



Amendment One, North Carolina Public Employers, and Domestic Partner Benefits

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On May 8, 2012, North Carolina voters approved an amendment to the North Carolina Constitution making marriage between a man and a woman the only “domestic” union that can receive legal recognition in the state. Some units of government in North Carolina presently extend some kinds of employee benefits—notably health insurance—to unmarried domestic partners. The question arises with the adoption of Amendment One whether this extension of benefits by public employers is now unlawful. Only the courts can answer that question. In my opinion, the courts, when they have occasion to rule, will say that Amendment One does not make such benefits unlawful.

Amendment One, as the new Section 6 to Article 14 of our state constitution has been popularly called, provides:

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.¹

Amendment One has one clear primary effect. It makes invalid any General Statute amending the marriage laws in this state to include same-sex marriage. It has a second effect that seems clear, too. While the phrase “domestic legal union” is not defined in the amendment text nor is it used anywhere in North Carolina statutory or case law, Amendment One also prohibits the General Assembly, as well as city and county governing boards, from granting any legal status whatsoever to relationships between same-sex couples, as has been done in other states.²

In the wake of Amendment One’s passage, the question confronting North Carolina local governments acting in their capacity as employers is whether the amendment changes their legal authority to offer domestic partner benefits to their employees. With Amendment One in place, may a North Carolina city or county or other unit of government offer benefits to unmarried,

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1. As set forth in S.L. 2011-409 (S 514).

2. California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, Washington, and Washington, D.C., currently provide a legal form of union with rights equivalent to those of marriage to same-sex couples.

opposite-sex domestic partners? Further, may such a unit of government offer benefits to same-sex domestic partners? I think, for reasons explored below, that the answer to this question is yes. But we won't know the answer for sure until the courts, when called upon, rule.

Before the adoption of Amendment One, North Carolina's appellate courts had not addressed at all the issue of whether local government employers had the authority to provide domestic partner benefits for same-sex spouses or domestic partners of the same or different sex. Analysis of the governing law, however, supports the conclusion that local governments do have that authority.

1. The North Carolina General Statutes give local government employers the authority to purchase insurance and other benefits for their employees and, in the case of municipalities, their dependents.
2. The General Statutes also give local governments the authority to develop policies that will foster the hiring and retention of a capable and diligent workforce.
3. Because the General Statutes themselves contain a rule of construction instructing that the authority given to local governments is to be construed broadly, it is reasonable to conclude that cities, counties, and other local government entities could have chosen to offer domestic partner benefits as a recruiting and retention tool.
4. Arguments that offering public employees domestic partner benefits are contrary to state or federal law or to North Carolina public policy are not supported by either North Carolina case law or case law from other states.³

Does the adoption of Amendment One change this authority? Amendment One itself makes no reference to employee benefits. The possibility that the amendment might have an effect on employee benefits is raised in the Official Explanation of the Constitutional Amendment, prepared by the Constitutional Amendments Publication Commission (comprising the North Carolina Secretary of State and Attorney General and the General Assembly's Legislative Services Director),⁴ which notes, without taking a position:

The term "domestic legal union" used in the amendment is not defined in North Carolina law. There is debate among legal experts about how this proposed constitutional amendment may impact North Carolina law as it relates to unmarried couples of same or opposite sex and same sex couples legally married in another state, particularly in regard to employment-related benefits for domestic partners; domestic violence laws; child custody and visitation rights; and end-of-life arrangements. The courts will ultimately make those decisions.⁵

In my opinion, Amendment One does not take away the authority of North Carolina local government employers to offer domestic partner benefits. First, Amendment One has plain meaning on its face: (1) the state can allow only a man and a woman to enter into a marriage, (2) marriage is the only legal status that the state can grant an opposite-sex couple, and (3) the state

3. Two and a half years before the passage of Amendment One, I analyzed the ability of North Carolina local governments to offer domestic partner benefits in detail in Diane M. Juffras, "May North Carolina Local Government Employers Offer Domestic Partner Benefits?," *Public Employment Law Bulletin* No. 37, November 2009, available at <http://sogpubs.unc.edu/electronicversions/pdfs/pelb37.pdf>.

4. See N.C. Gen. Stat. (hereinafter G.S.) § 147-54.8.

5. See the link to Official Explanation of Constitutional Amendment on the North Carolina Board of Elections website, www.ncsbe.gov/ (last visited May 16, 2012).

cannot grant any legal status whatsoever to relationships between same-sex couples. With this plain meaning, Amendment One merely puts into the constitution the North Carolina statutory law on marriage and civil unions between same-sex couples as it existed on May 8, 2012, and therefore effects no change on the ability of North Carolina local governments to offer their employees domestic partner benefits.

Second, there is no legal precedent in North Carolina or elsewhere for the proposition that a government employer's coverage of its employees' domestic partners under benefits plans makes valid or constitutes legal recognition of any union or confers rights and responsibilities to any union under the law. To extend benefits is not to "recognize" any kind of union.

Third, there appears to be a good chance that a court would find the denial of domestic partner benefits a violation of either the federal or the North Carolina equal protection clauses.

As the Official Explanation of the Constitutional Amendment observes, the courts will ultimately make the determination of whether Amendment One extends to employee benefit plans. This bulletin looks at the law that the courts will have to apply.

The Meaning of Amendment One

Rules Governing the Interpretation of a Constitutional Amendment

The North Carolina Supreme Court has said that in interpreting the state constitution and any amendments to it, the fundamental principles that a court must follow are that "effect must be given to the intent of the people . . . and constitutional provisions should be construed in consonance with the objectives and purposes sought to be accomplished, giving due consideration to the conditions then existing."⁶ The court's primary means of determining the "intent of the people" has been to look to the plain language of a constitutional provision or amendment, as it does when it interprets statutes. In this way, constitutional interpretation is "in the main governed by the same general principles which control in ascertaining the meaning of all written instruments."⁷ The court will look to the circumstances under which an amendment has been ratified for support of an interpretation based on plain meaning.⁸ To decide whether Amendment One means that North Carolina public employers may no longer offer domestic partner benefits, then, courts would first look to the plain meaning of the amendment text and then to the political and social conditions under which it was adopted.

It is likely that North Carolina's courts would find the plain meaning of Amendment One to be fairly narrow: namely, that the state can allow only a man and a woman to enter into a marriage; marriage is the only legal status that the state can grant an opposite-sex couple; the state cannot grant any legal status whatsoever to relationships between same-sex couples; and agreements between unmarried but cohabiting opposite-sex and same-sex couples relating to

6. See *Martin v. State*, 330 N.C. 412, 415 (1991); *In re Martin*, 295 N.C. 291, 299 (1978); *Perry v. Stancil*, 237 N.C. 442, 444 (1953).

7. See *Martin*, 330 N.C. at 416; *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989); *Perry*, 237 N.C. at 444. It is a well-established rule of statutory construction that where "a statute contains a definition of a word used therein, that definition controls, but nothing else appearing, words must be given their common and ordinary meaning." See *In re Clayton-Marcus Co.*, 286 N.C. 215, 219 (1974); *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 492, *rev.denied*, 360 N.C. 176 (2005).

8. See *Stephenson v. Bartlett*, 355 N.C. 354, 370–71 (2002); *Martin*, 330 N.C. at 416; *In re Martin*, 295 N.C. at 299–300 (1978).

financial affairs such as the responsibility for household expenses, the purchase and ownership of real property, and the disposition of assets will continue to be enforced by the North Carolina courts just as they were before Amendment One's passage.

The First Sentence of Amendment One: The Common and Ordinary Meaning of *Domestic Legal Union, Valid, and Recognize*

In its first sentence, Amendment One declares, "Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State." As noted above, the term "domestic legal union" is not defined by North Carolina law. So in accordance with established practice, North Carolina's courts will turn first to the dictionary to construe this phrase.⁹

Domestic Legal Union

Domestic: There is broad agreement among major dictionaries that the meaning of the word *domestic*, when used as an adjective, is "of or relating to the family or household."¹⁰

Legal: *Black's Law Dictionary* defines *legal* as meaning "established, required, or permitted by law."¹¹ *Merriam-Webster Dictionary* is in agreement with *Black's Law Dictionary*.¹² *American Heritage Dictionary* gives the greatest number of examples:

1. Of, relating to, or concerned with law: legal papers.
2. a. Established or recognized by law: a legal right.
b. Authorized by law: the legal owner.
c. Established legally other than by statute, as by a judicial opinion: a legal authority.
3. In conformity with or permitted by law: legal business operations.
4. Recognized or enforced by law rather than by equity.
5. In terms of or created by the law: a legal offense.
6. Applicable to or characteristic of attorneys or their profession.
7. Acceptable or allowable under official rules: a legal forward pass.¹³

9. See, e.g., *Bowers v. the City of High Point*, 339 N.C. 413, 419-20 (1994) (looking to *Black's Law Dictionary* to define "base pay," "pay," "base," "base compensation," and "rate" to interpret the meaning of the phrase "base rate of compensation"); *Knight Publishing Co.*, 172 N.C. App. at 492 (looking to the *American Heritage Dictionary* when interpreting the term "gathered" as used in a statute's definition of "personnel file"); *Ramsey v. Harman*, 191 N.C. App. 146 (2008) (looking to the *American Heritage Dictionary* for the definition of "substantial" and to *Black's Law Dictionary* for the definition of "emotional distress," because the statute authorizing the issuance of civil no-contact orders used but did not define the term "substantial emotional distress"). See also *State v. Ramos*, 176 N.C. App. 769 (2006) (unpublished disposition) at *3 (looking to the *American Heritage Dictionary* definition of the terms "lewd" and "licentious" when those word were not defined in connection with the elements of the criminal offense of taking liberties with a child).

10. See *American Heritage Dictionary of the English Language*, 5th edition (2011), under *domestic*, visited online at <http://ahdictionary.com/word/search.html?q=domestic&submit.x=13&submit.y=29> (last visited May 11, 2012); *Merriam-Webster's Online Dictionary*, under *domestic*, at www.merriam-webster.com/dictionary/domestic (last visited May 11, 2012); *Black's Law Dictionary*, 9th edition (2009), under *domestic*.

11. See *Black's Law Dictionary*, 9th edition (2009), under *legal*.

12. See *Merriam-Webster's Online Dictionary*, under *legal*, at www.merriam-webster.com/dictionary/legal (last visited May 11, 2012).

13. See *American Heritage Dictionary of the English Language*, 5th edition (2011), under *legal*, visited online at www.ahdictionary.com/word/search.html?q=legal (last visited May 11, 2012).

Union: *Merriam-Webster Dictionary* defines *union* as an act or instance of uniting or joining two or more things into one: as (1) the formation of a single political unit from two or more separate and independent units (2) a uniting in marriage; also: sexual intercourse.¹⁴

American Heritage Dictionary's definition is similar.¹⁵

Most dictionaries define not only individual words but also commonly used phrases. There are no entries, however, in *Black's Law Dictionary*, *Merriam-Webster Dictionary* or *American Heritage Dictionary* for the phrases *domestic union* or *legal union*. There are, by contrast, entries for the phrases *civil union* and *domestic partner*.

Civil union: *Civil union* is defined as “a legally sanctioned relationship between two people, especially of the same sex, having many of the rights and responsibilities of marriage.”¹⁶ *Merriam-Webster Dictionary* says it means “the legal status that ensures to same-sex couples specified rights and responsibilities of married couples.”¹⁷ *Black's Law Dictionary* says that a civil union is “a marriage-like relationship, often between members of the same sex, recognized by civil authorities within a jurisdiction.”¹⁸

Domestic partner: *American Heritage Dictionary* defines *domestic partner* simply, as “a person other than a spouse with whom one lives and is romantically involved.”¹⁹ *Black's Law Dictionary* provides two meanings for the phrase *domestic partnership*:

1. A nonmarital relationship between two persons of the same or opposite sex who live together as a couple for a significant period of time.
2. A relationship that an employer or governmental entity recognizes as equivalent to marriage for the purpose of extending employee-partner benefits otherwise reserved for the spouses of employees (emphasis added).²⁰

Merriam-Webster Dictionary says the term means “either one of an unmarried heterosexual or homosexual cohabiting couple especially when considered as to eligibility for spousal benefits.”²¹

Note that all three of these dictionaries define *civil union* in terms of having a legal status and rights and responsibilities similar to marriage. None of the three defines *domestic partner* in terms of legal status and legal rights.

14. See *Merriam-Webster's Online Dictionary*, under *union*, at www.merriam-webster.com/dictionary/union (last visited May 11, 2012).

15. See *American Heritage Dictionary of the English Language*, 5th edition (2011), under *union*, visited online at www.ahdictionary.com/word/search.html?q=union&submit.x=69&submit.y=19 (last visited May 11, 2012).

16. See *American Heritage Dictionary of the English Language*, 5th edition (2011), under *civil union*, visited online at <http://ahdictionary.com/word/search.html?q=civil+union&submit.x=41&submit.y=22> (last visited May 11, 2012).

17. See *Merriam-Webster's Online Dictionary*, under *civil union* (“the legal status that ensures to same-sex couples specified rights and responsibilities of married couples”), at www.merriam-webster.com/dictionary/civil%20union (last visited May 11, 2012).

18. See *Black's Law Dictionary*, 9th edition (2009), under *civil union*.

19. See *American Heritage Dictionary of the English Language*, 5th edition (2011), under *domestic partner*, visited online at www.ahdictionary.com/word/search.html?q=domestic+partner (last visited May 11, 2012).

20. See *Black's Law Dictionary*, 9th edition (2009), under *domestic partnership*.

21. See *Merriam-Webster's Online Dictionary*, under *domestic partner*, at www.merriam-webster.com/dictionary/domestic%20partner (last visited May 11, 2012).

A Possible Definition of Domestic Legal Union

In light of the common, ordinary meanings of *domestic*, *legal*, *union*, *civil union*, and *domestic partner*, as they are found in dictionary definitions, it seems likely that a North Carolina court would interpret the term *domestic legal union* as it is used in Amendment One to mean something along the lines of “a relationship between two people who are living together that is authorized by the state, has been entered into in accordance with procedures set forth by law, and gives the parties certain rights and responsibilities.”

Valid and Recognize

Interpretation of Amendment One will require the courts to give consideration to the meaning of the terms *valid* and *recognize*, as they are used in the first sentence: “Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.” *American Heritage Dictionary* defines the adjective *valid* as meaning “having legal force; effective or binding,” giving the example “a *valid* title,”²² while *Merriam-Webster Dictionary* says it means, “having legal efficacy or force; *especially*: executed with the proper legal authority and formalities,” and gives the example, “a *valid* contract.”²³ Thus, as already indicated by the word *legal* in the phrase *domestic legal union*, the concern of the amendment is on which cohabiting relationships may be entered into with legal authority. The word *recognize* has a similar meaning, namely, “to acknowledge formally as,”²⁴ or, in its noun form *recognition*, “confirmation that an act done by another person was authorized” and “the formal admission that a person, entity, or thing has a particular status.”²⁵

It may be argued that by offering domestic partner benefits to unmarried couples (whether opposite-sex or same-sex) a unit of government makes those relationships “valid” or “recognizes” them. The argument has merit, but, given the dictionary meanings of the terms *valid* and *recognize*, the argument seems likely to fail. To extend domestic partner benefits on behalf of an employee does not give that employee’s domestic arrangement “legal force” or make it “effective and binding.” It does not act as “confirmation” that the employee’s decision to enter the domestic arrangement was “authorized” in a legal sense. Extending the benefits does not validate the arrangement in any legal sense.

The Second Sentence of Amendment One: Contracts between Cohabiting Couples Still Enforceable

Based on the common and ordinary meaning of the words that comprise the first sentence of Amendment One, it seems likely that North Carolina courts will find that sentence to mean that in North Carolina, only one form of familial or household relationship can be accorded legal status; namely, marriage between a man and a woman. This fairly narrow but straightforward reading is supported by the second sentence of the amendment, which says:

22. See *American Heritage Dictionary of the English Language*, 5th edition (2011), under *valid*, visited online at <http://ahdictionary.com/word/search.html?q=valid> (last visited May 16, 2012).

23. See *Merriam-Webster’s Online Dictionary*, under *valid*, at www.merriam-webster.com/dictionary/valid (last visited May 16, 2012).

24. See *Merriam-Webster’s Online Dictionary*, under *recognize*, at www.merriam-webster.com/dictionary/recognize (last visited May 16, 2012).

25. See *Black’s Law Dictionary*, 9th edition (2009), under *recognition*.

This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.

This second sentence is striking in that it makes no mention of marriage or legal unions at all. Instead, it says in essence that the first sentence will not have any effect on the law that governs contracts between private parties. There is nothing to indicate that the second sentence refers to *employment* contracts between two private individuals or between a private corporation and an individual. In the absence of any other reference point, the second sentence most logically applies to contracts related to marriage or informal domestic unions or between the parties to a marriage or informal domestic union or partnership. Such contracts exist and have been recognized as valid and enforceable by North Carolina's courts.

North Carolina courts, like those of other states, have long enforced agreements regarding the finances and property of cohabiting, unmarried couples.²⁶ Where they have deemed it equitable, North Carolina courts have imposed constructive and resulting trusts as remedies in disputes over such agreements.²⁷ In a 2008 case, *Rhue v. Rhue*, the North Carolina Court of Appeals affirmed a jury verdict placing a constructive trust on the property of the male partner of an unmarried couple whose relationship had ended.²⁸ The court found that the woman in the relationship had presented sufficient evidence to establish the existence of an enforceable agreement to share their assets: she showed that she had paid for expenses for the male partner's business from her personal account and that she performed manual labor for both his business and personal projects, including building a home. She had managed their joint household expenses and raised the male partner's son and grandson from a previous relationship. She did all of this with the understanding that they were working for their mutual benefit. The male partner promised her that she would share in the value of the business that they built and the several parcels of property that they acquired and improved, which he said were for their retirement when they would "grow old together."²⁹ The male partner appealed the trial court decision, pointing out that there was no written agreement between the couple to the effect that they would share in the value of the business and properties. The court of appeals said that the

26. See *Rhue v. Rhue*, 189 N.C. App. 299, 306 (2008) (agreements regarding finances and property of unmarried but cohabiting couple, whether express or implied, were enforceable as long as sexual services or promises thereof did not provide consideration for them); *Suggs v. Norris*, 88 N.C.App. 539, 542–43 (1988) (same). See also *In re Estate of Roccamonte*, 808 A.2d 838, 843 (N.J. 2002) (male cohabitant's promise to provide support to female cohabitant for her life was not discharged by his death, and was thus enforceable against his estate); *Tolan v. Kimball*, 33 P.3d 1152, 1155 (Alaska 2001) (intention of the parties should control the distribution of property accumulated during the course of cohabitation); *Silver v. Starrett*, 674 N.Y.S.2d 915 (N. Y. Sup. Ct. 1998) (nonmarital separation agreement between lesbian couple was ratified when parties complied with its terms); *Kinkenon v. Hue*, 301 N.W.2d 77 (Nebraska 1981) (agreements between unmarried couples are enforceable so long as they do not rest on sexual services as consideration); *Marvin v. Marvin*, 557 P.2d 106, 113 (Cal.1976) (contract for continuing support made as part of nonmarital relationship is not invalid unless premised upon a consideration of sexual services); *Fernandez v. Garza*, 354 P.2d 260 (Ariz. 1960) (plaintiff's unmarried cohabitation with decedent did not bar the enforcement of a partnership agreement wherein the parties agreed to share their property and profits equally and where such was not based upon sexual services as consideration).

27. See *Rhue*, 189 N.C.App. at 306; *Suggs*, 88 N.C.App. at 543.

28. *Rhue*, 189 N.C. App. 309.

29. *Id.* at 305–08.

lack of a formal partnership agreement did not invalidate one partner's promises to the other.³⁰ The male partner further argued that for the court to recognize the existence of an agreement between the couple would establish a basis for common law marriage to be recognized in North Carolina. The court of appeals rejected that argument out of hand.³¹

The *Rhue* decision is consistent with North Carolina Court of Appeals' earlier decisions in *Suggs v. Norris* and *Collins v. Davis*.³² In the *Suggs* case, the female partner of a cohabiting couple brought suit against the estate of the male partner for the value of her contributions to the business of the male partner, with whom she had lived while they had operated a produce farm. The estate objected to a verdict for the female partner on the grounds that public policy forbade recovery by a partner to an unmarried but cohabiting couple for benefits conferred on the other partner. The court found that unless sexual services was the basis for the agreement to compensate one partner of a cohabiting couple, there was no violation of public policy and the evidence of the female partner's contribution to the business and to their household finances supported the jury's award of a constructive trust on the estate.³³

The *Collins* case was the first in which a North Carolina appellate court considered the issue of contractual agreements between unmarried couples. There, the male partner of a cohabiting, unmarried couple sued the female partner for his share of the value of real property that they had purchased together and to which they had jointly made improvements. The trial court had directed a verdict for the female partner on the ground that to recognize such a financial agreement between the partners to an unmarried relationship would violate public policy. The court of appeals, however, overturned the verdict of the trial court and ordered a new trial, holding that couples who live together are capable of entering into enforceable express or implied contracts for the purchase and improvement of houses, or for the loan and repayment of money.³⁴

Read in the context of North Carolina law on contracts between unmarried couples, the purpose of the second sentence of Amendment One seems to be to make clear that while the amendment prohibits state-authorized marriages and unions between individuals of the same sex, it does not change North Carolina law governing agreements between cohabiting, unmarried couples. Without the second sentence, Amendment One could be read as overturning the results in the *Rhue*, *Suggs*, and *Collins* cases. As a result of the second sentence, Amendment One does not prohibit two same-sex individuals or two opposite-sex unmarried individuals from entering into legally binding agreements with one another with respect to joint financial obligations, joint ownership of property, and disposition of such property under specified circumstances. The amendment further allows courts to continue to decide cases based on such agreements.

Amendment One cannot outlaw cohabiting, unmarried opposite-sex or same-sex couples. The U.S. Supreme Court's 2006 decision in the case *Lawrence v. Texas* said that statutes making it a crime to live with someone in a domestic-partner type relationship or to engage in various types of sexual practices other than heterosexual intercourse are not enforceable.³⁵ The Court ruled that the right to liberty under the Due Process Clause of the Fourteenth Amendment

30. *Id.* at 308–09.

31. See *Rhue*, 189 N.C. App. at 306.

32. See *Suggs v. Norris*, 88 N.C. App. 539 (1988); *Collins v. Davis*, 68 N.C. App. 588, 589, *aff'd*, 312 N.C. 324 (1984).

33. *Suggs*, 88 N.C. App. at 543–44.

34. *Collins*, 68 N.C. App. At 592-93.

35. *Lawrence v. Texas*, 539 U.S. 558 (2006).

protects the rights of individuals to engage in private, consensual sexual conduct without government interference. So it is fair to say that Amendment One does not mean that unmarried opposite-sex or same-sex relationships cannot exist. The Supreme Court has already acknowledged that they do. Nor does Amendment One take away the protection of law from agreements between the parties to such relationships. It simply makes it impermissible for any North Carolina unit of government to confer a legal status on such relationships.

The Circumstances Surrounding the Adoption of Amendment One

The rules of construction that govern the interpretation of the North Carolina Constitution instruct the courts to look to the circumstances—the political and social history and conditions—existing at the time of adoption as part of the process of construing plain meaning.³⁶ So in order to determine whether Amendment One is more narrowly concerned with limiting the sorts of intimate relationships to which the State of North Carolina will grant official legal status or whether Amendment One more broadly prohibits government employers from offering domestic partner benefits to its employees, a North Carolina court will need to consider national and state political and legal developments affecting marriage, civil unions, and domestic partnerships during the period leading up to the introduction of Amendment One into the General Assembly in 2011 and its passage by North Carolina voters in May 2012. The circumstances surrounding the adoption of the amendment suggest that the more narrow interpretation of Amendment One is the correct one.

Discussion and Coverage of Same-Sex Marriage and Domestic Partner Benefits Nationally

It is clear that the issue of whether or not same-sex couples should be given the opportunity to enter into marriage, as defined by state law, has been a part of a national debate for some years, gaining intensity in 1996, when the U.S. Congress passed the Defense of Marriage Act (DOMA). DOMA allows states to treat marriages legally performed in other states as invalid if they are between two persons of the same gender. In addition, by defining marriage as a union between a man and a woman, DOMA makes any federal law that defines affected persons by reference to a “spouse” not applicable to a same-sex spouse or domestic partner.³⁷ Since 1996, twenty-nine states plus North Carolina have adopted constitutional amendments limiting marriage in each of those states to a union between a man and a woman.³⁸ During this same period, six states and the District of Columbia passed legislation allowing same-sex couples to marry,³⁹ one state

36. See *Stephenson v. Bartlett*, 355 N.C. 354, 370–71 (2002); *Martin v. State*, 330 N.C. at 416; *In re Martin*, 295 N.C. at 299-300 (1978).

37. The Defense of Marriage Act (DOMA) is codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C. Currently, the only federal laws relating to employee benefits that this limitation affects are leave under the Family and Medical Leave Act and the Internal Revenue Code’s tax-favored treatment of employer-provided benefits for spouses.

38. Alaska (1998), Nebraska (2000), Nevada (2002), Arkansas (2004), Georgia (2004), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), Utah (2004), Kansas (2005), Texas (2005), Alabama (2006), Colorado (2006), Idaho (2006), South Carolina (2006), South Dakota (2006), Tennessee (2006), Virginia (2006), Wisconsin (2006), Arizona (2008), California (2008), Florida (2008). See www.hrc.org/files/assets/resources/US_Marriage_Prohibition.pdf.

39. Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), District of Columbia (2010), New Hampshire (2010), New York (2011). See www.hrc.org/files/assets/resources/

passed a law recognizing same-sex marriages legally entered into in another jurisdiction,⁴⁰ and nine states passed legislation providing for same-sex unions with rights similar to those conferred by marriage.⁴¹

In February 2011, several months before the introduction of the bill leading to Amendment One in the General Assembly, President Obama announced that his administration would no longer defend the federal Defense of Marriage Act in court against claims that it is unconstitutional. The President and U.S. Attorney General Eric Holder had concluded that a portion of DOMA (the section denying recognition of same-sex marriage for the purposes of federal law) violated the Equal Protection Clause of the United State Constitution.⁴² On June 24, 2011, shortly after the introduction of Amendment One in the North Carolina General Assembly, the New York State Assembly enacted a law making same-sex marriage lawful in that state. This made headlines as New York became the largest state in the union to allow same-sex marriage.⁴³ Then, in July 2011, President Obama endorsed a bill introduced into Congress that would repeal DOMA.⁴⁴ During this period, public polling organizations helped keep awareness of the debate over same-sex marriage high by repeatedly asking various segments of the population their opinions on the matter. According to a Gallup opinion poll conducted on May 3–6, 2012, Americans are evenly divided on the question of whether same-sex marriage should be made legal, with almost double the percentage in favor of same-sex marriage than in a 1996 Gallup poll.⁴⁵ That result is mirrored in surveys included in the PollingReport.com database, where an average of 50 percent of American adults support same-sex marriage rights while 45 percent oppose it, based on an average of nine surveys conducted in the past year.⁴⁶ These questions, like twenty-eight of the twenty-nine marriage amendments to state constitutions, focused solely on the question of whether same-sex couples should be allowed to marry in the same way that opposite-sex couples are. None mentioned employment benefits, domestic violence orders, child

[Relationship_Recognition_Laws_Map\(1\).pdf](#).

40. Maryland (2010). See [www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map\(1\).pdf](http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf).

41. California (domestic partnerships, 1999, expanded 2005), New Jersey (civil unions, 2007), Washington (domestic partnerships, 2007 and 2009), Oregon (domestic partnerships, 2008), Nevada (domestic partnerships, 2009), Illinois (civil unions, 2011), Rhode Island (civil unions, 2011), Delaware (civil unions, 2012), Hawaii (civil unions, 2012). See [www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map\(1\).pdf](http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf).

42. See Charlie Savage and Sheryl Gay Stolberg, "In Shift, U.S. Says Marriage Act Blocks Gay Rights," *New York Times*, February 23, 2011, online edition, available at www.nytimes.com/2011/02/24/us/24marriage.html?_r=1&pagewanted=all#.

43. See Nicholas Confessor and Michael Barbaro, "New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law," *New York Times*, June 24, 2011, online edition, available at www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all.

44. See Christine Mai-Duc, "Obama Endorses Repeal of Law Against Gay Union," *News & Observer*, July 20, 2011, available at www.newsobserver.com/2011/07/20/1356352/obama-endorses-repeal-of-law-against.html#storylink=cpy.

45. See Frank Newport, "Half of Americans Support Legal Gay Marriage," May 8, 2012, on the webpage Gallup Politics at www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx (last visited May 19, 2012).

46. See Nate Silver, "Support for Gay Marriage Outweighs Opposition in Polls," *FiveThirtyEight Blog*, *New York Times*, May 9, 2012, online at <http://fivethirtyeight.blogs.nytimes.com/2012/05/09/support-for-gay-marriage-outweighs-opposition-in-polls/>.

custody or end-of-life arrangements and whether or not they should be allowed or applicable to same-sex couples.

During the period immediately preceding the introduction of the bill leading to Amendment One, employment-related domestic partner benefits were a continuing concern within the gay and lesbian community but not a widespread topic of conversation at either a national or statewide level. Indeed, my search of nationwide news sources shows that while the legalization of same-sex marriage was regularly reported and debated during the past decade, there was virtually no coverage or general public discussion about the ability of same-sex partners to participate in employee benefit programs, even within the context of health care reform. Neither the federal Patient Protection and Affordable Care Act of 2010 (sometimes known as the health insurance reform bill) nor the debate leading up to its passage focused in any way on domestic partner health insurance benefits.

Campaigning by North Carolina Proponents and Opponents of Amendment One

In the months leading up to the 2012 vote on Amendment One, both supporters and opponents of the measure took to the airwaves, the newspapers, and the Internet to make their respective cases. Given the multiplicity of media outlets and the different emphases in different messages, I have found it impossible to gauge the influence of the campaigns in determining why voters cast their ballots as they did. This is especially true if the results of a poll by Public Policy Polling shortly before the election are accurate. According to the polling group, only 40 percent of voters understood that the amendment not only bans same-sex marriage but also prohibits the General Assembly from creating civil unions.⁴⁷ It seems unlikely that the North Carolina courts will be able to determine what those voting in favor of the amendment intended, either.

A few generalizations about proponents' and opponents' respective arguments may nevertheless be made. The proponents of Amendment One tended to emphasize the historical and religious tradition of marriage as a status limited to a man and a woman. None of the videos or written material produced by supporters of the amendment or newspaper reports about their statements that I have seen say that Amendment One will prohibit North Carolina public employers from offering domestic partner benefits. Much material produced by opponents of the amendment, however, either raises the question or flat out says that passage of Amendment One would mean that public employers could no longer include domestic partner benefits in employee benefits packages.⁴⁸

Two groups of law professors weighed in on Amendment One's effects on public employers' ability to offer domestic partner benefits, as well as on other issues, such as the amendment's effect on domestic violence and child custody laws. A group of University of North Carolina School of Law professors opposed to the amendment were the first to publish a position paper on November 8, 2011. They asserted that Amendment One would prohibit public employers from offering domestic partner benefits. The discussion was cursory, taking not even two full pages of a twenty-seven page paper, and it relied primarily on a decision by the Michigan Supreme Court about the meaning of Michigan's marriage amendment and on an opinion by

47. See "Marriage Amendment still leads by 14," *Public Policy Polling*, May 01, 2012, at www.publicpolicypolling.com/main/2012/05/marriage-amendment-still-leads-by-14.html.

48. For a representative example of material produced by both proponents and opponents of Amendment One, see links on the Ballotpedia website at [www.ballotpedia.org/wiki/index.php/North_Carolina_Same-Sex_Marriage,_Amendment_1_\(May_2012\)_Amendment_1_\(May_2012\)](http://www.ballotpedia.org/wiki/index.php/North_Carolina_Same-Sex_Marriage,_Amendment_1_(May_2012)_Amendment_1_(May_2012)).

the Nebraska Attorney General about the meaning of Nebraska's marriage amendment.⁴⁹ The bulk of the paper discusses Amendment One's possible impacts on different facets of North Carolina's family law. It is possible that the UNC law professors' paper influenced the Constitutional Amendments Publication Commission's description of the amendment, which raises the issues of availability of public employer domestic partner benefits and possible impacts on family law, as the UNC paper was published in November and the committee did not meet to draft its explanation of the amendment until March 1, 2012. A group of Campbell University School of Law professors published a response to the UNC group's paper on April 18, 2012, in which they argued that the effects of Amendment One would not be as far-reaching as the UNC group claimed.⁵⁰ The Campbell University law professors said it was likely that public employers would still be able to offer domestic partner benefits, although perhaps under a different name.

News reports from across North Carolina before the 2012 vote reflected the different emphases of the proponent and opponent camps and the mixed messages that voters received.⁵¹ This passage from an article on the Triangle area's WRAL website exemplifies what voters were learning from the independent media:

Amendment opponents also say it could cut off health insurance benefits for unmarried partners and their children, especially those who are civil employees. Tami Fitzgerald, chairwoman for Vote FOR Marriage NC, which supports the amendment, said that's not true. "I think it's speculation on their part. There are no children who will lose their health care," Fitzgerald said.⁵²

Given the lack of agreement among proponents and opponents of Amendment One about its effects, it seems unlikely that the North Carolina courts would be able to discern voters' intent in passing the amendment. Thus, the circumstances surrounding the proposal and adoption of Amendment One support the interpretation that it neither adds to nor subtracts from North

49. See Maxine Eichner, Barbara Fedders, Honing Lau, and Rachel Blank, *Potential Legal Impact of the Proposed Domestic Legal Union Amendment to the North Carolina Constitution*, November 8, 2011, available online as a PDF document from a link at www.law.unc.edu/faculty/directory/eichnermaxine/ or through the American Civil Liberties Union of North Carolina.

50. See Lynn R. Buzzard, William A. Woodruff, and E. Gregory Wallace, "The Meaning and Potential Legal Effects of North Carolina's Proposed Marriage Amendment," April 18, 2012, available online as a PDF document from a link in a post on Ted Mohn, *What You Think Blog, Fayetteville Observer*, April 25, 2012, available online at <http://blogs.fayobserver.com/mohn/April-2012/NC-s-Defense-of-Marriage-Amendment--Law-School-St.>

51. See, e.g., Quintin Ellison, "Will NC pass amendment banning same-sex marriages? Question decided May 8," *Smoky Mountain News*, April 11, 2012, available online at www.smokymountainnews.com/component/k2/item/6725-will-nc-pass-amendment-banning-same-sex-marriages?-question-decided-may-8; "Marriage amendment backers, foes differ on impact

Voters head to polls May 8", on the website of the Piedmont Triad area's WXII News, available at www.wxii12.com/news/local-news/north-carolina/Marriage-amendment-backers-foes-differ-on-impact/-/10622650/12481668/-/ariknrz/-/index.html#ixzz1wkQoRR7D; Laura Leslie, "NC Marriage Amendment: what it does," on the website of the Triangle area's WRAL news, May 3, 2012, available at www.wral.com/news/state/nccapitol/story/11060038/; David Forbes, "Battle lines being drawn: Amendment One has passions flying," on the website of the Asheville area newspaper *Mountain Xpress*, April 11, 2012, available at www.mountainx.com/article/41951/Battle-lines-being-drawn-Amendment-One-has-passions-flying.

52. See Laura Leslie, "NC Marriage Amendment: what it does," on the website of WRAL news, May 3, 2012, available at www.wral.com/news/state/nccapitol/story/11060038/.

Carolina law with respect to same-sex unions as of May 8, 2012, but merely constitutionalizes the current limitation on giving legal status to any relationship other than a legal marriage between a man and a woman.

In other words, the purpose and meaning of Amendment One appears to be to embody in the constitution the existing North Carolina law regarding marriage and civil unions. With Amendment One in place, the General Assembly may not enact legislation opening marriage to same-sex couples, nor may it enact legislation authorizing civil unions.⁵³ Nothing in the language of Amendment One suggests any meaning or intent to change any law or practice relating to employment-related benefits for unmarried same-sex or opposite-sex partners.

Interpretations of Similar Language in the Constitutional Amendments of Other States

North Carolina courts may also consider how courts in other states have interpreted similar language in amendments to their respective state constitutions. Of the twenty-nine other constitutional amendments limiting marriage to a man and a woman (marriage amendments), none is identical to Amendment One. Ten prohibit same-sex marriage but say nothing about other forms of civil union, eighteen prohibit recognition both of same-sex marriage and any other form of legal union other than heterosexual marriage, and one, Michigan's, appears to limit unmarried same-sex and opposite-sex couples even from entering into contracts creating obligations related to the relationship. The appendix at the conclusion of this bulletin sets forth the language of each of the twenty-nine other constitutional amendments for comparison purposes.

None of the other marriage amendments mention domestic partner benefits, nor do any of them mention any purpose other than marriage, with the exception of the Michigan marriage amendment, which provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union *for any purpose.*" (emphasis added)⁵⁴

More to the point for the interpretation of Amendment One, in only three states—Ohio, Louisiana, and Michigan—have marriage amendments given rise to decisions by their respective highest courts about how the state's marriage amendment affects domestic partnerships. In Ohio, the supreme court found that the marriage amendment did not take away the protections that the state's domestic violence laws gave to domestic partners. In a second case, the Ohio Court of Appeals found that the marriage amendment did not prohibit establishment of domestic partner registries by the state's municipalities. In Louisiana, the state's highest court found that a city's registry for domestic partners did not constitute *de facto* recognition of domestic partnership in violation of Louisiana's marriage amendment. Michigan's high court ruled that the Michigan marriage amendment does not permit Michigan public employers to offer domestic partner benefits. The language of the Ohio and Louisiana amendments more closely resembles that of Amendment One than does the language of the Michigan marriage amendment.

53. Whether or not Amendment One prohibits local governments from instituting domestic partner registries is unclear to me as it is questionable whether such registries could ever constitute recognition of same-sex or opposite-sex relationships as legal unions in the absence of state law to that effect.

54. *See Mich. Const. Art. I, § 25.*

The Ohio Marriage Amendment

The Ohio marriage amendment provides:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.⁵⁵

Ohio's appellate courts have been asked to interpret the meaning of its marriage amendment twice—once as applied to the constitutionality of a domestic violence statute and once as applied to a city's creation of a domestic partner registry. In the first case, a defendant indicted under Ohio's domestic violence statute moved for dismissal of the case against him because he was not married to the victim. Ohio's domestic violence statute prohibits committing physical harm against a "family or household member." Another statutory section defines "family or household member" as including "a person living as a spouse" with a defendant. "Person living as a spouse" is in turn defined as "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question."⁵⁶

The defendant claimed that the Ohio marriage amendment overturned the domestic violence statutes because the statutes created and recognized a legal relationship that approximated the designs, qualities, or significance of marriage within the meaning of the amendment. The Ohio Supreme Court rejected the argument. The court held that there is a distinction between creating a quasi-marital relationship (as banned by the amendment) and merely creating a classification for a limited purpose. The intent of the marriage amendment, the court noted, was to prevent the creation or recognition of a legal status that approximates marriage through judicial, legislative, or executive action. The intent of the domestic violence statutes, on the other hand, was to protect persons from violence by close family members or residents of the same household. In using the term "person living as a spouse," Ohio's domestic violence statute merely identified a particular class of persons entitled to its protections.⁵⁷

The court found that the state, in enacting and enforcing the domestic violence statutes, did not create the defendant's relationship with the alleged victim and did not and would not be creating the cohabitation between any persons affected by the statute: "rather it is a person's determination to share some measure of life's responsibilities with another that creates cohabitation." This was in contrast to marriage, where the state manifestly played a role. In addition, the court noted, persons who satisfy the "living as a spouse" category do not receive any of the rights, benefits, or duties of legal marriage. The court found that in recognizing a category of persons cohabiting with another outside marriage, Ohio's domestic violence statute did not conflict with Ohio's marriage amendment and was not, therefore, unconstitutional.⁵⁸

In the second case in which the Ohio courts were asked to interpret the meaning of its marriage amendment, a group of taxpayers brought suit against the City of Cleveland on the

55. Ohio Const. Art. XV, § 11.

56. *See* State v. Carswell, 871 N.E.2d 547, 552 (Ohio 2007).

57. *Id.* at 553–54.

58. *Id.* 553–54.

grounds that the city's domestic partner registry conflicted with the state's marriage amendment.⁵⁹ The city's ordinance provided that couples could file a declaration of domestic partnership⁶⁰ and be placed in a registry provided they (1) paid a fee, (2) shared a common residence, (3) agreed to be in a relationship of mutual interdependence, (4) were not married to another individual, (5) were neither one a part of an existing domestic partnership with another person, (6) were eighteen years of age or older, and (7) were not related by blood in a way that would prevent them from being married in Ohio. The ordinance also set forth rules governing the filing, terminating, and registering of domestic partnerships.⁶¹

The taxpayers argued that Cleveland's domestic partner registry violated Ohio's marriage amendment because it gave "recognition" to domestic partnerships that approximate the aspects of marriage set forth in the amendment: marriage's design, qualities, significance, or effect. The court of appeals disagreed, citing the Ohio Supreme Court's rejection of a broad interpretation of the marriage amendment in its *Carswell* domestic violence decision and its explanation of the difference between marriage and other kinds of relationships:

[B]eing married is a status. Marriage gives a person certain legal rights, duties, and liabilities. For example, a married person may not testify against his or her spouse in some situations . . . A married person may inherit property from a spouse who dies intestate . . . The definition of 'status,' our understanding of the legal responsibilities or marriage, and the rights and duties created by the status of being married, combined with the first sentence of the amendment's prohibition against recognizing any union that is between persons other than one man and one woman, causes us to conclude that the second sentence of the amendment means that *the state cannot create or recognize a legal status for unmarried persons that bears all the attributes of marriage—a marriage substitute*.⁶² (emphasis in the original)

Because the domestic partner registry ordinance did not create or recognize a legal status for unmarried persons that had the attributes of marriage or a marriage substitute, the court held that the ordinance did not conflict with the marriage amendment and was thus constitutional:

The legal status of marriage is exceptional. Marriage automatically provides instant access to an extensive legal structure designed to protect the couple's relationship and to support the family in a variety of ways. The domestic partner registry, by contrast, is much more limited in its scope and bears almost none of the attributes of marriage. The domestic partner registry does not create any causes of action nor does it confer any legal benefits. . . . Although the domestic partner registry places upon domestic partners, if they wish to continue the relationship, the marital duties to "share a common residence," "to maintain a "committed relationship," and to "share responsibility for each other's common welfare," unlike a marriage, there is no method of enforcement for these provisions.

59. *Cleveland Taxpayers for Ohio Constitution v. Cleveland*, 2010 WL 3816393 (Ohio App. 8 Dist. 2010), *appeal not allowed*, 941 N.E.2d 804 (Ohio 2011).

60. One of the purposes of a domestic partner registry is to help establish that a couple meets local private and public employer pre-requisites for enrolling in domestic partner benefits.

61. *See Cleveland Taxpayers*, 2010 WL 3816393 at *1.

62. *See id.* at *2, *citing Carswell*, 871 N.E.2d at 551.

Domestic partners who separate cannot take advantage of the domestic relations laws that govern divorce, alimony, child support, child custody, and equitable distribution⁶³

Given the distinctions that the Ohio Supreme Court and Ohio Court of Appeals have made between the legal status of marriage and the limited purpose classification of couples who cohabit, on the one hand, and between the legal status of a married couple and that of registered domestic partners, on the other, it is very likely that the Ohio courts would interpret Ohio's marriage amendment to allow public employers to offer domestic partner benefits. In doing so, they would be recognizing a class of persons eligible for benefits (a limited purpose classification like that in Ohio's domestic violence statute) and would not be creating or recognizing a legal status with the rights, duties and attributes of marriage.

The Louisiana Marriage Amendment

The Louisiana marriage amendment provides:

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.⁶⁴

In *Ralph v. City of New Orleans*, the Louisiana Court of Appeals was faced with a slightly different issue than that before the Ohio courts.⁶⁵ The *Ralph* case involved a claim by taxpayers that the city of New Orleans had violated both Louisiana's marriage amendment and another provision in the Louisiana Constitution barring local ordinances that govern private or civil relationships except as otherwise provided by law when it established a domestic partner registry open to all city residents and began offering domestic partner benefits to its employees. To be eligible for domestic partner benefits, the city required employees to first enroll in the domestic partner registry. Although the lower court found in favor of the city, holding that the registry and the provision of domestic partner benefits did not violate the Louisiana marriage amendment, the plaintiff taxpayers did not properly appeal that ruling, and the court of appeals declined to address that issue.⁶⁶

The court did, however, review and uphold the trial court's ruling that the domestic partner registry and the extension of domestic partner benefits did not violate the constitutional provision prohibiting local governments from creating private or civil relationships. The reasoning behind that holding would be relevant to a North Carolina court's consideration of what it means to make valid or recognize a "domestic legal union." The plaintiffs in the *Ralph* case argued that there was no such thing as a domestic partner until the city created the status by

63. *Id.* at *2-*3.

64. La. Const. Art. XII, § 15.

65. *Ralph v. City of New Orleans*, 4 So. 3d 146, 155 (La. Ct. App. 2009).

66. *Id.* at 157-58.

instituting the registry.⁶⁷ The Louisiana Court of Appeals disagreed for much the same reason as the Ohio Court of Appeals rejected a similar argument in the *Cleveland Taxpayers* case. Looking to legislative history, the Louisiana court found that the city ordinance establishing the registry “did not create the concept of domestic partnership, and was intended merely to acknowledge the previous and continuing existence of these arrangements, not to give them any particular legal status”⁶⁸

The court acknowledged that it could be argued that the registry ordinance recognized the *de facto* existence of domestic partner relationships, but it found that the ordinance did not control, regulate, or direct domestic partnerships because it did not set forth rules governing the creation, maintenance, or termination of the partnerships but only provided rules pursuant to which the partnerships could be registered.⁶⁹ The Louisiana court found that private contracts that might form domestic partnerships were not controlled, regulated, or directed by the ordinance and that the terms and legal effect of these contracts were regulated as were other contracts, “by the applicable general [contract] laws of the state, city and nation.”⁷⁰ The Louisiana court’s language and ruling are similar to the language of the second sentence of Amendment One.

With respect to the city’s offer of domestic partner benefits, the court found that it did not govern private relationships as the provision of domestic partner benefits was clearly “otherwise provided by law:” Louisiana’s statute provides for a city to contract for any type of insurance protection for itself or its officers and employees, the only limitation being on the length of the contract term. Louisiana’s statute refers to benefits provided to employees and does not address, limit, or define who might be considered to be covered dependents of those employees.⁷¹ In this, Louisiana’s statutes are similar to the North Carolina statutes giving local governments the authority to procure health insurance and other benefits for their employees,

The Michigan Marriage Amendment

The Michigan Supreme Court has interpreted the Michigan marriage amendment to prohibit Michigan public employers from extending domestic partner benefits to their employees.⁷² This is the only state appellate court to have interpreted its marriage amendment this way. As the Michigan Supreme Court itself has noted, Michigan’s amendment is unique among those of other states limiting marriage to a union between a man and a woman.⁷³ The amendment says:

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.⁷⁴

The prohibition against recognizing any other form of union similar to marriage “*for any purpose*” is not found in any other marriage amendment. This should be significant to a North

67. *Id.* at 154.

68. *Id.* at 154.

69. *Id.* at 156.

70. *Id.* 154.

71. *Ralph v. City of New Orleans*, 4 So. 3d 146, 157 (La. Ct. App. 2009).

72. *See Nat’l Pride At Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

73. *Id.* at 542–43.

74. Mich. Const. Art. I, § 25.

Carolina court looking for guidance from other states in that the phrase “for any purpose” is the lynchpin on which the Michigan Supreme Court’s analysis rests.

The Michigan court approached the domestic partner benefits question by making clear what was not at issue. The case, it said, was not about whether Michigan public employers were recognizing a domestic partnership as a marriage or whether they were declaring domestic partnerships to be marriages or something similar to marriage. It was instead about whether Michigan public employers were recognizing domestic partnerships as a union similar to marriage *for the purpose of employee health insurance benefits*. To do so, the Michigan court said, would be to act contrary to the purpose of Michigan’s marriage amendment, which is to limit the state and its political subdivisions to considering marriage between a man and a woman as the only form of intimate relationship entitled to government benefits or protections on the basis of the relationship.⁷⁵

Amendment One does not have the expansive language of the Michigan marriage amendment or anything similar to it. That means that the interpretation of Michigan’s amendment is likely to be of less persuasive value to a North Carolina court than the interpretation of marriage amendments with language more similar to that of Amendment One; namely, Ohio’s and Louisiana’s.

Do Domestic Partner Benefits Confer Rights and Responsibilities Similar to Those of Marriage?

Given that North Carolina’s Amendment One does not explicitly mention either domestic partnership or unmarried cohabitation, a North Carolina court would probably analyze whether a public employer’s provision of domestic partner benefit could be said to be creating or recognizing a *domestic legal union*. As discussed in greater detail above, a likely meaning of *domestic legal union* is “a relationship between two people who are living together that is authorized by the state, has been entered into in accordance with procedures set forth by law, and gives the parties certain rights and responsibilities.” For the reasons set forth below, it is unlikely that a court would find that the provision of domestic partner benefits creates any sort of formal legal status for unmarried couples of either the same or opposite sex.

In North Carolina, the rights conferred by marriage include⁷⁶

- an equitable distribution of marital property acquired by either spouse or both together during the marriage, including pension, retirement, and any other deferred compensation of the other spouse;⁷⁷
- the right to insure their spouses’ lives under a life insurance policy without the spouse’s consent;⁷⁸
- the right to request alimony upon separation;⁷⁹

75. *Id.* at 533–37.

76. For an overview of marriage law in North Carolina, see Janet Mason, “Marriage in North Carolina,” *Popular Government*, Vol. 71, No.2 (Winter 2006): 26–36, available online at <http://shopping.netsuite.com/s.nl/c.433425/it.1/id.123/f>.

77. G.S. 50-20(b)(1).

78. G.S. 52-3.

79. G.S. 16.2A.

- the right to assert a claim to administer a deceased spouse's estate;⁸⁰ and
- the right to a share in the real property and the personal property of a deceased spouse.⁸¹

North Carolina law also makes each spouse responsible for debts incurred for expenses deemed necessary for the health and welfare of a spouse during the marriage regardless of which spouse is the individual legally obligated for the debt,⁸² and it makes each spouse responsible for the support of any minor child born to the marriage.⁸³

A public employee and his or her domestic partner who take advantage of a public employer's domestic partner benefits will gain none of the rights and responsibilities of marriage as set forth above. A decision to offer domestic partner benefits would simply enlarge the group of individuals that one employer allows to participate in its group benefit plans by virtue of a person's connection to an employee. Although Amendment One expressly allows the parties to a domestic partnership to enter into contractual agreements with one another and an unmarried couple could enter into a binding agreement about how they will share ownership of any real or personal property they acquire during the course of the relationship, they have no greater rights with respect to financial support during their lifetimes, a share of each other's pension and retirement accounts, insuring one another other's lives, or inheriting one another's property than they would with a neighbor or a close friend. Numerous courts in other jurisdictions have reached a similar conclusion; namely, that the extension of domestic partner benefits grants unmarried couples almost none of the very large package of rights and responsibilities that married couples enjoy.⁸⁴

Establishing Eligibility for Domestic Partner Benefits Using Criteria Similar to Those for Marriage

Employers who offer domestic partner benefits typically require employees and their domestic partners to establish certain facts supporting the existence of an interdependent household relationship before the employer allows the domestic partner to enroll in its benefit programs. Those facts are usually the same as or very similar to facts that individuals must establish in order to be granted a marriage license. Most employers who offer domestic partner benefits require the employee and partner to show that they are at least eighteen years old, that they are

80. G.S. 28A-4-1.

81. G.S. 29-13 and 30-3.1.

82. *See* N.C. Baptist Hosp. v. Harris, 319 N.C. 347 (1987).

83. G.S. 50-13.4.

84. *See, e.g.*, *Lowe v. Broward County*, 766 So. 2d 1199, 1205–06 (Fla. App. 4. Dist. 2000), *rev. denied*, 798 So. 2d 346 (2001) (county ordinance recognizing domestic partners does not address the panoply of statutory rights and obligations exclusive to the traditional marriage relationship and thus does not create new "marriage-like" relationship); *Leskovar v. Nickels*, 166 P.3d 1251, 1255-56 (Wash. App. 2007), *rev. denied*, 166 P.3d 1251 (2007), (citing *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001)) (mayor's executive order that same-sex marriages of city employees be recognized for benefits purposes does not conflict with state defense of marriage law); *Tyma v. Montgomery County*, 801 A.2d 148, 158 (Md. Ct. App. 2002) (county's recognition of domestic partnership does not create alternative form of marriage, common-law marriage, or any legal relationship or confer any other benefits of marriage). *See also* *Slatery v. City of New York*, 686 N.Y.S.2d 683, 686–89 (N.Y.A.D. 1 Dept. 1999), *appeal denied*, 727 N.E.2d (2000) (formal requirements regulating marriages are far more stringent than those regulating domestic partnerships and rights acquired by married partners with respect to their spouse's property are unavailable to domestic partners).

competent to contract, and that they do not share certain blood relationships.⁸⁵ This is similar to North Carolina's marriage laws which require the parties to a marriage to be at least eighteen years of age, mentally competent, not nearer in kinship than first cousins, and not married to another person, in addition to being of different sexes.⁸⁶

In addition, to establish eligibility for benefits, employers typically require domestic partners to certify that they have resided together for a stated minimum period of time, usually six months, and that they are in a long-term committed relationship. Employers also typically require an affirmation that the partners are either jointly responsible for each other's welfare and living expenses or for the direction and management of the household or simply that they are financially interdependent. Some employers require documentary evidence of financial interdependence such as evidence of a joint checking account, joint ownership of property, joint tenancy under a rental agreement, health care power of attorney, or durable power of attorney.⁸⁷ These requirements go beyond what is necessary to create a marriage in North Carolina and lack the most crucial element of marriage creation—the parties' expression of consent to be married in the presence of and solemnization of the marriage by a religious officiate or magistrate.⁸⁸

Would a North Carolina court find that a public employer's use of some of the eligibility criteria for marriage to determine the existence of a committed but unmarried relationship for employee benefits purposes makes valid or recognizes a domestic legal union within the meaning of Amendment One? Courts in a number of other states have found to the contrary. With the exception of the Michigan marriage amendment case *National Pride at Work*, discussed above, which turns on the unique language of the Michigan amendment, courts in other states have found that public employers are not recognizing a marriage-like relationship when they use some of the same criteria that the law requires for marriage to define the class of persons eligible to participate in their benefit plans. As one court explained, the recognition of domestic partners does not create the functional equivalent of marriage but simply adds another unmarried status to a list that already includes "single," "divorced," and "widowed."⁸⁹

Neither the North Carolina Constitution nor the General Statutes contain any provisions comparable to that of the Michigan marriage amendment. There is, therefore, no strong reason to think that the North Carolina courts would hold any differently than those courts in other

85. See, e.g., Town of Carrboro Code of Ordinances, Section 3-2.1, available at www.ci.carrboro.nc.us/tc/PDFs/TownCode/TownCodeCh03.pdf; *Ralph v. City of New Orleans*, 2009 WL 103895 (La. App. 4 Cir. 2009) at*4; *Tyma*, 801 A.2d at 151 n.4; *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1246 (Pa. 2004); *Lowe*, 766 So .2d at 1202.

86. For the law governing marriage in North Carolina, see Janet Mason, "Marriage in North Carolina," *Popular Government*, Vol. 71, No.2 (Winter 2006): 26–36, available online at <http://shopping.netsuite.com/s.nl/c.433425/it.I/id.123/f>.

87. See Joseph Adams and Todd Solomon, *Domestic Partner Benefits: An Employer's Guide*, 2nd ed. (Washington, D.C., 2003), 32–39.

88. See Mason, "Marriage in North Carolina."

89. See *Devlin*, 862 A.2d at 1243–44, 1246–47; *Schaefer v. City and County of Denver*, 973 P.2d 717, 721 (Colo. Ct. App. 1998) (interpreting Colorado Revised Statutes § 14-2-101 *et seq.* (1998)). See also *Crawford v. City of Chicago*, 710 N.E.2d 91, 99 (Ill. App. 1. Dist.), *appeal denied*, 720 N.E.2d 1090 (1999) ("Public or private employers who permit their employees to obtain health benefits covering anyone the employee designated, whether a parent, child, cousin, friend, or domestic partner, do not create a new type of marriage; rather they merely extend the existing categories of beneficiaries").

states that have held that offering domestic partner benefits does not create a marriage-like relationship.

Are Public Employee Domestic Partner Benefits Contrary to North Carolina Public Policy as Evidenced by Amendment One?

No North Carolina court has ever considered the question of whether a public employer's offer of domestic partner benefits violates state public policy as evidenced by the General Statutes' prohibition against same-sex marriage, which was enacted before Amendment One. In *Suggs v. Norris*, however, one of the North Carolina Court of Appeals' domestic partner contract cases, the court held that unless sexual services formed consideration for the contract, there was no violation of state public policy in enforcing a contract to compensate a domestic partner for her contribution to their household and business.⁹⁰ This decision, like the others in which the court of appeals enforced domestic partner contracts, suggests that North Carolina's courts do not see the state's privileging of marriage between a man and a woman as prohibiting the existence of domestic partnerships.⁹¹

Public Employment Law Bulletin No. 37 from November 2009, entitled "May North Carolina Local Government Employers Offer Domestic Partner Benefits?,"⁹² discussed the public policy based arguments made by opponents of domestic partner benefits in detail. As noted in that bulletin, there have been challenges to public employer decisions to offer domestic partner benefits in as many states as they have been offered in. These challenges have generally come from taxpayers who believe that domestic partner benefits contravene public policy as evidenced by statutes that require marriage to be between a man and a woman. They have usually focused on four primary arguments, all of which have generally failed in the courts. These arguments are

1. that a local government's decision to offer domestic partner benefits is an intrusion into an area reserved for state legislation,
2. that the extension of domestic partner benefits creates a common law marriage,
3. that the extension of domestic partner benefits would create a new marriage-like relationship, and
4. that domestic partner benefits conflict with state statutes regulating sexual behavior.⁹³

The same arguments might be made with respect to Amendment One's prohibition on same-sex marriage and would likely fail for the same reasons:

1. Courts have found that policies offering domestic partner benefits do not intrude into an area traditionally reserved for the state because such policies only affect family relationships to the limited extent that they only qualify an additional group of people as eligible to participate in employer-based health benefits.⁹⁴

90. *Suggs v. Norris*, 88 N.C.App. 539 (1988).

91. See the discussion at pp. __, above.

92. See Diane M. Juffras, "May North Carolina Local Government Employers Offer Domestic Partner Benefits?," *Public Employment Law Bulletin* No. 37, November 2009, available at <http://sogpubs.unc.edu/electronicversions/pdfs/pelb37.pdf>.

93. See *Id.* at pp. 14–21.

94. On this point, see the discussion at pp. 18–19, above.

2. North Carolina does not recognize common law marriages.
3. Most courts have found that neither the offer of domestic partner benefits to public employees nor the enrollment of a domestic partner in employee benefits creates a marriage-like relationship. Domestic partner benefits have nothing to do with marriage and merely enlarge the category of health insurance beneficiaries.
4. The U.S. Supreme Court's ruling in the case *Lawrence v. Texas* means that state statutes regulating sexual conduct do not apply to domestic partner benefits.

Readers are referred to *Public Employment Law Bulletin* No. 37 for a more detailed discussion of these arguments and counterarguments.

Amendment One, Domestic Partner Benefits, and the Equal Protection Clause

To judge from opposition to constitutional amendments and statutes prohibiting same-sex marriage in other states, there is a strong possibility that Amendment One itself will be challenged on equal protection grounds. The Equal Protection Clause of Article I, Section 19, of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution both forbid North Carolina from denying any person the equal protection of the laws. Article I, Section 19, of the North Carolina Constitution says:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. *No person shall be denied the equal protection of the laws*; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

(emphasis added)

Section 1 of the Fourteenth Amendment to the U.S. Constitution says:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

(emphasis added)

The equal protection clauses mean that neither the federal government, a state, nor a political subdivision of a state may intentionally and arbitrarily discriminate against anyone through the terms of a statute or other legislative enactment or through the application of the terms of the statute by an officer or employee of the government.⁹⁵ Most laws do, in fact, differentiate in some way between groups of persons. The equal protection clauses do not prohibit this. But they

⁹⁵ See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Yan-Min Wang v. UNC-CH Sch. of Med.*, 2011 WL 4552300 (N.C. App. 2011) (finding that plaintiff did not identify any classification upon which she was denied equal protection).

do require that government treat persons who are in all relevant respects alike in the same way and that it refrain from using invidious classification schemes like those based on race or sex.⁹⁶

Amendment One and the Federal Equal Protection Clause

An argument that Amendment One violates the federal Equal Protection Clause would likely be framed in the following way: Amendment One classifies citizens on the basis of their sexual orientation and treats individuals who are attracted to and partnered with the same sex differently than it treats individuals who are attracted to and partnered with the opposite sex. This classification can be said to be based on sex in as much as it is based on stereotypical notions of what it means to be male and female.

The U.S. Supreme Court has held that it will uphold a classification of citizens in a law so long as it bears a *rational relation to some legitimate end* and the law making the classification neither burdens a fundamental right, such as voting or marrying, nor targets a protected or “suspect” class such as race or sex.⁹⁷ The rational relation test gives great deference “to legislative determinations as to the desirability of particular statutory discriminations.”⁹⁸ Under rational basis review, it is not the court’s role to second-guess the government or to determine whether the desired goal is actually served by the challenged statute or regulation. Rather, the court need only determine whether the legislature “rationally might have believed . . . that the desired end might be served.”⁹⁹

In contrast to rational basis review, which is often referred to as regular scrutiny, any classification that burdens a fundamental right or creates a classification along the lines of race or national origin (race and national origin being deemed suspect classes) will be subject to strict scrutiny, passing constitutional muster only if it is narrowly tailored to serve a compelling state interest.¹⁰⁰ Classifications that are created along gender lines are considered “quasi-suspect” and are subject to *intermediate scrutiny* by the courts. To withstand intermediate scrutiny, a statutory classification must be *substantially related to an important governmental objective*.¹⁰¹

An equal protection challenge to Amendment One would likely argue that being gender-based, sexual orientation is a quasi-suspect class. Amendment One would, in this argument, necessarily be subject to intermediate scrutiny, which means that the state must show that the prohibition against same-sex marriage is substantially related to an important government objective.

It is difficult to predict how the federal Fourth Circuit Court of Appeals, which has jurisdiction over North Carolina, would rule on such a challenge. Based on its previous decisions in cases in which gay plaintiffs raised equal protection challenges to government policies, it seems likely that the Fourth Circuit would find that sexual orientation is not a quasi-suspect class entitled to intermediate scrutiny and that it would apply the less demanding rational relation

96. See *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

97. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

98. See *McCool v. City of Philadelphia*, 494 F. Supp. 2d 307, 317 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

99. See *Id.* at 321.

100. See *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Clark*, 486 U.S. at 461.

101. See *Clark*, 486 U.S. at 461 (1988); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723–724 and n.9 (1982).

standard.¹⁰² How the court would hold after applying rational basis review to the merits of the challenge is unclear.

Three federal appeals courts have considered similar challenges to date with mixed results. All three courts applied the rational relation test. Most recently, the First Circuit Court of Appeals held that Section 3 of the federal Defense of Marriage Act, whose definition of marriage as limited to a man and a woman for the purposes of federal law, violated the U.S. Constitution's Equal Protection Clause. DOMA's limitation of marriage to opposite-sex couples has had the effect of denying federal employee benefits to same-sex spouses of federal employees lawfully married in Massachusetts. The First Circuit found that Section 3 was not adequately supported by any legitimate government interest. The government had not shown any connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of traditional opposite-sex marriage.¹⁰³ Two federal district courts in the Second and Ninth circuits have also found that DOMA violates the Equal Protection Clause.¹⁰⁴

The Ninth Circuit Court of Appeals has also held that California's marriage amendment violates the Equal Protection Clause of the Fourteenth Amendment. The court found that the amendment was not rationally related to California's interests in childrearing and procreation, in proceeding with "caution" in considering changes to the traditional definition of marriage, in protecting religious liberty, and in preventing children from being taught about same-sex marriage in schools.¹⁰⁵

The federal Eighth Circuit Court of Appeals decided differently. It held that the Nebraska marriage amendment prohibiting same-sex marriage was subject to rational basis review, was rationally related to a legitimate state interest in encouraging heterosexual couples to bear and raise children in committed marriage relationships, and, as such, that it did not violate the federal Equal Protection Clause.¹⁰⁶ As of the publication date, none of the three cases are pending before the U.S. Supreme Court, although the First Circuit's opinion notes that certiorari before the Court is likely to be sought and granted.¹⁰⁷

What is certain is that if Amendment One were to be found unconstitutional on equal protection grounds by the Fourth Circuit, North Carolina public employers would not be able to deny domestic partner benefits to their employees. Logically, if it is unconstitutional for the government to treat same-sex couples differently in their ability to marry, it would be unconstitutional

102. See *Veney v. Wyche*, 293 F.3d 726, 731–32 (4th Cir. 2002) (prisoner's claim that he was discriminated against during his detention on the basis of sexual orientation and gender is subject to rational basis review); *Selland v. Perry*, 905 F. Supp. 260, 265–66 (D. Md. 1995), *aff'd*, 100 F.3d 950 (4th Cir. 1996) (U.S. military's "Don't ask, don't tell" policy was rationally related to legitimate purpose of maintaining discipline and fighting ability in armed forces).

103. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 2012 WL 1948017 at *5–*6, *8–*9 (1st Cir. May 31, 2012). The U.S. Government was represented by attorneys for the U.S. House of Representatives in this case as the Obama administration has decided no longer to defend DOMA.

104. See *Windsor v. United States*, 2012 WL 2019716 (S.D.N.Y. June 6, 2012) (under rational basis review, DOMA violates equal protection clause as applied to woman seeking a refund of federal estate taxes levied on her same-sex spouse's estate); *Dragovich v. U.S. Dep't of Treasury*, 2012 WL 1909603 (N.D. Cal. May 24, 2012) (Section 3 of DOMA is constitutionally invalid to the extent that it excludes same-sex spouses from enrollment in the long-term care plan).

105. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012), *rehearing en banc denied*, 2012 WL 1994574, ___ F.3d ___, (9th Cir. Jun. 05, 2012).

106. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864–68 (8th Cir. 2006).

107. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 2012 WL 1948017 at *12.

for the government, acting as employer, to treat its gay and lesbian employees differently with respect to benefits eligibility for their partners. Once the General Assembly provided for either same-sex marriage or same-sex civil unions, public employers would be able to limit benefits eligibility to spouses or legally recognized partners.

If the Fourth Circuit were to hold that Amendment One is constitutional and does not violate the Equal Protection Clause, the question would remain: May North Carolina public employers provide domestic partner benefits to its employees without violating Amendment One? In my opinion, North Carolina local government employers could continue to offer domestic partner benefits for all of the reasons set forth earlier in this bulletin.

Amendment One and the North Carolina Equal Protection Clause

In deciding challenges to statutes that plaintiffs claim violate the North Carolina Equal Protection Clause, North Carolina courts use the same standards as the federal courts do in deciding challenges that claim violation of the federal Equal Protection Clause.¹⁰⁸ Strict scrutiny is reserved for those cases in which the law classifies persons on the basis of race or national origin (suspect classifications) or where it interferes with the ability of some group of people to exercise a fundamental right. Classifications on the basis of sex trigger intermediate scrutiny.¹⁰⁹ If a law classifies people in any other way, the law receives only rational basis scrutiny; that is, the person challenging the law must show that it bears no rational relationship to any legitimate government interest.¹¹⁰ No cases from the North Carolina state courts have addressed the standard of scrutiny appropriate to distinctions made on the basis of sexual orientation. The North Carolina courts might decide that sexual orientation is closely related to gender and apply intermediate scrutiny as the New Jersey, Connecticut, and Iowa courts have done. North Carolina courts are perhaps more likely to follow the lead of the Fourth Circuit and apply rational basis scrutiny, but it is impossible to predict with any certainty.

In those states with state marriage amendments or statutes that have been challenged on state equal protection grounds, the outcomes vary depending on whether the court has applied intermediate scrutiny or the rational basis review. The New Jersey Supreme Court found that classifications on the basis of sexual orientation call for intermediate scrutiny and held that under New Jersey's Equal Protection Clause, gays and lesbians in committed same-sex relationships were entitled to the same rights and privileges that married couples enjoyed. The court left it to the legislature to determine whether those equal rights and privileges should be granted by redefining marriage in that state's marriage statute or by creating a new form of union for same-sex couples.¹¹¹ In Connecticut and Iowa, statutes limiting marriage to one man and one woman were challenged as violations of those states' equal protection clauses. The Connecticut and Iowa Supreme Courts, like that of New Jersey, found that sexual orientation was a quasi-suspect class entitled to intermediate scrutiny. The Iowa court found that the statute was not

108. *See* *Dep't of Transp. v. Rowe*, 353 N.C. 671, 675 (2001); *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131 (1978).

109. *See Rowe*, 353 N.C. at 675 (citing *Clark v. Jeter*, 486 U.S. 456 (1988)), *Craig v. Boren*, 429 U.S. 190 (1976).

110. *See Rowe*, 353 N.C. at 675 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)); *Texfi Industries, Inc. v. City of Fayetteville*, 301 NC 1, 11 (1980).

111. *Lewis v. Harris*, 908 A.2d 196, 200, 212 (N.J. 2006). In 2007, the New Jersey Legislature enacted a form of civil union that provides same-sex couples with the same rights and benefits as does its marriage statute.

substantially related to any of the government goals set forth as justifications for it; namely, protection of traditional marriage, ensuring optimal environments for raising children, promoting procreation, promoting stability in opposite-sex relationships, conservation of important state resources, and recognizing religious opposition to same-sex marriage.¹¹² The Connecticut Supreme Court took a slightly different approach and held that preserving the traditional definition of marriage was not an important government interest sufficient to discriminate against an entire class of persons.¹¹³

The Maryland Court of Appeals (the highest court in that state) and the Washington Supreme Court reached different conclusions than did the courts of New Jersey, Iowa, and Connecticut. First, both the Maryland and the Washington courts applied rational-basis scrutiny in analyzing whether a prohibition on same-sex marriage violated the equal protection clauses of their respective state constitutions. The Maryland Court of Appeals found that the state's interest in fostering a stable environment for procreation was a rational basis for prohibiting same-sex marriages and that Maryland's marriage amendment to its state constitution was consistent with the state's equal protection clause.¹¹⁴ The Washington Supreme Court held that a Washington statute prohibiting same-sex marriage did not violate the Washington Constitution's Privileges and Immunities Clause, which grants equal protection to all its citizens. Like the Maryland court, the Washington Supreme Court found that the statute was rationally related to the state's interests in procreation and children's well-being.¹¹⁵

Although it appears from the discussion of the foregoing cases that the outcome of a challenge to Amendment One on the grounds that it violates North Carolina's Equal Protection Clause will depend upon whether the North Carolina courts apply intermediate or rational basis review, the sample size—five—is simply too small to draw any conclusions from. The success of an equal protection challenge to Amendment One cannot be predicted. But there may be grounds for concluding that an equal protection challenge to the practice of denying employee benefits to same-sex partners might succeed where a challenge to Amendment One itself may not.

Denying Gay and Lesbian Employees the Opportunity to Enroll Their Partners in Employee Benefit Plans Likely Violates the Equal Protection Clause

Four recent cases from states that prohibit same-sex marriage suggest that equal access to domestic partner benefits is an issue separate and distinct from the right to marry. Oregon, Montana, Alaska, and Arizona each have either a constitutional amendment or a state statute prohibiting same-sex marriage. Public employee plaintiffs in those states chose not to challenge the marriage laws themselves but to challenge instead the unequal opportunity to enroll members of their households in their employers' group health plans. In Oregon, Montana, and Alaska, the challenges were made under the guarantee of equal protection found in each state's constitution. In Arizona, the challenge was made under the federal Equal Protection Clause.

In all four of these cases, the courts found a violation of the applicable equal protection clause. In the first case to address this issue, the Oregon Court of Appeals held that the Oregon Health Sciences University, a state institution, violated the Oregon Constitution's Privileges and

112. *Varnum v. Brien*, 763 N.W.2d 862, 889–906 (Iowa 2009).

113. *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 432, 476, 481 (Conn. 2008).

114. *Conaway v. Deane*, 932 A.2d 571, 631–35 (Md. App. Ct. 2007).

115. *Andersen v. King Cnty.*, 138 P.3d 963, 1007–09 (Wash. 2006).

Immunities Clause when it denied lesbian employees the opportunity to enroll their domestic partners in the university's employee benefit plans. Oregon's Privileges and Immunities Clause is similar to North Carolina's Equal Protection Clause. The court held that there was no justification for treating the class of homosexual employees differently from that of employees married to opposite-sex partners.¹¹⁶

While the Oregon case did not discuss the appropriate standard of review, focusing instead on what constitutes a "class" for Oregon's equal protection purposes, the Montana and Alaska cases expressly applied rational basis review. As in the Oregon case, the Montana case was brought by state university employees. In this case, the Montana Supreme Court applied rational basis review and found that the Montana University System's policy of denying dependent health insurance benefits to the same-sex partners of its employees was not rationally related to the government employer's interest in administrative efficiency. Thus, the policy violated the Equal Protection Clause of the Montana Constitution.¹¹⁷ The Alaska Supreme Court found that the City of Anchorage's and the State of Alaska's policy of not offering the same employee benefits to the same-sex partners of employees that it did to employees' opposite-sex spouses was not rationally related to the government's interest in cost control, administrative efficiency, and the promotion of marriage. The court held that the policy therefore violated the Equal Protection Clause of the Alaska Constitution.¹¹⁸

The facts and procedural posture of the Arizona case were different from the preceding three cases, but the legal analysis of the equal protection claims was similar. The challenge here was not to a policy, but to the Arizona law prohibiting family health insurance benefits from being extended to same-sex partners. The decision of the federal Ninth Circuit Court of Appeals was made in response to an appeal from a trial court injunction against that law's taking effect until the trial on the merits had been decided. The Ninth Circuit held that the equal protection challenge to the statute was likely to succeed on the merits and thus affirmed the district court's injunction, finding that the statute could not survive rational basis review as the denial of benefits did not further state's interests in cost savings, administrative efficiency, and favoring marriage and families with children.¹¹⁹

What is striking about these four cases—the only ones I found in which the denial of domestic partner benefits was challenged on equal protection grounds—is that all four reached the conclusion that the denial of benefits violated equal protection on the basis of rational basis scrutiny. This is the least stringent of the three bases of scrutiny in that all the government need show is that there is some rational relationship between the law or policy in question and the interest it was adopted to further. It does not have to be the best way of furthering that interest, just a rational one. In all of the cases, the government's professed interest was in cost-saving and administrative efficiency. The Oregon, Montana, and Alaska courts, as well as the Ninth Circuit, all found that their state's singling out and discriminating against a historically unpopular group could not be justified by an appeal to cost and efficiency. In the Arizona and Alaska cases, the state also invoked the state's policy of favoring marriage as a government interest that the policy on domestic partner benefits was designed to further. Both the Ninth Circuit and the Alaska Supreme Court rejected this justification, the Ninth Circuit noting that the withholding

116. *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 447–48 (Or. App. 1998).

117. *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004).

118. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 793–94 (Alaska 2005).

119. *See Diaz v. Brewer*, 656 F.3d 1008, 1014–15 (9th Cir. 2011).

of benefits to same-sex partner could not promote marriage when under Arizona law, same-sex partners are not permitted to marry.¹²⁰

These four cases will provide the federal Fourth Circuit Court of Appeals and the North Carolina appellate courts precedents for their consideration of an equal protection challenge to a public employer's denial of domestic partner employee benefits, if one comes before them. It is, as always, impossible to predict how a court will decide, especially because decisions often turn on the specific facts, circumstances, and procedural elements of a case. Given the consistency in the review of this issue by the four western courts—Oregon, Montana, Alaska, and the federal Ninth Circuit—it seems more likely than not that North Carolina's courts would decide similarly.

Conclusion

North Carolina's Amendment One says nothing about employee benefits. Looking to the common definitions of the language of the amendment, a North Carolina court is likely to find that the heretofore unused term "domestic legal union" refers to a cohabiting opposite-sex or same-sex couple who have formalized their relationship in accordance with the provisions of North Carolina law. A court would likely find that the first sentence of Amendment One means that in North Carolina marriage is limited to a man and a woman and that the General Assembly and local governments may enact no other form of legal status for opposite-sex or same-sex couples. A court would likely draw on North Carolina precedent in recognizing the validity of and enforcing agreements between cohabiting but unmarried partners in interpreting the second sentence of Amendment One. The court would likely hold that the amendment does not prohibit the existence of domestic partnerships and that it will continue to enforce contractual agreements memorializing them. Decisions from other states interpreting the language of their state constitutional marriage amendments support this narrow interpretation of Amendment One. Previous decisions of the North Carolina courts and decisions from other states make it unlikely that a court will find that a public employer's extending domestic partner benefits confers the rights and responsibilities of marriage or creates a marriage-like legal status. North Carolina courts are likely to conclude, then, that while Amendment One constitutionalizes the state's statutory prohibition on same-sex marriage, it does not make any changes to the legal authority of public employers to provide domestic partner benefits to its employees.

120. See *Diaz*, 656 F.3d at 1014–15; *Alaska Civil Liberties Union*, 122 P.3d at 792–94.

Appendix:

Texts of the Marriage Amendments from the Twenty-Nine Other States That Have Them

Alabama Constitution Article I, § 36.03

- (a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.
- (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
- (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.
- (d) No marriage license shall be issued in the State of Alabama to parties of the same sex.
- (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.
- (f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.
- (g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

Alaska Constitution Article I, § 25

To be valid or recognized in this State, a marriage may exist only between one man and one woman.

Arizona Constitution Article XXX, § 1

Only a union of one man and one woman shall be valid or recognized as a marriage in this state.

Arkansas Constitution Amendment LXXXIII

- § 1 Marriage consists only of the union of one man and one woman.
- § 2 Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the

legislature may recognize a common law marriage from another state between a man and a woman.

- § 3 The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

California Constitution Article I, § 7.5

Only marriage between a man and a woman is valid or recognized in California.

Colorado Constitution Article II, § 31

Only a union of one man and one woman shall be valid or recognized as a marriage in this state.

Florida Constitution Article I, § 27

Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.

Georgia Constitution Article I, § 4, ¶ 1

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

Idaho Constitution Article III, § 28

A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.

Kansas Constitution Article XV, § 16

- (a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.
- (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

Kentucky Constitution § 233A

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

Louisiana Constitution Article XII, § 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.

Michigan Constitution Article I, § 25

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Mississippi Constitution Article XIV, § 263A

Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.

Missouri Constitution Article I, § 33

That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.

Montana Constitution Article XIII, § 7

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

Nebraska Constitution Article I, § 29

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Nevada Constitution Article I, § 21

Only a marriage between a male and female person shall be recognized and given effect in this state.

North Dakota Constitution Article XI, § 28

Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Ohio Constitution Article XV, § 11

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Oklahoma Constitution Article II, § 35

- A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
- B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
- C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Oregon Constitution Article XV, § 5a

It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.

South Carolina Constitution Article XVII, § 15

A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments.

South Dakota Constitution Article XXI, § 9

Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.

Tennessee Constitution Article XI, § 18

The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign

jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Texas Constitution Article I, § 32

- (a) Marriage in this state shall consist only of the union of one man and one woman.
- (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

Utah Constitution Article I, § 29

- (1) Marriage consists only of the legal union between a man and a woman.
- (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Virginia Constitution Article I, § 15-A

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Wisconsin Constitution Article XIII, § 13

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

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