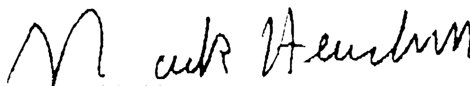
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In Re LEGISLATIVE REFERENDUM NO. 334, STATE QUESTION 711	)))	Case No. ______________

PETITIONERS' BRIEF IN THE CHALLENGE OF LEGISLATIVE REFERENDUM 334 STATE QUESTION 711

Respectfully submitted this 27th day of August, 2004.



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PETITIONERS' BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF MANDAMUS

Petitioners represent numerous and diverse lifestyles present among Oklahoma citizens. They challenge Legislative Referendum 334 State Question 711 on many grounds, a good number of which result from the fact that the proposal is a poorly drafted, multiple-subject question filled with vagueness and confusion which came about in a strange and unorthodox legislative process, sowing confusion in the minds of many voters. Petitioners suggest that many voters will be torn between approving *some* part(s) of the Question and opposing the rest. The Question as it now stands subjects Oklahoma voters to the crudest form of legislative "logrolling" despite clear and unequivocal constitutional and statutory prohibitions against this practice. For example, voters who would disdain applying the term "marriage" to any but a church-sanctioned union of one previously unmarried man and one previously unmarried woman, but who might still see some inherent fairness in allowing each worker in the marketplace to designate *some* person as recipient of contracted and earned benefits, would have to vote the entire measure "up or down." Many other voters will be misled, or at least thoroughly confused, by the various terms used in the language of the Question. Some will doubtless wonder what "benefits of marriage" are being prohibited, as the title indicates, and whether these are the same as "the legal incidents thereof." The confusion resulting from the language of the Question is fatally misleading.

Examination of the proposal clearly brings to light the many *different* perspectives

and opinion that exist among Oklahoma voters as to how a whole panoply of *different* issues are to be treated at law; this very multiplicity of opinions about such different issues and the different public responses to them, constitutes the Question's most egregious flaw -- its blatant violation of the "single-subject rule." Even cursory examination of the proposal shows that this Question is far more complex than a simple "up or down" vote on same-sex marriages, and as such it fails the fundamental requirement for presentation of referendum Questions to the voting population. When the State's founding fathers constructed our Constitution, they realized that the democratic resolution of competing complex issues and concepts requires a clarity of thought and choice which is not present in this Question; because of the absence of such clear meaning and single subject, the proposed Question should be ruled legally insufficient and constitutionally invalid.

I: The Legislative Process Creating the Legislative Referendum Was Defective

State Question 711 is the final offspring of HB 2259, a criminal Act dealing with protecting minors from rape, sodomy and other lewd acts. In the House it went through all required readings and emerged from Committee "do pass." The full House passed it; upon referral to the Senate it went through the first two readings and came out of Committee "do pass." Note that throughout this time it remained essentially the same bill. Then at final reading a Senator struck the Act in its entirety (except for the title identifying it as a criminal measure) and instead inserted the current "marriage protection content."[1] The manner

[1] See Appendix Item 2-A for a flow chart of the progress of HB2259, and other parts of Tab 2 for a full legislative history and other relevant underlying legislative journal documents.

in which this Question came into being violates a multitude of constitutional and statutory requirements for enactment of legislation, contrary to the provisions of Okl. Const. Art. 5 Section 2, which mandates that legislative referendums be enacted in the same manner "as other bills are enacted . ." and contrary to Art. 5 Section 57 which requires that "every act of the legislature *shall embrace but one subject which shall be clearly expressed in its title*."

The *procedural course,* as well as the *subject matter and title,* of HB 2259 were convoluted and tarnished at various points through its twisted evolution into Legislative Referendum Number 334; the improper and irregular manner by which this Question evolved not only offers grounds in itself for disqualification of the ballot question[2], but it is assuredly to blame for grievous deficiencies in the Question as to vagueness and multiple subjects. Because of the late change of content the public scrutiny which normally would attend the creation of a legislative referendum did not occur. A bill which failed to see sufficient light of day and normal public exposure and debate in the process of its enactment is understandably more likely to lack the single purpose and the clarity of thought and meaning to which the people are entitled before they must pass upon it in the voting booth.

II: State Question 711 Is Constitutionally Void For Vagueness

The Question is unconstitutionally vague;[3] examination of its language yields a

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[2] Petitioners are aware that this court is disinclined to inject itself into internal legislative actions under the separation of powers doctrine. Petitioners do not offer the above criticism of the legislative process for HB 2259/ State Question 711 as sole and sufficient reason to keep it off the ballot. However, they believe that the process was defective and argue it *not only* as a ground for the invalidation of the Question, *but also and more importantly as an argument that the legislative history shows that this entire Question came about and was finally passed within one* week – and with n committee consideration in either house! Such a rush to enactment and the lack of any public or normal procedural scrutiny contributed greatly to the end result: a flawed Question presenting multiple subjects in too vague a manner as to pass constitutional muster.

[3] Petitioners recognize that this court normally follows the "prudential rule of necessity" in deferring consideration of constitutional challenges to initiatives until after passage. In re Initiative

multitude of questions about intent and meaning. What does State Question 711 purport to do? It deals with marriage, obviously. But what *kind* of marriage? Its supporters would rush to say, "Well, hetero-sexual marriage, of course." The Question is still unanswered; what *kind* of hetero-sexual marriage? As shown at Appendix Tab 4, it is possible to identify a multitude of *different types or kinds* of marriages, even among hetero-sex persons. Are all of them subject to the provisions of the proposed Question, and if so, to what extent? And of great importance to a great number of hetero-sexual couples in the state, does the language at Section 35(A), which seems to ban the application of "legal incidents of marriage" to "unmarried couples" apply to common-law couples who for many years may have lived and believed that they were married and entitled to the incidents thereof? Equally real to many hetero-sexual couples, is the question of *serial marriages*. Can a man be married to *more than one woman*, at different times? Or does this measure intend to establish a "once-per-lifetime" rule about marriages generally?

Further there is the uncertainty introduced by the juxtaposition of "benefits of marriage" as stated in the ballot title[4], and the phrase "legal incidents thereof" in the body of the proposal. Presumably "benefits of marriage" is not synonymous with "incidents of marriage." What do benefits and incidents mean? Is the meaning the same in all instances

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Petition No. 363, 927 P2nd 558, 565 (Okl. 1996). However, Petitioners believe that the constitutional attacks argued herein are such as to meet the facial constitutional attack which the Supreme Court may reach if in the court's opinion "to do so would prevent costly and unnecessary election." In re Initiative Petition No. 662, 879 P2nd 810, 814 (Okl. 1994). Also see In re Supreme Court Adjudication, Etc., 534 P2nd 3 (Okl. 1975) to the same effect.

[4] This proceeding is not technically a "ballot title challenge," but the discrepancy between the title and body of the Question as to "benefits" or "incidents thereof" seems a relevant and persuasive part of Petitioners' vagueness argument, especially in light of case law which clearly relies on and legitimizes analysis of an enactment's title in determining legislative intent.

for all types of "marriage"? Are "legal incidents of" or "marriages" performed out of state invalid *ab initio*, and if so is there a retroactive and unfair taking of earned or contracted benefits? What are "unmarried couples *or groups*" within the context of the proposal's language? How will common law couples, "quasi-marriages," and serial or subsequent marriages be treated under this Question? A voter (especially a thoughtful voter aware of the many nuances of family, contract, inheritance/intestate succession, and employment law) may very well be confused about how this all fits together (if at all), and as to what he or she is really voting on. Voters are entitled to be afforded an opportunity to express their will, with a question that is "sufficiently definite to apprise the voters with substantial accuracy as to what they are asked to approve." Arthur v. Stillwater, 611 P2nd 637, 643 (Okl. 1980), rehr'g den'd 1980. The vagueness of this Question presents a serious constitutional due process infirmity. Because the measure is confusing and vague on so many vital components, it is subject to facial attack and the proposed Question should be held invalid.[5] In addition to the vagueness issue (though related thereto) is the crucial issue of just how many subjects are the people being asked to vote upon, as discussed following.

III: State Question 711 Violates the Single Subject Rule

Just as the people are entitled to be able to reasonably understand what they are asked to approve or reject in terms of clear meaning and lack of vagueness, there is a further absolute requirement which this Question fails to meet. To amend our constitution the

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[5] Petitioners refer to the "clear and simple language" provisions of Title 34 §9 in this regard. Although the statute appears to apply directly to *Initiative Petitions* the concept surely should be applicable as well to *Legislative referenda*, where the concern is not the *type or origin* of the Question, but that the people have a fair and democratic opportunity to understand and make their choice.

Question must deal with a single subject[6], as required both by Okla. Const. Art. 24 §1 ("No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted.") and by Art. 5 §§2 and 57 (Referendum Question by legislature is to be enacted *as other bills are enacted,* and providing that "every act of the legislature shall *embrace but one subject,*" respectively). The single-subject rule has a clear purpose which is quite demonstrable in this instance: to prevent voters from being forced into a "logrolling situation" whereby they must sacrifice their position on one matter in order to get their way on another matter. This is the classic danger inherent in the democratic process which our Constitution strenuously guards against. In the words of this Court, quoting an earlier Wisconsin case, the reason for the single-subject rule is:

> "Changes suggested thereto [proposed Constitutional amendments] 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." In re Initiative Petition No. 314, 625 P2nd 595.

In the same case, this court also approvingly quoted from a Minnesota case, to the effect that the logic behind the single-subject rule was:

> "...to afford voters the freedom of choice and prevent 'logrolling,' or the combining of unrelated proposals in order to secure approval by appealing to different groups which will support the entire proposal in order to secure some part of it although perhaps disapproving of other parts."

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[6] Other states have dealt with this similar issue. In Missouri, for example, the ballot question is clear and simple – and without doubt consists of a single subject: "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman." [See Appendix Tab 5.]

It is axiomatic to declare that our law forbids multiple subject ballot questions; it is another matter to determine where the line is between single subject and multiple subject offerings. The case law discussing the single-subject rule appears confusing at first blush, but upon closer examination certain patterns and rules of interpretation emerge which clearly support Petitioners' challenge to this Question. There are two broad tests which are persuasive in this regard. which may be categorized as the "mutual independence test" and the "voter support expectation test." State Question 711 fails both tests.

(III A) The Question Deals With Different Subjects Which Are Mutually Independent

The concept of "mutual independence" has been stated a number of different ways in the case law, but all of them come down to the determinative question: can any part of the proposed question *stand alone* -- and if the answer is affirmative, the conclusion is that more than a "single subject" is involved and the prohibition is violated. Some of the ways in which this general test are: In re Initiative Petition No. 314, *supra*, uses language that

> ". . . if, logically speaking, ***they should stand or fall as a whole***, then there is but one amendment submitted.. ."

and then also states

> "but if any one of the propositions, although not directly contradicting the others; does not refer to such matters,. . . then there are in reality two or more amendments to be submitted and the proposed amendment falls within the constitutional prohibition. . ."

In re Initiative Petition No. 314 goes goes ono an extensive discussion of various "liberal" and more conservative "germaneness" test, and decides that:

> "Even those decisions which pronounce a "reasonably germane" standard impose the critical criteria of "incidental"

> and "supplemental" or being an "administrative detail." Even under the "rational relationship" test the initiative fails for each of the major proposals – advertising, franchising, and liquor by the drink – is an important, substantial change in our constitution. None is essentially "subordinate" to the other. There is no interdependence between proposals permitting advertising, franchising and liquor by the drink. Allowing franchising is not incidental or supplemental to permitting advertising, nor is it an administrative detail. They are certainly not so "interrelated and interdependent" that they form an 'interlocking package" and they do not have a common underlying purpose, as each proposal has its own purpose." *Id*, citations omitted.

Applying the various descriptive phrases found in the case law to this instant case, it is obvious that the proposals set out in the Question are independent of each other, and constitute more than a "single subject." An analysis of the proposal itself *might* show that (1) banning same-sex marriage, is related and incidental to, (2) refusing to recognize out-of-state same-sex marriages (even though some persons might well take an individual state's rights perspective whereby they favor the first proposition but not the second). Likewise it could be argued that a proposal defining marriage could have, as a reasonably related and subordinate sub-part, a prohibition against issuing a marriage license in violation of the stated marriage requirement. (Assuming the definition was not so vague as to confuse the license issuer.)

However – and here lies the crux of the problem – it is inconceivable that a definition of marriage necessarily entails and is subordinate to any "legal incidents thereof" which might exist in the market place by virtue of employment contracts and totally independent of "marital status." To argue otherwise would be to subordinate all of contract and employment law to a narrow and likely irrelevant definition of "marriage," simply

because the end result (certain "legal incidents" such as benefits or other contract rights) *might be the same.* The concept of marriage definition on the one hand, and the concept of enforcement of contract or other employment rights on the other, are two mutually independent and not necessarily related concepts. There is nothing logically necessary that if marriage is to be defined in one way, that various benefits and rights earned by contract or employment must be subordinated to the defined marital status. This part of the Question must fail the single subject test, because in addition to confusing the issue of what "benefits" or "legal incidents" are banned and how far into the marketplace the ban might travel, this language is clearly getting into the issue of "civil unions" or alternative contractual relationships which although not being marriages, could entail various rights and obligations. At the very least, it becomes apparent that the Question actually deals with three general subject matters (heterosexual marriage; same-sex marriage; and also relationships among hetero- or same-sex couples who are not married). These subjects are not necessarily tied together; they are related at best as different lifestyles within a broad, general study of how humans live together, each of which can stand or fall on its own.

(III B) The Question Fails Because There Is No Reasonable Expectation of Similar Voter Support for Each Prong of the Proposal

"Logrolling" has been discussed previously; it is related to but not necessarily the same as the other test which Petitioners believe is determinative of the sufficiency and constitutionality of Question 711, which is the "voter expectation test." Whereas "logrolling" is the *resulting* anti-democratic evil which progressive constitutions attempt to ban, "reasonable expectation of similar voter support" is the *pre-submission test* used to

prevent an undemocratic and aberrant result. In other words, cases applying the "pre-submission voter expectation test" focus on how the general public might view the various parts of a state Question, to determine if the parts make up such an insufficiently integrated whole as to force voters to "choose the lesser of various evils."

In re Initiative Petition No. 314, *supra*, quoted approvingly from the Arizona case of Kerby v. Luhrs, 36 P2nd 549 (Ariz. 1934) to the effect that multiple components of a measure will violate the single subject rule if they elicit diverse voter reactions:

> "But if any one of the propositions, although not directly contradicting the others. . . is not such that the voter supporting it ***would reasonably re 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." [Emphasis added,]

This State Question, as argued above, deals with at least *three different and separate general subjects* which are viewed very differently by voters. Petitioners respectfully refer the Court to the items at Appendix Tabs 7 and 8, which show a number of public opinion polls and surveys concerning voter attitudes toward "same-sex marriage" as opposed to "civil unions" as opposed to various other combbinations. The result is not surprising: people tend to have very different reactions and attitudes toward these different concepts. There is no "reasonable expectation" that voters who might approve of a narrow definition of marriage banning same-sex marriage, would necessarily favor banning some other "civil unions" or contracted relationship – or especially that they might favor banning various contract or employment rights just because they might appear to be "incidents of marriage." Even more, with Oklahoma's long tradition of common law marriages, it is inconceivable

that all voters who might oppose same-sex marriages would also oppose existing common law marriages, or ban the "incidents of marriage" to such "unmarried couples." Shortness of space prevents a full explication of the problems associated with this Question, but it is likely that a same-sex partner's designation on an employment health or life insurance policy might well be held unenforceable as "an incident of marriage"[7] and that a surviving common-law spouse could well be surprised when her right to inherit is challenged as a result of the adoption of this Question.

Just as public opinion varies so greatly in these areas, the arena of public and electoral debate likewise shows great diversity: one presidential candidate[8] is on record opposing same-sex marriage but favoring civil unions. The other presidential candidate opposes same-sex marriage, and in fact is pushing very hard for a Federal Constitutional Amendment to protect the "sanctity of marriage" – but it is not clear on the record how he would treat hetero-sexual unmarried couples. In the same vein, this candidate's running mate just this week (August 24) announced at a press conference that he is sympathetic to the positions of gays and lesbians especially since his daughter is lesbian, and that while he supports the President's "Sanctity of Marriage" efforts, he personally "favors each state making its own

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[7] There are thousands of Oklahoma workers who presently may designate (as a condition of their employment) a domestic partner for certain defined benefits. Typically the worker may not merely designate "some other person," but is limited to a "domestic partner," a member of the same or opposite sex with home he or she shares a relationship bearing most of the trappings of a marriage. This proposed Question could stand for the proposition that such benefit designations are unenforceable. The extent and impact of the economic dislocations and confusion resulting therefrom are enormous. See the Affidavit of Carol Parsons [Item 6A] and the items generally at Tab 6.

[8] See Appendix Item 8A.

decisions in this regard."[9] Petitioners could belabor this point more but it is not necessary: the plain fact is that in today's society, opinions about marriage and various other forms of cohabitation are so varied and so passionately held one against another, that it is neither plausible nor realistic to assume that a voting populace consisting of over two million souls may all reasonably be expected to react the same way to the three different general concepts embodied in this particular State Question.

The language of numerous initiative challenges all reflect this concern, that voters should not be straight-jacketed into supporting various concepts, some of which they do not in fact favor. In In re Initiative Petition No. 342, 797 P2nd 331 (Okl. 1990) this court ruled:

> "Voters should not have to adopt measures of which they really disapprove in order to embrace propositions that they favor. The changes proposed by the Petition [aspects of the Corporation Commission] are not so related that a voter supporting one of the proposed measures can reasonably be expected to support all of the changes. ***The Petition simply does not allow voters a choice. The Petition embraces more than one general subject in violation of Article XXIV, Section 1.***" [Emphasis added.]

Again, in In re Initiative Petition No. 363, 927 P2nd 558 (Okl. 1996) this court reiterated:

> "For purpose of Constitution's requirement that proposal for its amendment by articles submitted to voters embrace no more than one general subject, "logrolling," which requirement seeks to prevent, is combining unrelated proposals ***to induce voters to vote for those for which they might not have voted if submitted as separate amendments.***" [Emphasis added.]

In In re Initiative Petition No. 360, 879 P2nd 810, 816 (Okl. 1994) this court

[9] See Appendix Item 8B.

discussed its earlier ruling in the challenge to Initiative Petition 314, *supra*, and again stated that Article 24 Section 1 of the constitution was applicable

> ". . .to prevent corruption in making, procuring, or submitting initiative and referendum petitions. . . Further, we resolved that the ***single subject requirement is necessary so that the voter is not forced to vote approvingly for an initiative containing unrelated proposals in order to secure approval of the entire initiative.***" [Emphasis added.]

This Question uses a popular rubric ("no same-sex marriages") to gloss or mask very different concepts and confuse and entice voters to approve other concepts which arguably could not garner majority support if properly presented as individual subjects to the voting public. It represents exactly what our constitution attempts to prevent: it restricts and unfairly coerces the democratic process; and it should be held legally and constitutionally invalid.

IV: The Question Violates the Equal Protection and Due Process Clauses

Unfortunately, one facet of Question 711 is quite clear: it evidences intentional and egregious discrimination against the rights of gay Oklahomans in their personal relationships, and as to their marriage rights. Marriage is a fundamental right.[10] Likewise, the United States Supreme Court has also held in Stanley v. Illinois, 405 U.S. 645 (1972) that the rights of an unwed father concerning his child (surely included as "Legal incidents" within the language of the Question) cannot be denied solely because of his unmarried status (although he would be proscribed as within the class of "unmarried couples or groups"

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[10] "The decision whether to marry and who to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving v. Virginia, 388 U.S. 1,12 (1967). See also Lawrence v. Texas, 539 U.S. 558 (2003): marriage is central to the liberty protected by the Fourteenth Amendment."

under the proposed Amendment). In the same vein, protection of family and personal rights concerning adoptions would come into conflict with the language of the Question.

Question 711 speaks directly to the issue of who can marry in the State of Oklahoma, and prescribes different standards for one class of citizens (same-sex marriages); it also denies access to the "incidents of marriage" which as sated above presumably include child custody rights and adoption rights, and proscribes their application to homosexual persons. As such it is facially violative of the Equal Protection and Due Process clauses of the United States and Oklahoma Constitutions and void *ab initio,* unless the state can show the necessary rational government interest in such obvious disproportionate and unequal treatment of a distinct class. Romer v. Evans, 517 U.S. 620 (1996) establishes a second prong to test for disallowed or invidious discrimination:

> ". . .whether the law raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a ***bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest*** . . ." [Emphasis added.]

Petitioners recognize that the court may be reluctant to address these constitutional arguments at this time, rather preferring to hear such challenges at a later time. However, under In re Initiative Petition No. 662, *infra at f/n 2,* to address the issue now would seem well advised "to prevent a costly and unnecessary election."

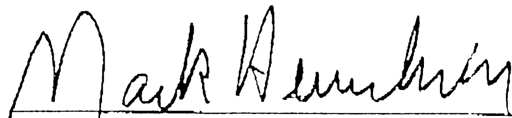
CONCLUSION

In its current form State Question 711 is not a proper Referendum Question to be presented to Oklahoma voters. As a probable result of its irregular legislative evolution, it

is vague and confusing and likely could result in very unintended ramifications and consequences. Voters may not really understand what they are being asked to decide. Further, many voters will undoubtedly be torn between competing views on different subjects and aspects of the Question, resulting in undemocratic voter coercion and improper logrolling. Finally, the Question is defective on constitutional considerations of due process and equal protection, both to the general voting public and especially to Oklahoma's homosexual community as well as unmarried hetero-sexual couples.

The Question is unconstitutional; it is poorly framed and surely destined – if presented to the voters and passed – to unlawful results and a wasted election. If its proponents want to ban homosexual marriages in Oklahoma, they should present an Initiative that clearly and squarely addresses that subject – *and that subject alone*. Such an initiative would be subject to serious due process and equal protection attacks, but at least the playing field would be plain and level, and everybody would know what was at stake. That is the minimum requirement for a fair and properly functioning democracy; State Question 711 fails to meet such a standard.

Respectfully submitted this 27th day of August, 2004.



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the within and foregoing Brief was mailed this 2 th day of August, 2004, to:

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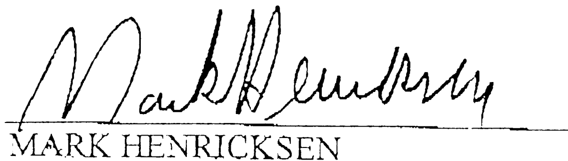
State Capitol Building
Oklahoma City, Oklahoma

by depositing it in the U.S. Mails, first class postage prepaid thereon.



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