the sole text in all biology, geology and astronomy classes and lessons at every educational level in this State.

Louisianans should not have to go running to Federal Court to preserve their fundamental right to a government charged with protecting the rights of the individual and with security justice for all. Louisiana is a Sovereign State. Its Courts have the necessary power and authority to protect its State Constitution from proposed constitutional amendments that violate our governmental foundations.

This idea was current both at the Louisiana Constitutional Convention of 1973 and in the year we founded this Nation. Louis "Woody" Jenkins was in 1973-74 a member of the Louisiana House of Representatives, a Delegate to the Constitutional Convention and Floor Spokesperson for the Convention Committee on Bill of Rights and Elections. He personally steered the new Louisiana Declaration of Rights through its floor debates. In 1975 he wrote a law review article that our Supreme Court has repeatedly quoted with approval. Jenkins, The Declaration of Rights, 21 Loyola L. Rev. 9-42 (1975) (hereinafter cited as "Jenkins"). On this point he stated:

A constitution cannot reasonably yield or give away rights, particularly those of future generations who cannot consent to a social compact devised in the present. Jenkins at 12 (footnote omitted).

The footnote to that quotation states:

16. Section 1 of the 1776 Virginia Constitution is persuasive in its provision: That *all men* are by nature equally free and independent and *have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity*; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. *Ibid.* (Italics by Rep. Jenkins).

At the end of his landmark article, Rep. Jenkins emphasized the Convention's intention to sweep away prior Louisiana Supreme Court rulings in conflict with its purposes:

The changes wrought by the new Declaration of Rights are basic. They go to the very core of the philosophy underlying government in Louisiana. **And they change the nature of that philosophy.** Jenkins at 42 (boldface supplied).

Proposed constitutional amendments that violate the core philosophy of the 1974 Louisiana Declaration of Rights cannot and shall not be allowed into our State Constitution. So, for example, a proposed constitutional amendment that denies equal protection to a repressed minority or that imposes religious bigotry, cannot and shall not be allowed onto the ballot of any election. That is why Louisiana can never have a constitutional amendment that disbars Lesbian and Gay lawyers or that makes it legal to murder Lesbians and Gay men or that replaces modern science with a religious

text or that bars same sex couples from arguing in Court that they have the right to marry or that bars civil unions or that bars all unmarried couples from protecting their property and their intimate relationships through legal documents.

b. Rights Now in the Louisiana Declaration of Rights Can Never be Diminished or Eliminated

If the first two sentences of Article I, Section 1, Constitution of Louisiana, does not limit the ability of a transient electoral majority to amend our Constitution forever, the third sentence most certainly does. It states:

The rights enumerated in this Article are inalienable by the state and shall be presented inviolate by the state.

These words must be given their literal and unambiguous meaning. Rep. Jenkins was clear at the conclusion of his landmark article on that point:

Debate on the Preamble and Declaration of Rights of the new Louisiana Constitution occupied the attention of delegates to the Constitutional Convention for more than two weeks. Before that, the Committee on Bill of Rights and Elections had considered the proposal for nearly four months. During these periods, hundreds of amendments were offered to delete or change existing language or add new provisions. Virtually every word of Article I was considered carefully and debated thoroughly. The language it contains should be read quite literally. In almost every instance, the delegates meant exactly what they said. Jenkins at 42.

Some of the most civic minded and important citizens of our State gathered in that Constitutional Convention. Their numbers included some of the savviest lawyers in Louisiana. The words they chose, "inalienable" and "inviolable," are not words of common speech. Those words are imperatives. There are no two ways to read either of those words. Like Horton the Elephant, they meant what they say and they said what they meant.

c. Only the Declaration of Rights Can Amend the Declaration of Rights

If somehow discrimination and bias can be written into our State Constitution, and if rights set forth in Article I, Section 1, can be somehow alienated and violated, such action can only happen through an amendment of Article I and nowhere else in our State Constitution. On this point Rep. Jenkins repeatedly and forcefully stated the unambiguous understanding of the Constitutional Convention:

The final sentence of this Section can, however, have far reaching effects. First, it insures that the rights enumerated in the Declaration of Rights cannot be legislated away by the state. Because all rights listed in that article are inalienable, no other

provision of the Constitution can be interpreted in such a way as to infringe on these rights. The effect of this standard is to place the Declaration of Rights on a plane higher than the remainder of the Constitution. Jenkins at 14-15 (boldface supplied) (footnotes omitted):

In the footnotes to that quotation Rep. Jenkins gave two examples to show just how serious the Convention was on this point:

26. The Convention had no intention of allowing the substantive rights enumerated in the Declaration of Rights to be undermined by other provisions of the Constitution, such as art. VI, section 9 (police power as limit on local government); art. VI, section 17 (land use; zoning; historic preservation); art. VI, section 20 (intergovernmental cooperation); art. VI, section 41 (cooperation with federal government); or art. XII, section 11 (continuity of government).

27. *Compare N.D. Const. art. I, sec. 24: "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."* Also consider the remarks of Justice Jackson in *Minerville School Dist. v. Gobitis*, 310 U.S. 586 (1940): "The very purpose of the Bill of Rights [of the United States Constitution] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities" *Ibid.* (Brackets, italics and ellipse by Rep. Jenkins).

Rep. Jenkins also quoted the following exchange between Delegates during debate to emphasize the State's duty to protect everything in the Declaration of Rights from anything outside that portion of the Constitution:

30. The words "by the state" after the word "inviolate" were added by a floor amendment offered by Delegate Walter Lanier. During the discussion of his amendment, the following exchange occurred:

Ms. [Mary] Zervigon: Then when you continue and say, "and shall be preserved inviolate by the state", that puts the duty on the state ... to have these rights preserved inviolate?

Mr. Lanier: that is correct. Lanier, Proceedings Aug. 29, 1973, at 54. Jenkins at 15 (n)(brackets and ellipse by Rep. Jenkins).

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 Delegates' clear intent that nothing outside of Article I, even something elsewhere in the Constitution, can alienate or violate any right in Article I.

Plaintiffs need not prove that something in Article I authorizes same sex marriage or civil unions. All they need prove is that Article I, Section 22, guarantees them access to Courts to make those arguments. If this proposal passes, new Article XII, Section 15, will slam the courthouse door on all unmarried couples seeking civil unions and all same sex couples seeking marriage. And the third sentence of that new Article XII, Section 15, will impair all legal documents attempting to give a legal status to members of an unmarried couple (whether same sex or otherwise) if those legal documents are construed to create a legal status substantially similar to marriage for unmarried individuals. That will result in a violation of Article I, Section 23, which prohibits any "law impairing the obligation of contracts" and also a violation of Article I, Section 4, that guarantees that "Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property."

d. Conclusion on Count I

~~This proposed amendment has no business in our State Constitution.~~ It seeks to write into our Constitution both discrimination on the basis of marital status and discrimination on the basis of sexual orientation. Discrimination on a basis that is so essential a part of a human being's self-identity is abhorrent to the core philosophy of the Louisiana Declaration of Rights. If, however, there is in general no limit on what amendments can go into our Constitution, at the least those amendments cannot alienate or violate any right already protected by Article I, such as the right of access to Courts, the right to have one's contracts recognized at law, and the right to dispose of one's private property within one's household. Even if both of the last two sentences are wrong, it is absolutely clear that only an amendment to Article I can affect any right set forth in Article I.

This proposed constitutional amendment violates all three of those constitutional principles.

COUNT II

(Multiple Objectives of Single Amendment)

a. Legislative Passage of a Proposed Constitutional Amendment Must Comply with Article XIII Exactly

Article XIII is the Article of the 1974 Constitution of Louisiana that sets forth how to amend that Constitution. Thirty-two years prior to the 1973 Constitutional Convention, our Supreme Court issued a landmark Opinion styled *Graham v. Jones*, 198 La. 507 3 So.2d 761 (1941). That Opinion declared unconstitutional a proposed constitutional amendment that the voters had already approved at an election seven months prior to the rendering of that Opinion. In *Graham* our Supreme Court

spoke forcefully and at great length on the fundamental necessity of all constitutional amendments to follow exactly and precisely the constitutional procedure for amending a constitution:

Mr. Cooley, the most eminent writer on Constitutions and the jurisprudence which makes them effective, has said:

"The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. The people of the Union created a national constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. By the constitution which they establish, they not only *tie up* the hands of their official agencies, *but their own hands as well*; and neither the officers of the State, *nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.*" Cooley's Constitutional Limitations, 8th Edition, Vol. I, p. 81.

The general rule governing the restraints which the people have placed in their Constitution upon themselves, their officers, agents and representatives, is set forth in 16 C.J.S., Constitutional Law Section 7, in the following language:

"Provisions of a constitution regulating its own amendment, *** are not merely directory but are mandatory; and a strict observance of every substantial requirement is essential to the validity of the proposed amendment. *These provisions are as binding on the people as on the legislature, and the former are powerless by their vote of acceptance to give legal sanction to an amendment the submission of which was made in disregard of the limitations contained in the constitution.*"

The above rule has been announced and followed in a number of cases decided by both federal and state courts. Thus, in *Duncan v. McCall*, 139 U.S. 449, 11 S. Ct. 573, 576, 577, 35 L. Ed. 219, to which we have hereinabove referred, the Supreme Court of the United States, speaking through Chief Justice Fuller, declared that: "***while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, *and they have themselves thereby set the bounds to their own power, as against the sudden impulses of mere majorities.*"

In disposing of the argument that a favorable vote by the electorate on a proposal to amend the constitution cures antecedent failures to observe the commands of the constitution with respect to the formulation or submission of such proposals, the Supreme Court of Alabama, in the case of *Johnson v. Craft*, 205 Ala. 386, 87 So. 375, 387, to which we have hereinabove referred, on rehearing, declared: "The people themselves are bound by the Constitution; and, being so bound, are powerless, whatever their numbers, to change or thwart its mandates, except through the peaceful means of a constitutional convention, or of amendment according to the mode

therein prescribed or through the exertion of the original right of revolution. 'The Constitution may be set aside by revolution, but it can only be amended in the way it provides,' said Hobson, C.J., in *McCreary v. Speer*, 156 Ky. 783, 791, 162 S.W. 99, 103."

The question under discussion was also considered by the Supreme Court of Iowa in *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738, 741, 15 N.W. 609. The court, in holding that a proposed constitutional amendment improperly submitted was not validated by the favorable vote of the electors, expressed itself in these words: "It matters not if not only every elector, but every adult person in the state, should desire and vote for an amendment to the constitution, it cannot be recognized as valid unless such vote was had in pursuance of, and in substantial accord with, the requirements of the constitution." To the same effect, see *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 P. 3, where the rule announced in the *Koehler* case was thoroughly discussed and approved by the Supreme Court of California.

We know of no textwriter on Constitutional Law, nor of any decision by the highest court of any of the states that questions the soundness of the above mentioned rule. On the contrary, every well-recognized authority and every decision on the subject concede, not only the soundness of, but the absolute necessity for, the rule that once the people have agreed on the method to be followed in effecting changes in their fundamental law, they are powerless to alter the terms of their agreement except in the manner provided in the agreement itself.

Jameson, in his work on Constitutional Conventions, which was approved by Cooley in his work on Constitutional Limitations, in discussing those clauses of the constitution which prohibit their amendment except in the ways and modes prescribed, after stating that, "restriction is really the policy and the law of the country," also states: "The idea of the people thus restricting themselves in making changes in their Constitutions is original, and is one of the most signal evidences that amongst us liberty means, not the giving of rein to passion or to thoughtless impulse, but the exercise of power by the people for the general good, and therefore, always under the restraints of law." 3 So.2d at 782-83 (all italics and asterisks in original)

b. On this Point, Judicial Interpretations of the 1921 Constitution Apply Equally to the 1974 Constitution

The last sentence of Article XIII, Section 1(B), 1974 Constitution of Louisiana, states:

When more than one amendment is submitted at the same election, each shall be submitted so as to enable the electors to vote on them separately.

This sentence was obviously borrowed directly from the 1921 Constitution of Louisiana,

Article I, Section 21, of which stated:

When more than one amendment shall be submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately.

c. The 1974 Constitution Expressly Reinforces the "Single Object" Doctrine

The sentence quote above from the 1921 Constitution was interpreted by our Supreme Court in *Graham, supra*, to require each proposed constitutional amendment to have a single object. The Delegates at the 1973 Constitutional Convention re-enforced that doctrine by expressly stating in the first sentence of Article XIII, Section 1(B):

A proposed amendment ... shall be confined to one object;
.... (Boldface supplied).

d. The "Single Object" Doctrine

The key ruling of *Graham, supra*, is the requirement that every proposed constitutional amendment in Louisiana be confined to a single object:

It requires no argument, nor citation of authorities to support the proposition that if the changes contained in the proposed amendment may be logically viewed as parts of a single plan then their submission as one amendment meets the constitutional requirement. But does Act 384 of 1940 fall within this well recognized rule? That is the question presented for decision. 3 So.2d at 774.

In order to ascertain whether the provisions contained in the body of Act 384 of 1940 violate the constitutional prohibition against submitting more than one amendment in the same proposal, necessarily the entire text of the statute must be considered.

After analyzing the holdings in a number of earlier cases, Judge Lockwood, speaking for the Supreme Court of Arizona, in the case of *Kerby v. Luhrs*, 44 Ariz. 208, 36 P. 2d 549, 554, 94 A.L.R. 1502, lays down the rule to be applied whether one or more than one constitutional amendment is covered by a proposition submitted, as follows:

"If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the constitutional prohibition. Nor does the rule as stated unduly hamper the adoption of legitimate amendments to the Constitution. Such a document was presumably adopted deliberately, after careful preparation, as a harmonious and complete system of government. Changes suggested thereto should represent the free and mature judgment of the electors, so submitted that they cannot be constrained to adopt measures of which in reality they

disapprove, in order to secure the enactment of others they earnestly desire." 3 So.2d at 775-76 (boldface supplied).

That is precisely what this proposed constitutional amendment forces many electors to do. Arguably the first and fourth sentences of the proposed amendment embrace a single object amenable to being in a single amendment. The first sentence bans same sex marriages in Louisiana while the fourth sentence bans importing a same sex marriage from another jurisdiction into Louisiana. The second and third sentences, however, each has its own object which is different from the object of the first and fourth sentences. The second sentence bans civil unions, common law marriages, putative spoushoods and all other nonmarital unions lacking a valid marriage certificate. The third sentence goes even further by denying any legal status whatsoever to unmarried couples if that legal status smacks of marriage for unmarried individuals.

The result is that voters who "earnestly desire" to ban same sex marriages, but who also "earnestly desire" that civil unions be allowed in Louisiana, must vote against themselves. Likewise, voters who "earnestly desire" the banning of same sex marriages, but also "earnestly desire" that some legal recognition and support be given to unmarried individuals in committed relationships, must vote against themselves. This proposed constitutional amendment places such voters in the precise dilemma that *Graham, supra*, expressly disallowed, quoting the Supreme Court of Idaho in *McBee v. Brady*, 15 Idaho 761, 100 P. 97, 101:

"This provision of the Constitution is a wise one, and is intended to prevent several inconsistent and conflicting propositions from being submitted to the voters in the same amendment, and forcing the voter to approve or reject such amendment as a whole. In other words, it prevents burdening a meritorious proposition with a vicious one, and alike prevents a vicious proposition from having the support of a meritorious one, and gives to the voter the right to have each separate proposition submitted to him in order that he may express his will for or against each separately without being compelled to accept a provision to which he is opposed in order to have adopted a provision which meets his favor." 3 So.2d at 776 (boldface applied).

Our Supreme Court went on to quote with approval the Supreme Court of Iowa in *Jones v. McClaghry*, 169 Iowa 281, 151 N.W. 2d 210, 216, ending the quotation with:

"The elector in approving or rejecting cannot be put in a position where he may be compelled, in order to aid in carrying a proposition, also to vote for another which, if separately submitted, he would reject." 3 So.2d at 777.

The Court in *Graham, supra*, concluded by analyzing in detail the proposed constitutional amendment before it. The Court concluded that the said proposed constitutional amendment violated the Single Object Doctrine.

e. The Judiciary's Obligation to Enforce the Constitution

Plaintiffs realize the gravity of what they are asking this Court to do. They are fully aware of the super heated emotional climate surrounding the entire subject of same sex marriage. Plaintiffs also fully realize the amount of courage and respect for law and order that any Court will need in removing from the ballot an admittedly popular general idea (banning same sex marriage).

Our Supreme Court showed such courage and respect for law and order in *Graham, supra*, in overturning a proposed constitutional amendment after the people had already voted for it. In so doing, our Supreme Court stated words that ring down the decades and inspire everyone who believes in the rule of law:

It cannot be logically and fairly stated that, because this court has held that the proposed constitutional amendment is void, its holding is, in effect, a declaration that the Supreme Court of Louisiana has arrayed its opinion against the will of 140,000 voters of this State. When the mandatory provisions of the Constitution are violated, the Constitution itself strikes with nullity the act that did violence to its provisions. The Justices of the Supreme Court simply perform their sworn duty to uphold the Constitution by declaring that the offensive act transcends the fundamental law and, therefore, is ineffective. If other officials of the State government intentionally or unintentionally failed to comply with the mandatory provisions of the Constitution – which clearly and explicitly set forth the manner in which that fundamental law shall be amended – it is the absolute right of any citizen and taxpayer to challenge the constitutionality of a proposed amendment and it is the obvious sworn duty of the members of the Supreme Court to declare that the Constitution has been violated and, therefore, the attempt to so amend it was ineffective, not because of the opinion or the will of the Justices of the Court, but because the clear and mandatory provisions of the Constitution under which the proposed amendment was submitted to the people were entirely disregarded and disobeyed. **It is the sacred responsibility and duty of the Court of last resort to protect the constitutional rights of the minority against invasion or destruction by the vote of a majority.** Otherwise, this would become a government of men and not of law. This cardinal principle is one of the basic pillars of sound, just and stable government by both the Sovereign States and the Sovereign Union.... [T]o give constitutional effect to the proposed amendment with the sanction of the Court would unquestionably lead to the destruction of the Constitution because the amendment was not predicated and founded upon the observance of the Constitution's mandatory provisions but was based upon their violation.

It is argued that the Court has thwarted the will of a majority of the voters upon strict legal technicalities. It cannot be truthfully

stated nor successfully urged that the clause of the Constitution requiring constitutional amendments to be submitted separately is an unimportant or a technical provision. 3 So. at 795 (boldface and ellipse supplied).

Plaintiffs pray, both for their own sakes and for that of the State of Louisiana, that this Court and every other Court considering this issue will show the same resolute determination and unwavering commitment to our great State Constitution that the Justices of our Supreme Court showed in 1941.

COUNT III
(Violation of Prefiling Requirement)

Paragraphs 27 through 37 of the Petition set forth in detail the basis for Court III. Plaintiffs respectfully refer the Court to those Paragraphs in the Petition on this point.

One of the major reasons for the 1974 Constitutional Convention, and one repeatedly referred to in the debate over proposed Article XIII, was the destructive effect that repeated amendments had on the prior constitution. Delegate Bergeron noted:

Our present constitution was adopted in 1921. Well, since 1921, we've had five hundred and thirty-six amendments adopted by the people. Bergeron, Proceedings, Vol. 9, p. 3115.

Delegate Bergeron went on to state that the primary purpose for the 1973 Constitutional Convention was the over amending of the prior Constitution:

We're here because so many constitutional amendments have been added to our constitution – so many changes. They were necessary; yes, they were necessary, but so many proposed constitutional amendments were not necessary. That is the problem. How do we stop the problem? Bergeron, Proceedings, Vol. 9, p. 3116.

Rep. Jenkins, on behalf of the Committee on the Bill of Rights and Elections, introduced proposed Article XIII during the floor debate and explained the reason for proposing some form of prefiling requirement:

The reason that this is included is because we feel that there must be some effort to screen, or limit, the number of amendments that are offered... So, what we've provided in Section 1 is a means whereby we screen proposed amendments by requiring prior thought before they are introduced, so that a legislator has to think at least ten days in advance of the session, before he introduces something. We do this now for local bills; we do it for retirement bills. It has worked well in those areas. If publication is important enough in those areas, certainly it's important enough for constitutional amendments. Jenkins, Proceedings, Vol. 9, p. 3113 (ellipse supplied).

Delegate Stinson also discussed the evil that the prefiling requirement was designed to eliminate:

Don't you think that the purpose has been explained by the committee spokesman that the ten day is those that will be carefully thought out - not at the last minute be thrown in there and said, well, we are going to pacify some group or somebody - that comes down in the middle of a session and wants one introduced, or within the required time to start with. The purpose of this amendment by the committee is to discourage, except those that are badly needed and thought out in advance, don't you think? Stinson, Proceedings, Vol. 9, p. 3123.

A few minutes later Rep. Jenkins stood up again to explain the reason for the Committee's proposal. (That original proposal was to require publication ten days before the legislative session in the Official Journal. That proposal was later changed by a floor amendment to its present form, requiring prefiling ten days before the session convenes.) Rep. Jenkins stated:

Now, let's be practical and talk about how the amendment process really works. I want to refer you to what Senator Sixty [Rayburn] said a couple of months ago. What is the best way to pass a bill, or to pass a joint resolution proposing a constitutional amendment? What is the best way?

The best way is to propose it on the last day for filing bills - to get it to a committee hearing as fast as you can - preferably with little or no notice, and get it to the floor as fast as you can. That's the best way because that's the way it passes. The less people know about it, the more chance it has of passing. Now, the reason we put in this requirement that you advertise in advance is not to give public notice. That wasn't the purpose. It will, it will give all of the people who read the official journal, and keep up with official notices, it will give them notice. But, that's not the purpose. The purpose is to get away from this last minute stuff so that before the session, a legislator has in mind what he's going to propose, and puts in the official journal that he intends to propose it so that he can't get away with his last minute proposal. Jenkins, Proceedings, Vol. 9, pp. 3123-24 (brackets and boldface applied).

In its final form, this proposed constitutional amendment is full of "last minute stuff." Neither House approved it in this form until June 9, 2004, when the Senate approved it only twelve (12) days before the session ended. The House of Representatives did not vote on this wording until June 15, only six (6) days before the Legislature adjourned.

Assuming that prefiled joint resolutions can be amended, at least to polish or qualify language, at some point repeatedly amending the original results in a whole new joint resolution that was not properly prefiled. Where that line might fall may be a discussion for another case, but here

there have been so many changes to so many aspects as to make this proposed constitutional amendment too much "last minute stuff" and not enough prefiled joint resolution.


CONCLUSION

Plaintiffs realize that over half a century has passed since a Louisiana Court has struck down a proposed constitutional amendment. The rarity of the event does not make it any less necessary. Our Supreme Court, in *Graham, supra*, found the novelty of its opinion to be essentially irrelevant:

It is asserted on behalf of relators that if this Court maintains respondent's contentions, it will be the first time in its history the Court had held that a constitutional amendment, approved by the vote of the people, is unconstitutional. **But everything must have a first time**, as is forcibly illustrated by the fact that it is the first time a proposal, embracing such a drastic change in our fundamental law, as the one under review, has been submitted to the voters. It is also the first time that the Legislature, in submitting a proposed constitutional amendment, has failed to comply with two of the essential requirements of the Constitution itself. 3 So.2d at 783 (boldface supplied).

If the Courts of Louisiana deny relief to the Plaintiffs, the result will be to embolden those who would use our State Constitution as an engine for social change or as a club to force their views upon others and to crush those whom they loath or fear. Louisiana, more than any other State in the Union, is a patchwork of marvelously diverse minorities. If we start picking and choosing among different minority groups, writing first this one and then that one out of the Louisiana Declaration of Rights, doing so through multiple-object amendments that hide their less popular objects behind a frenzy to approve the more popular ones, while allowing the Legislature to rewrite and cut and paste the original prefiled resolution any which way that the Legislature wants, the result will be grim indeed. Plaintiffs engage in no overstatement whatsoever when they state that the justice of their cause requires that they prevail in this case - not for their own sakes alone but for that of constitutional government of, by and for the people of Louisiana.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum has been served upon

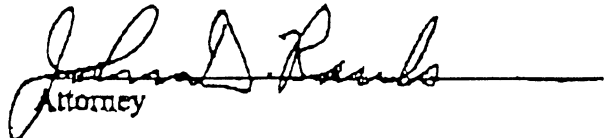
The Hon. W. Fox McKeithen
Secretary of State of Louisiana
Through The Hon. Charles C. Foti, Jr.
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by facsimile and by placing a copy of same to each in the United States Overnight Mail, postage prepaid and properly addressed this ~~11th~~ day of August, 2004.

I also certify that a copy of the foregoing Memorandum has been served upon:

Sherry S. Landry
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by hand delivery of a copy of same to each this ~~11th~~ day of August, 2004.


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