

STATE OF LOUISIANA  
COURT OF APPEAL  
FOURTH CIRCUIT

No. 2004-CA-1521

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FORUM FOR EQUALITY PAC, ETC., ET AL.,

*(Plaintiffs-Appellees)*

versus

CITY OF NEW ORLEANS, ET AL.,

*(Defendants-Appellants)*

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A Civil Proceeding on Appeal from  
The Orleans Parish Civil District Court  
in and for the Parish of Orleans, State of Louisiana  
(No. 11325, Division "C"),  
The Honorable Christopher J. Bruno, Pro Tempore Judge, Presiding

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**Original Brief of Appellant, W. Fox McKeithen, in His Official Capacity  
as Secretary of State of Louisiana**

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## STATEMENT OF JURISDICTION

La. Const. (1974) art. 5, §10(A)(1) provides for the general appellate jurisdiction of the court of appeal over civil matters.

## STATEMENT OF THE CASE

In its 2004 Regular Session, the Louisiana Legislature adopted House Bill No. 61 enacting Act No. 926.<sup>1</sup> Act No. 926 of 2004 is a joint resolution proposing a constitutional amendment and reads as follows:

### “A JOINT RESOLUTION

“Proposing an amendment to the Constitution of Louisiana, to enact Article XII, Section relative to marriage; to require that marriage in the state shall consist only of the union of one man and one woman; to provide that the legal incidents of marriage shall be conferred only upon such union; to prohibit the validation or recognition of the legal status of any union of unmarried individuals; to prohibit the recognition of a marriage contracted in another jurisdiction which is not the union of one man and one woman; to provide for submission of the proposed amendment to the electors and provide a ballot proposition; and to provide for related matters.

“Section 1. Be it resolved by the Legislature of Louisiana, two-thirds of the members elected to each house concurring, that there shall be submitted to the electors of the state of Louisiana, for their approval or rejection in the manner provided by law, a proposal 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

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<sup>1</sup> The legislative history of Act 926 is available on the Internet at “<http://www.legis.state.la.us/bills/byinst.asp?sessionId=04RS&billtype=ACT&billno=926>”

marriage contracted in any other jurisdiction which is not the union of one man and one woman.

“Section 2. Be it further resolved that this proposed amendment shall be submitted to the electors of the state of Louisiana at the statewide election to be held on September 18, 2004.

“Section 3. Be it further resolved that on the official ballot to be used at said election there shall be printed a proposition, upon which the electors of the state shall be permitted to vote FOR or AGAINST, to amend the Constitution of Louisiana, which proposition shall read as follows:

To provide that marriage in this state shall consist of the union of one man and one woman, that legal incidents of marriage shall not be conferred on a member of any union other than such union, and that the state shall not validate or recognize a legal status identical or substantially similar to that of marriage for unmarried individuals or any marriage contracted in any other jurisdiction which is not the union of one man and one woman. (Adds Article XII, Section 15)”

Plaintiffs-appellees then brought this lawsuit in Orleans Parish Civil District Court. Essentially, the petition alleges three grounds for the constitutional invalidity of Act 926 of 2004: (1) It alleges that the current constitution limits the substantive content of what amendments may be made to it, including the substantive content of Act 926 or, alternatively, where in the constitution certain amending provisions, including those of Act 926, might be placed (and Act 926 purports to place its provisions in the wrong article); (2) it alleges that Act 926 of 2004 violates the single object requirement of La. Const. (1974) art. 13, §1; and it alleges that Act 926 violates the pre-filing requirement of La. Const. (1974) art. 13, §1.

What is most striking about the petition is that its allegations of unconstitutionality are with the substantive content of Act 926 of 2004, but it is not the alleged constitutional violations (the substantive content) of Act 926 (and its legal effect and enforcement) that is sought to be enjoined. Rather, the petition seeks to enjoin the ability of the people of Louisiana to express themselves either FOR or AGAINST the proposed constitutional amendment at a referendum held on its ratification, which itself is not a constitutional violation.

In response, the defendant-appellant filed exceptions of no right of action and no cause of action against the preliminary injunction and then the permanent injunction.

### ACTION OF THE TRIAL COURT

The trial court overruled the exceptions and granted a preliminary injunction on August 13, 2004, from which the defendants-appellants took a suspensive appeal, and this court dismissed as moot on August 24, 2004, 2004-CA-1473. On August 20, 2004, the trial court granted a final judgment recognizing declaratory relief and issuing a permanent injunction to prohibit the Secretary of State from including the proposed constitutional amendment on the ballot for the September 18, 2004 election, from which the defendants-appellants took a suspensive appeal.

The District Court issued judgment on August 20, 2004 granting declaratory relief and issuing a permanent injunction, which can be found at pages 25 & 26 of the Record. Reasons for judgment were issued, and can be found at pages 27-29 of the Record.

The District Court issued written reasons that the amendment at issue violated the single object requirement of the constitution, Art. 13, §1. [Record, p. 28-29] The trial court found that the date set by the Legislature for the submission of the proposed amendment, September 18, 2004, is unconstitutional in that it is not a statewide election date, for the reasons orally assigned in the preliminary injunction trial. [Record, p. 29]

### ASSIGNMENT OF ERRORS

1. The district court erred in denying Defendant-Appellant's peremptory exception of no right of action.<sup>2</sup>
2. The district court erred in denying Defendant-Appellant's peremptory exception of no cause of action.<sup>3</sup>
3. The district court erred in finding that the proposed constitutional amendment, Act No. 926 of the 2004 Regular Session, was itself unconstitutional in that it did not confine itself to a single object. [Record, pp. 28-29]
4. The district court erred in finding that the date set by the Legislature, September 18, 2004, for the submission of the proposed constitutional

<sup>2</sup> We are unable to cite the record regarding this assignment of error, as we were informed by the Clerk's office that there is no record transcript in this matter. We asked and were given only page numbers for the District Court's Judgment and Reasons for Judgment.

<sup>3</sup> We are unable to cite the record regarding this assignment of error, as we were informed by the Clerk's office that there is no record transcript in this matter. We asked and were given only page numbers for the District Court's Judgment and Reasons for Judgment.

amendment, Act No. 926 of the 2004 Regular Session, was unconstitutional in that it is not a statewide election date, nor does the date represent a special election called for the specific purpose of approval or disapproval of the proposed constitutional amendment. [Record, p. 29]

5. The district court erred in granting the permanent injunction to prevent the Secretary of State from placing on the September 18, 2004 ballot the proposed amendment designated as Act No. 926, Acts of Louisiana (also designated as Article XII, §15 “Defense of Marriage”). [Record, p. 26]
6. The district court erred in admitting, over objection, the purported expert testimony, of legal experts whose alleged field of expertise was Louisiana law?<sup>4</sup>

#### ISSUES PRESENTED FOR REVIEW

1. Did the district court err in denying the peremptory exceptions of no right and no cause of action and in granting the permanent injunction to prevent the election for the people’s referendum vote on ratification of the proposed constitutional amendment?
2. Did the District court err in ruling that the proposed amendment was itself unconstitutional in that it does not confine itself to a single object?
3. Did the district court err in ruling that the September 18, 2004, referendum on ratification of the proposed constitutional amendment set by the legislature was not a “statewide election” within the meaning of La. Const. (1974) art. 13, §1?
4. Did the district court err in admitting, over objection, the purported expert testimony, of legal experts whose alleged field of expertise was Louisiana law?

#### ARGUMENT

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<sup>4</sup> We are unable to cite the record regarding this assignment of error, as we were informed by the Clerk’s office that there is no record transcript in this matter. We asked and were given only page numbers for the District Court’s Judgment and Reasons for Judgment.

*May it please the Court:*

**1. The District Court Erred in Overruling the Peremptory Exceptions of No Right of Action and No Cause of Action and in Granting the Permanent Injunction to Prevent the Election for the People's Referendum Vote on Ratification of the Proposed Constitutional Amendment.**

The allegations of unconstitutionality in the petition concern the substantive content of Act 926 of 2004, but it is not the alleged constitutional violations (the substantive content) of Act 926 (and its legal effect and enforcement) that is sought to be enjoined. Rather, the petition seeks to enjoin the ability of the people of Louisiana to express themselves either FOR or AGAINST the proposed constitutional amendment at a referendum held on its ratification. The referendum election held for such purpose is not itself a constitutional violation, and no law or constitutional provision grants anyone the remedy—be it by way of preliminary injunction or permanent injunction—of preventing the people of the state from having the opportunity to vote in a referendum on ratification of a constitutional amendment proposed by the legislature.

While a proper plaintiff may, after a referendum, apply to the courts for an injunction to prevent the enforcement of the substantive content of a constitutional amendment that impinges on a real and actual legal interest, on the grounds that it was not proposed to the people by the legislature in substantial compliance with the provisions of the constitution governing constitutional amendments, no law—constitutional or statutory—grants anyone the remedy of preventing a public referendum on a proposed constitutional amendment or of nullifying the date that the legislature has set for such referendum.

The state constitution itself places uniquely in the legislature alone the power to designate the election at which referendums on proposed constitutional amendments shall take place. La. Const. (1974) art. 13, §1. *See Graham v. Jones*, 198 La. 507, 3 So.2d 761 (La. 1941). The courts do not have the power to usurp the legislature's discretion in this regard and upset the date of such election. Otherwise, individual judges and plaintiffs could defeat the basic organ of law by mere procedural means, even when they lack any substantial reason to do so. If a courts had the power to enjoin the placement of the referendum at that election until after the election date passed, the proposed constitutional amendment, not having been voted on by the people, would be defeated *ipso facto*, even if later it was found that there was error in the court's decision and there was no substantial

reason for the injunction. In this way, such an injunction would actually create irreparable harm, but it would not prevent irreparable harm, because an injunction can always be obtained after the referendum vote, but prior to the official promulgation of its results (or thereafter), to prevent the legal effect and enforcement of the substantive content of the constitutional amendment, if it were adopted by unconstitutional means. Moreover, it would mean that a member of the judiciary could prevent the valid action of a co-equal branch of government. Thus, there is no declaratory or injunctive remedy to prevent the people from voting at a legislatively-designated referendum on ratification of a constitutional amendment proposed by the legislature.

Prior to ratification, a constitutional amendment proposal has no effect. Hence, it cannot in that status impose any harm, much less irreparable harm, on the plaintiffs-appellees. Until the proposed constitutional amendment is voted on and ratified, it follows that any attack on it in the courts in an attempt to deprive the people of their constitutional right to vote on it is at best premature. Only if the result of such a referendum election shows that the constitutional amendment proposal was indeed ratified by a vote of the people does the substantive content of the constitutional amendment that allegedly impinges on someone's real and actual interest, C.C.P. art. 681, become ripe to attack—*viz.*, to prevent it from having legal effect and to prevent its enforcement. But if the result of the referendum election is the people's rejection of ratification, the whole lawsuit and judicial attack is entirely moot and merely advisory. In that event, the constitutional amendment is simply rejected by the people and cannot have any legal effect or enforcement.

The people have the constitutional right and privilege to vote at referendum on the ratification of constitutional amendment proposals, and the law does not give the plaintiffs-appellees a right or a remedy at law to prevent the people from exercising that privilege and right.

**2. The District Court Erred in Ruling that the Proposed Constitutional Amendment Has A Single Object Within the Meaning of La. Const. (1974) art. 13, §1.**

The District Court found that the proposed amendment was itself unconstitutional, in that it did not confine itself to a single object as required by Article 13, §1. [Record, p. 29] The District Court found plaintiff Schultz's testimony "compelling in that a vote on the proposed amendment would cause him to violate either his conviction against same sex marriages or his strong support of

civil unions.” [Record, p. 29] However, that is not the constitutional test for determining whether the legislature complied with the single object requirement.

La. Const. (1974) art. 13, §1, provides for the manner of amending the constitution when the *legislature* shall present a proposed amendment to the people voting at referendum for ratification. In this situation, the constitutional provisions allocate certain functions to the legislature and certain other functions to the people. Allocated to the legislature, *inter alia*, is the power, discretion, and responsibility for drafting the proposed amendment and setting the election date for the people’s referendum. The people must vote on the constitutional amendment and either ratify it or reject it, but the people are given no power whatsoever to draft the amendment or even assist in the drafting. In fairness to the people’s vote, the only requirement is that the amendment has a single object. There is no requirement that it not have multiple parts. There is no requirement that the people get to vote on each of its parts separately. It is sufficient if the constitutional amendment presents a single plan with multiple parts which are all at least germane to one another.

Thus, no plaintiff has a real and actual legal interest in voting on each sentence separately of a proposed constitutional amendment. The people must vote on what is proposed by the Legislature; they do *not* have the right to draft the constitutional amendment by voting on each sentence, phrase, part, or whatever of it. Nearly everyone has things they like about any constitutional amendment proposal and things they do not like about it; they must weigh the pro’s and con’s on balance and decide whether to vote for it or against it. Plaintiff Schultz even testified that on other proposed constitutional amendment votes, such as on the “Stelly Plan” he was in favor of one part and against another part.<sup>5</sup>

The state constitution vests the power and discretion in the Legislature to draft the constitutional amendment proposals; the only requirement put on them in doing so is the single object requirement, which requires only that a single plan be drafted, although it can have multiple parts that are germane to one another.

The Supreme Court of Louisiana explained in *Miller v. Greater Baton Rouge Port Comm.*, 225 La. 1095, 74 So.2d 387 (La. 1954):

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.*

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<sup>5</sup> We are unable to cite the record regarding Plaintiff Schultz’s testimony, as we were informed by the Clerk’s office that there is no record transcript in this matter. We asked and were given only page numbers for the District Court’s Judgment and Reasons for Judgment.

*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; and *Orleans Parish School Board v. New Orleans*, La.App., 56 So.2d 280.

*Miller, supra*, 225 La. at 1105, 74 So.2d at 390 (emphasis added) and the authorities cited therein.

In *Graham v. Jones, supra*, the language in the opinion regarding the multiplicity of objects in the constitutional amendment therein could be considered *obiter dicta*, because the *ratio decidendi* of the case was that the Legislature had failed to designate the date of the referendum election for the constitutional amendment, as required by the constitution, and the secretary of state's setting of the date was considered a violation of the separation of powers doctrine. Moreover, the objects were considered multiple in that case because several different discrete articles and sections of the constitution were sought to be amended by the one constitutional amendment. Such was not the case in *Miller, supra*, nor is it the case herein. The situation in this case is like the one in the *Miller* case, not like the situation in the *Graham* case. Thus, *Graham* has been modified, explained, and refined by the subsequent *Miller* case, which has set forth the "germaneness" rule for a single object when there is one single plan with multiple parts. The constitutional amendment in this case properly follows the current law on the single object requirement.

In this case, there is but a single plan—*viz.*, to provide that marriage shall be between a man and a woman and that all alternative relationships of whatever nomenclature that mimics or contains incidents unique to marriage between persons other than a man and woman are not given formal legal recognition. All of the provisions together in this proposed constitutional amendment are clearly germane to one another. All of the provisions support the idea that marriage is between a man and a woman and enforce that one concept by specifically providing that the one-man, one-woman marriage shall be given legal approbation and that alternative "marriage-type" unions and relationships shall not be given legal approbation.

### **3. The District Court Erred in Ruling That the September 18, 2004, Referendum on Ratification of the Proposed Constitutional Amendment Set**

**by the Legislature Was Not a “Statewide Election” Within the Meaning of La. Const. (1974) Art. 13, §1.**

La. Const. (1974) art. 13, §1, provides that the legislature shall have the power and discretion to set the date for the people’s referendum for ratification of a constitutional amendment proposed by the legislature. The legislature is *explicitly* given the power to authorize by law even a *special election* for this purpose. The requirement of a “statewide election” in this constitutional provision is simply to assure (1) that all of the registered voters in the state get the opportunity to vote for or against ratification of the proposed constitutional amendment and (2) that they must vote all at the same time, that is, on the same day in the same election. The legislature cannot call for a “partial-state” or “half-state” referendum for ratification of a constitutional amendment; it must be a referendum conducted throughout the whole state. Under the constitutional provision, there is no pre-set statewide election date that the legislature must choose; but, as required by Article XI, Sec. 1, the legislature has adopted an election code which sets forth the conduct of all elections in Louisiana. Under the Election Code, there are pre-set statewide election dates, which are the gubernatorial and congressional elections as set forth in R.S. 18:402(A) and (B). They are statewide election dates because the legislature has provided for the costs of such elections to be paid for by the state, whether or not a gubernatorial or congressional candidate appears on the ballot [R.S. 18:1400.1-1400.4], providing for the conduct of such elections by the state on a statewide basis. [See, Affidavit of Wade O. Martin, III, Record Exhibit “A”].

In *City of Donaldsonville v. State*, 1999-1582 (La.App. 1 Cir. 6/23/00), 764 So.2d 339, *writ den.* 2000-2257 (La. 10/27/00), 772 So.2d 654, the legislature passed a statute calling for gaming referendums throughout the state. The court held that the statute was not a local law but had general state concern because the referendums were held throughout the state in a statewide election. The court explained,

“All persons throughout the state of Louisiana were affected by the passage of section 1300.21. *Every voter in the state was given the opportunity to cast a ballot on whether to prohibit or allow video draw poker devices within his parish, and the election was held throughout the whole of the state.* The statute affected the state as a whole, persons throughout the state were affected, and the statute operated on a subject of statewide concern. *See Polk*, 626 So.2d at 1136. Of particular note, the statute was adopted pursuant to the state’s police power. As held in *Kotch* and recognized in *Polk*, 626 So.2d at 1136-37, laws adopted for the benefit of the entire state and pursuant to the state’s police power are general. Louisiana courts

have consistently recognized that the legislature's authority to regulate gaming constitutes a legitimate exercise of police power. *Polk*, 626 So.2d at 1137. Section 1300.21, mandating a *statewide election* to determine whether to prohibit or allow video draw poker devices, constituted a general law rather than a local or special law.

*Id.*, at pp. 6-7, 772 So.2d at 344 (emphasis added).

Even under previous election laws, the courts have held,

"[O]ur statutes and jurisprudence clearly reflect that there be a distinction between statewide or multiparish or district races and those which are purely local in nature. In the former situations it is the Secretary of State who tabulates the results. In the latter case the local committee compiles and tabulates the result."

*LeCompte v. Bd of Election Commissioners of Parish of Terrebonne*, 331 So.2d 173, 176 (La. App. 1st Cir. 1976).

A statewide election is one conducted by the State through the Board of Election Supervisors of each parish. *Burgess v. City of Shreveport*, 448 So.2d 861, 863 (La.App. 2 Cir. 1984) *aff'd*, in pertinent part, 471 So.2d 690 (La. 1985).

The legislature has provided by law for the gubernatorial and congressional election dates provided for in R.S. 18:402(A) and (B) to be held throughout the state, with the costs to be paid for by the state, whether a gubernatorial or congressional candidate appears on the ballot. R.S. 18:1400.1 – 1400.4. Contrast the conducting of such gubernatorial or congressional elections with local elections, which dates are specifically provided for in R.S. 18:402(C) and (D) and which election costs are specifically provided for in paragraphs (C) of R.S. 18:1400.1-1400.4, as being the responsibility of the governing authority that relates to the character of the office or the issue involved in such election.

More specifically, the Louisiana Election Code is set up to require the state to pay *all* the costs of elections for gubernatorial and congressional elections, whether or not a gubernatorial or congressional candidate appears on the ballot, in La. R.S. 18:1400.1, 18:1400.2, 18:1400.3 and 18:1400.4, and these elections are considered statewide elections. [See, Affidavit of Wade O. Martin, III, Record Exhibit "A"]. It is only when a local or municipal candidate or a local bond, debt, tax, proposition, or question also appears on the ballot that locals share in the costs of such elections.

La. R.S. 18:402(B) provides that the congressional primary election shall be held on the first Saturday in October of an election year and the congressional

general election shall be held on the first Tuesday after the first Monday in November of an election year. The court in *Love v. Foster*, 147 F.3d 383 (5th Cir. (La.) July 16, 1998) upheld the ruling of the District Court which fashioned a remedy consistent with the U.S. Supreme Court and the U.S. Fifth Circuit rulings which held that members of congress from Louisiana could not be elected prior to the first Tuesday following the first Monday in November of an election year. The remedy fashioned by the District Court and affirmed by the U.S. Fifth Circuit in *Love* ordered the adjustment of the election dates for members of congress to be held on the first Tuesday after the first Monday in November, which is November 2, 2004 for this election year, with any general election being held on the December date provided for by the election code. [R.S. 18:512(C)]. The court's decision in *Love* did not alter the dates for the state and local elections that are established in La. R.S. 18:402. Nor has the Louisiana Legislature has amended the Louisiana Election Code to change the date of the congressional primary election and therefore, pursuant to the provisions of the Louisiana Election Code, the September 18, 2004 election is the congressional primary election for state elections.

“Absent action by Congress, any further changes that might be made therein [to the Louisiana Election Code] are the exclusive province of the Louisiana Legislature and Governor, as are any refinements or valid significant changes they may wish to make as a consequence of today's resolution.”

*Love*, 147 F.3d at 387.

La. Const. (1974) art. 13, §1, was adopted by the voters as part of the Louisiana Constitution in 1974, and it provides that each joint resolution proposing the amendment of the constitution shall specify the statewide election at which the proposed amendment shall be submitted, and also provides that special elections for submitting proposed amendments *may be authorized by law*. Since 1974, the Louisiana Legislature has authorized elections for proposed constitutional amendments on election dates that were not gubernatorial or congressional elections. See, Act 2, 1989 First Extraordinary Session of the Louisiana Legislature authorizing the special statewide election for April 29, 1989; Act 613, 1989 Regular Session of the Louisiana Legislature authorizing the special statewide election for October 7, 1989; and Act 233, 1993 Regular Session of the Louisiana Legislature authorizing the special statewide election for October 16,

1993, all attached to the Affidavit of Wade O. Martin, III, Record Exhibit "A". This evidences that the Louisiana Legislature has recognized that election dates, other than the gubernatorial and congressional dates, set forth in the Louisiana Election Code are not considered statewide elections for purposes of Article 13, §1, and that a specific act of the legislature is required to place a proposed constitutional amendment on the ballot for such a special election date.

Additionally, the requirement for a statewide election in Article 13, §1, is not limited to an election where there is a statewide candidate on the ballot. The Report of the Secretary of State for the years 1982, 1994 and 1998 show that proposed constitutional amendments have previously been placed on the ballot for the following elections where there was no statewide candidate on the ballot: September 11, 1982, October 1, 1994, and October 3, 1998. [See, Affidavit of Wade O. Martin, III, Record Exhibit "A", and the attachments thereto]. In addition, after the ruling in *Love, supra*, the Report of the Secretary of State for the year 1998 indicates that proposed constitutional amendments were put before the voters on October 3, 1998 and this election did not include the election of members of Congress. [See, Affidavit of Wade O. Martin, III, Record Exhibit "A", and the attachments thereto]. Again, the Louisiana Legislature has clearly recognized that the congressional election dates set forth in the Louisiana Election Code are statewide elections for purposes of Article 13, §1, including the election held on October 3, 1998 that did not have congressional candidates on the ballot, which is factually the same as this case before this Court.

In sum, since the Louisiana Election Code statutorily provides that the September 18, 2004 election is the congressional primary election, it is a statewide election and the Louisiana Legislature was correct in its determination that the election was a statewide election and that no specific act of the legislature was required to place the proposed constitutional amendment on the September 18, 2004 ballot. Thus, the referendum election that the legislature has set for ratification of this proposed constitutional amendment meets all of the criteria for a statewide election, and there can be no doubt that the statewide election called for complies with the requirement that it be a statewide election within the meaning of La. Const. (1974) art. 13, §1, and the District Court erred in ruling otherwise.

**4. The District Court Erred in Admitting, over Objection, the Purported Expert Testimony, of Legal Experts Whose Alleged Field of Expertise Was Louisiana Law.**

At the trial on the merits, the trial court admitted, over objection, the alleged expert testimony of two witnesses who claimed their field of expertise was Louisiana law; this testimony was sought and presented by the plaintiffs.

Admitting such testimony was a clear violation of C.E. art. 702, which allows expert testimony only for the purpose of assisting the trier of fact in the understanding of evidence and determination of facts, not law. Plaintiffs' witnesses—whether a so-called “expert” or not an expert—do not have the capacity to testify as to their opinion of the law and its meaning and effect, as ascertaining the meaning of law and its effects and how to comply with it is strictly within the province of the court. Thus, no one should be admitted as an expert in the field of Louisiana law in a Louisiana court. *See Morrison v. Johnston*, 571 So.2d 788, 791-792 (La. App. 2<sup>nd</sup> Cir. 1990) *writ den.* 575 So.2d 367 (La. 1991); *Wilson v. Wilson*, 542 So.2d 568, 573 (La. App. 1<sup>st</sup> Cir.1989); *Guitreau v. State Farm Mut. Auto. Ins. Co. et al.*, 540 So.2d 1097, 1102 (La. App. 1<sup>st</sup> Cir. 1989); *Clesi, Inc. v. Quaglino*, 137 So.2d 500, 503 (La. App. 4<sup>th</sup> Cir.1962).<sup>6</sup>

## 5. Additional Argument

Although not a basis for the District Court's decision, the Defendant-Appellant makes the following arguments addressing the other assertions made by Plaintiffs-appellees in the trial court.

### ***A. A Constitutional Amendment May Eliminate Rights Contained In The Pre-existing Constitution Being Amended***

Plaintiffs-appellees argue that because the proposed constitutional amendment is unconstitutional under the 1974 Louisiana Constitution's Declaration of Rights, Article I, that it is proper to enjoin the election. Plaintiffs-Appellees admitted in their district court memorandum that they are seeking to overturn the precedent and jurisprudence of the Supreme Court of Louisiana—*viz.*, *Police Jury of the Parish of Washington v. All Taxpayers, Property Owners and*

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<sup>6</sup>While *State v. Francis*, 546 So.2d 1357 (La. App. 4<sup>th</sup> Cir. 1989) appears on the surface to be an anomaly in the jurisprudence misconstruing C.E. art. 702 in this regard, upon closer scrutiny the holding in that case can be seen to be actually procedural—*i.e.*, once one party got away with questioning the witness about a special circumstance and its legal effect, the other party on cross-examination would not be precluded from asking the witness about the same matter (the party who “opened the door” on the matter would not then be heard to object to cross-examination on the grounds that the witness could not testify to the matter). Even assuming *Francis* to be a valid interpretation of C.E. art. 702 (which is not admitted), it is clearly inapplicable to this case.

*Citizens of Industrial District No. 1 of Washington Parish*, 278 So.2d 474 (La. 1973)—in claiming that the state constitution should be interpreted so that certain rights therein can never be amended out of it. Both the District Courts and this Honorable Court are obligated to follow the precedent of the Supreme Court of Louisiana and may not fail to do so. *Louisiana Electorate of Gays and Lesbians, Inc. [LEGAL], etc., et al. v. State, etc., et al.*, 2001-2106 (La. 3/28/02) at page 5, 812 So.2d 626, 629. Thus, both the lower court and this Honorable Court must follow the Supreme Court of Louisiana's precedent and cannot overrule that precedent and line of jurisprudence. The plaintiffs will have to wait until they appeal this case all the way to the Supreme Court of Louisiana and only then try to argue for overruling that state supreme court precedent.

For all purposes of this lawsuit, therefore, in the district court and in this Honorable Court, there is no limitation on the power of people of Louisiana to amend their constitution in any respect, providing the amendment does not conflict with the United States Constitution. Such is the precedent and jurisprudence of the Supreme Court of Louisiana. *Washington Parish Police Jury v. All Taxpayers, etc., supra; Louisiana Ry. & Nav. Co. v. Madere*, 124 La. 635, 50 So. 609 (La. 1909); and the cases and authorities cited therein.

Not only is the precedent and jurisprudence of the Supreme Court of Louisiana, but it is also the general rule applied throughout Louisiana's sister states. "There is no limitation on matters which can be the subject of a constitutional amendment in Florida," *Lane v. Chiles*, 698 So.2d 260, 263 (Fla. 1997). A constitutional amendment necessarily annuls any and all former provisions of the same constitution which conflict with it. *Ward v. Harding*, 860 S.W.2d 280 (Ky 1993). "Even a principle that is rooted in the constitution can, of course, be abrogated by constitutional amendment. See *In re Interrogatories Propounded by Senate*, 189 Colo. 1, 536 P.2d 308, 318 (1975)," *Fonfara v. Reapportionment Commission*, 222 Conn. 166, 172, 610 A.2d 153, 157 (Conn. 1992). "A basic tenet of constitutional law is that only the people of a state are vested with the power of amendment and *this power is plenary*," *Chevron USA, Inc. v. State of Mississippi*, 578 So.2d 644, 649 (Miss. 1991) (on rehearing) (emphasis added). "A constitutional amendment will supersede any inconsistent portions of antecedent constitutional or statutory provisions, as 'the latest expression of the will of the people,'" *State of West Virginia ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 462, 377 S.E.2d 139, 144 (W.Va. 1988).

"No part of the Constitution...is inviolable. To hold to the contrary would give absolute finality to a portion of the Constitution and would thwart the express will of the people when they retained the right to amend their Constitution. The people specifically reserved this right to themselves in...the Nebraska Constitution.

\* \* \*

"If it then be contended that even if Initiative 300 is an amendment to our Constitution, it conflicts with that same Constitution, we find that position without merit. We agree with the Massachusetts Supreme Judicial Court, which stated in a footnote simply that '[i]t is difficult to comprehend how the proposed constitutional amendment can be "unconstitutional" under our Constitution.' *Answer of the Justices*, 375 Mass. 847, 849 n. 2, 377 N.E.2d 915, 916 n. 2 (1978).

Similarly, in *Floridians Against Casino Takeover v. Let's Help*, 363 So.2d 337, 341-42 (Fla.1978), the Supreme Court of Florida stated:

'[C]onflict' with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal. Such an assertion ignores established patterns of constitutional construction. When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions.

"It would completely subvert our role as one of the three branches of government established by the people in the Constitution to expand our jurisdiction to tell the voters of this state that although the Constitution states that the people have reserved the power to amend that Constitution, they may only amend it in ways that we determine are fundamental or have something to do with our 'organic' law.

*Omaha National Bank v. Spire*, 223 Neb. 209, 216, 222-223, 389 N.W.2d 269, 274, 278, (Neb. 1986).

There is nothing in La. Const. (1974) art. 1, §1, or any other provision, to the contrary. Plaintiffs-Appellees rely heavily on a law review article by Mr. Woody Jenkins. In his law review article at 21 *Loyola L. Rev.* 9 (1975), Mr. Woody Jenkins actually never says that the state constitution cannot be amended subsequently to provide for different rights than those in the "Declaration of

Rights” article [La. Const. (1974) art. 1] or to repeal any of those rights. Nor does he say that a subsequent constitutional amendment to another article in the constitution that conflicted with a provision in Article 1 would not have the effect of superseding it. The only thing he says is that in the provisions in the other articles dealing only with the structure and organization of government, as a matter of constitutional interpretation, the courts should not take a provision which merely grants a general governmental power to some governmental department and which does not conflict with any provision in Article 1 and interpret it so as to unnecessarily conflict with an individual right secured in Article 1. Mr. Jenkins says nothing of subsequent constitutional amendments by which the people of the state intend to change their constitution in a way that conflicts with a previous provision, regardless where that provision may be situated in the constitution.

Even if there were any provision in the pre-existing constitution that purported to limit the substantive content of any future constitutional amendment or in what article of the constitution a future constitutional amendment might be placed, that provision, too, would be subject to a later amendment, either explicitly or implicitly. It is the latest expression of the people’s will for their constitution that takes precedence. Just as “[t]he legislative department of the state has no power to pass any irrevocable law [citing Cooley’s Const. Lim. (7th Ed.) p. 174],” *Louisiana Ry. & Nav. Co., supra*, 124 La. at 642-643, 50 So. at 611, the people cannot adopt by their ratification any “irrevocable” constitutional provision that cannot be changed by a subsequent ratification.

***B. Act 926 of 2004 Was Properly Pre-filed in Accordance with La. Const. (1974) Art. 13, §1***

Plaintiffs-Appellees also attack the constitutional amendment proposal under La. Const. (1974) art. 13, §1, on the grounds that, although they admit that legislation containing a constitutional amendment proposal was pre-filed, they claim that it was so amended in the legislative process that it actually became another constitutional amendment proposal, which had not been pre-filed but which then was passed and became the proposal to be put to the people at referendum.

Plaintiffs-appellees claim that the legislative process so amended the constitutional proposal that it was not the same constitutional proposal that was pre-filed. This claim relates to what is a proper amendment to proposed

legislation, for the legislative process itself is a process of refining and amending ideas and language to arrive, in the end, at a consensus provision approved by a majority. Such a process necessitates the action of extensive amending. How far does the Legislature have in the amendments that it can make to an original piece of legislation? La. Const. (1974) art. 13, §1(A), makes an express and specific reference that a constitutional amendment should be enacted “pursuant to all of the procedures and formalities required for passage of a bill except submission to the governor.” The procedures and formalities required for the passage of a bill are governed by La. Const. (1974) art. 3, §15, which reads, in pertinent part within Subsection (A),

“§ 15. Passage of Bills

“Section 15. (A) Introduction; Title; Single Object; Public Meetings. The legislature shall enact no law except by a bill introduced during that session, and **propose no constitutional amendment except by a joint resolution introduced during that session, which shall be processed as a bill.** Every bill, except the general appropriation bill and bills for the enactment, rearrangement, codification, or revision of a system of laws, shall be confined to one object. Every bill shall contain a brief title indicative of its object. Action on any matter intended to have the effect of law shall be taken only in open, public meeting.”

(Emphasis added.) La. Const. (1974) art. 3, §15(C), which reads, “No bill shall be amended in either house to make a change not germane to the bill as introduced,” sets wide boundaries for the scope of such amendments. That boundary is “germaneness.” See *Jones v. Bd. of Ethics for Elected Officials*, 605 So.2d 1064 (La. 1992).

In the *Jones* case, the proposed legislation originated as legislation providing simply that licensed physicians could be appointed to and to serve on the boards of commissioners of hospital service districts. During the legislative process, the proposed legislation was amended extensively, and by the time it was finalized, deleted the provisions dealing with licensed physicians serving on hospital service districts and, instead, provided an exception to the Code of Governmental Ethics regulating the practice of lobbying both generally and specifically. Thus, the Supreme Court of Louisiana itself stated the issue 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. The Supreme Court of Louisiana found that the amendment was germane, because generally both the original form of the proposed legislation and the finally amended one sought to foster the policy of the Code of Ethics by defining what persons in the private sector would be regulated with respect to dealing with public servants, by increasing public confidence in the integrity of government, and by refining lobbying regulation in the Ethics Code, which had had some lobbying provisions prior thereto.

The germaneness in this case *sub judice* is much clearer than in the *Jones* case. The pre-filed form of the proposed legislation originally sought to amend the state constitution by adding thereto a new Article 1, §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.”

The final Act that was passed after the amendments of the legislative process added a new Article 12, §15, which reads,

#### §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 provisions are not only germane but almost identical in substance. Thus, plaintiffs’ attack lacks merit entirely.

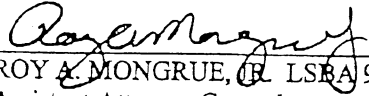
#### CONCLUSION

In supplement hereto, the defendant-appellant adopts the arguments in the brief of Intervenor Hainkel et al. concerning these erroneous district court reasons. The district court erred in overruling defendant-appellant’s peremptory exceptions

and in granting declaratory and permanent injunctive relief and therefore, for any and/or all of these reasons, the judgment of the District Court granting declaratory and injunctive relief should be reversed at plaintiffs-appellees' costs.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon opposing counsel of record by fax and by depositing the same in the United States Mail, postage prepaid, and properly addressed as follows:

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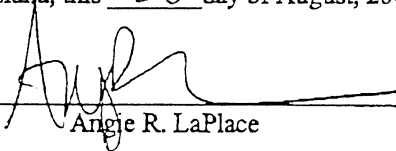
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