

Potential Legal Impact of the Proposed Domestic Legal Union Amendment to the North Carolina Constitution

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November 8, 2011

EXECUTIVE SUMMARY*

A proposal to amend the North Carolina Constitution will be on the ballot on May 8, 2012. The proposed Amendment states: “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 This report assesses the potential legal impact of the proposed Amendment.²

The Amendment’s sponsors claim that it would simply place North Carolina’s current legal ban on same-sex marriage into the state Constitution.³ The proposed Amendment, however, would reach beyond the current prohibition against same-sex marriage by barring the state from recognizing any “domestic legal union” other than heterosexual marriage.

This difference in language would expand the Amendment’s impact far beyond current North Carolina law. It would also cause this Amendment to have much broader effects than similar amendments that have been enacted in other states. Most of these states’ amendments bar same-sex marriage; some of them also bar the state from creating other statuses that give unmarried couples rights that approximate marriage. Very few, however, would restrict the state from giving more limited protections to unmarried couples.

The language of our Amendment would restrict protections for all unmarried couples – whether they are straight or same-sex. In addition to prohibiting same-sex marriage, the Amendment:

- would prohibit North Carolina from passing **civil unions** in the future;
- would bar the state from creating **a domestic partnership status for same-sex couples that would give them some lesser range of protections than married couples**;
- would eliminate the **domestic partner insurance benefits** currently offered to their employees by a number of **local governments**, including Chapel Hill, Durham, Greensboro, and Mecklenburg and Orange Counties.

In addition, courts could interpret the language of the Amendment to restrict many more protections for unmarried couples, whether they are straight or same-sex. The problem is that no one can say for certain how many more. In prohibiting state validation or recognition of “domestic legal unions,” the proposed Amendment would introduce into the Constitution a

* We wish to thank Beth Posner, Victor Flatt, Patrick Hunter, Sarah Arena, Marcellus Braxton, Agata Pelka, and Jessica Thaller for valuable assistance in preparing this report.

¹ An Act to Amend the Constitution to Provide that Marriage Between One Man and One Woman is the Only Domestic Legal Union that Shall be Valid or Recognized in this State, Session Law 2011-409 (2011), available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S514v5.pdf>.

² This report does not seek to prescribe one or more preferred interpretations of the Amendment. Rather, it endeavors to highlight significant effects that could result from interpretation of the Amendment.

³ See Lynn Bonner, *N.C. Senator Wants Gay Marriage Ban In State's Constitution*, MCCLATCHY NEWSPAPERS, Mar. 1, 2011, <http://www.mcclatchydc.com/2011/03/01/109603/nc-senator-wants-gay-marriage.html#storylink=misearch> (2011).

phrase whose meaning is unclear, which has never been used in any prior statutory law in North Carolina or interpreted by our courts, and which has never been interpreted by courts in any other state. Given how courts have interpreted amendments in other states, it is very possible, however, that courts would interpret the Amendment to bar the state from giving *any* protections to unmarried couples – straight or same-sex – based on their relationships. This would:

- invalidate **domestic violence protections** for all unmarried partners;
- undercut existing **child custody and visitation law** that is designed to protect the best interests of children;
- prevent the state from giving committed couples protections that help them order their relationships, including the right to
 - determine the **disposition of their deceased partner's remains**;
 - **visit their partner in the hospital** in the event of a medical emergency;
 - to **make emergency medical decisions for their partner** if their partner is incapacitated; and
 - to make **financial decisions for their partner** if their partner is incapacitated.

Furthermore, if courts interpreted it in a far-reaching manner, the Amendment could even:

- invalidate **trusts, wills, and end-of-life directives by one partner in favor of the other**.

It is impossible to predict definitively how broadly courts would interpret the Amendment's prohibitions, given its vague and untested language. However, two things are clear: First, it will take courts years of litigation to settle the Amendment's meaning. Second, when the dust clears, unmarried couples will have fewer rights over their most important life decisions than they would have had otherwise.

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I. INTRODUCTION

A proposal to amend the North Carolina Constitution will be presented to North Carolina voters in May 2012. The proposed Amendment states: “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.”⁴ If voters approve the Amendment by majority vote, it will become part of our state’s Constitution.

Although sponsors of the Amendment argue that it simply places North Carolina’s current ban on same-sex marriage into the state constitution, the proposed Amendment is worded far more broadly. It does not simply restrict “marriage” to opposite-sex couples, as our current law does.⁵ Instead, it bars the validity and recognition of all “domestic legal unions” besides heterosexual marriage. Language makes all the difference in law, and this difference in language would produce broader – and potentially far broader – legal effects.

In prohibiting all “domestic legal unions” aside from heterosexual marriage, the Amendment would restrict protections for all unmarried couples. This includes an increasingly large group of citizens. The 2010 Census reported 222,800 unmarried couples in North Carolina, an increase of 55% in the past decade. Of these unmarried cohabitant households, 88% were opposite-sex; 12% were same-sex.⁶ Couples who cohabit are increasingly diverse, including not only same-sex couples who cannot marry under North Carolina law, but also young, opposite-sex couples who delay marriage, middle-aged couples who decide not to marry, and older couples who have been previously married and are hesitant to remarry.⁷ All these citizens would have their rights limited by the Amendment.

In prohibiting “domestic legal unions” besides heterosexual marriage, the proposed Amendment is significantly broader than marriage amendments that have been passed in other states. The Amendment would introduce language into our Constitution that is not clear on its face, has never been used in any North Carolina statute or interpreted by courts in our state, and never been interpreted by courts in any other state. It could take courts years – at the cost of considerable judicial resources – to settle its full effects. No matter how courts eventually resolve these issues, the Amendment would cast a shroud of uncertainty over North Carolina’s legal system in the meantime. Ultimately, based on courts’ interpretations of marriage amendments in

⁴ An Act to Amend the Constitution to Provide that Marriage Between One Man and One Woman is the Only Domestic Legal Union that Shall be Valid or Recognized in this State, Session Law 2011-409 (2011), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S514v5.pdf>

⁵ N.C. GEN. STAT. § 51-1 (“A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife. . .”); N.C. GEN. STAT. § 51-1.2 (“Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”).

⁶ U.S. Census Bureau, 2010 Census Summary File, Unmarried-Partner Households by Sex of Partner; U.S. Census Bureau, 2000 Census Summary File, Unmarried-Partner Households by Sex of Partner.

⁷ *See* IRA ELLMAN, PAUL KURTZ, BRIAN BIX, LOIS WEITHORN, KAREN CZAPANSKIY, & MAXINE EICHNER, FAMILY LAW: CASES, TEXTS, AND PROBLEMS 919 (5th ed., 2010).

other states, courts could interpret the Amendment broadly, to bar any relationship protections to unmarried couples.

The following sections will review the Amendment's text and interpretation, and then assess its potential legal impact in six specific areas: 1) the state's ability to offer civil unions and domestic partnerships; 2) municipalities' ability to continue offering domestic partner benefits to their employees; 3) protections for unmarried victims of domestic violence; 4) child custody law formulated in the best interests of children; 5) health-care and end-of-life decision making by unmarried couples; and 6) estate planning by unmarried couples. In each of these areas, we demonstrate, the Amendment may uproot existing law.

II. UNTANGLING THE MEANING OF THE AMENDMENT

In declaring that no "domestic legal union" besides heterosexual marriage "shall be valid or recognized by this state," the language of the proposed Amendment goes well beyond existing North Carolina law. North Carolina already provides by statute that, to be valid, a marriage celebrated within North Carolina must be between persons of the opposite sex.⁸ Furthermore, North Carolina law also provides that same-sex marriages that are validly entered into in other states are not valid in North Carolina.⁹

These laws prohibit same-sex marriage, but do not limit the state's ability to grant more limited protections to same-sex couples. Furthermore, these laws do not bar the state or local government from giving some protections to all unmarried couples, whether they are straight or same-sex. In contrast, if the Amendment were passed, it would broaden the current legal prohibition beyond same-sex marriage to forbid the validity or recognition of "domestic legal unions."

How broadly this prohibition would extend is not clear from the language of the Amendment. The Amendment does not define the term "domestic legal union," nor define what it would mean to "validate" or "recognize" such a union. Further, the phrase "domestic legal union" has never been used in any North Carolina legislative enactment, or been interpreted by courts in this state. The issue would therefore be one of first impression in the North Carolina courts. Based on how our sister states have interpreted language in their marriage amendments, however, the language could be interpreted broadly, to bar all relationship rights for unmarried couples.

A. North Carolina's Amendment is Far Broader Than the Marriage Amendments of Most Other States

The language of this Amendment is not only broader than existing North Carolina law; it is also significantly broader than similar constitutional amendments that have passed in other states. Approximately ten states have amendments that simply restrict the institution of marriage to opposite-sex couples – as existing North Carolina law does.¹⁰ These states' amendments simply

⁸ See *supra* note 5.

⁹ See *id.*

¹⁰ These are: Alaska (ALASKA CONST. art. I, § 25), Arizona (ARIZ. CONST. art. XXX, § 1), Arkansas (ARK. CONST. amend. LXXXIII, § 1), California (CAL. CONST. art. I, § 7.5), Colorado (COLO. CONST. art. II, § 31), Mississippi

prohibit same-sex couples from marrying in the state, and prohibit courts from recognizing same-sex marriages celebrated in other states.

Most of the remaining state amendments – a somewhat larger group than the first group – not only limit marriage to opposite-sex couples, they also bar the state from creating marriage-like statuses for same-sex (or, in some states, all unmarried) couples. For example, Alabama’s amendment forbids recognition of “[a] union *replicating marriage* of or between persons of the same sex,”¹¹ while Kentucky’s declares that “[a] legal status *identical or substantially similar to that of marriage* for unmarried individuals shall not be valid or recognized.”¹² In contrast to North Carolina’s proposed Amendment, these amendments bar recognition of same-sex marriages and civil unions, but would not bar protections for unmarried couples not substantially equivalent to marriage. North Carolina’s language goes beyond this, barring the “validity” or “recognition” of the relationships of unmarried couples, even for the purposes of giving these relationships much less significant protections than those accorded married couples.

Only three other states have adopted constitutional amendments that approach the breadth of North Carolina’s proposed language. Like North Carolina, these three states potentially bar giving any protections to unmarried couples based on their relationship. Idaho’s constitutional amendment, which was adopted in late 2006, has identical language to that proposed in North Carolina.¹³ Because Idaho courts have yet to interpret that statute, however, its scope is still unclear. Similarly, South Carolina’s amendment, passed in 2006, declares that “[a] marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized,” and bars the State and its political subdivisions from “respecting any other domestic union, however denominated.”¹⁴ Its scope has also not yet been interpreted by South Carolina courts. Finally, Michigan’s amendment, passed in 2004, states that “the union of one man and

(MISS. CONST. art. XIV, § 263A), Missouri (MO. CONST. art. I, § 33), Montana (MONT. CONST. art. XIII, § 7), Nevada (NEV. CONST. art. I, § 21), Oregon (OR. CONST. art. XV, § 5A), and Tennessee (TENN. CONST. art. XI, § 18); Hawaii’s amendment states that its legislature has the power to reserve marriage to opposite-sex couples. (HAW. CONST. art. I, § 23).

¹¹ ALA. CONST. art. I, § 36.03(g) (italics added).

¹² KY. CONST. § 233A (italics added). Louisiana’s and Wisconsin’s amendments also uses the “*identical or substantially similar to that of marriage*” language. (LA. CONST. art. XII, § 15; WIS. CONST. art. XIII, § 13 (italics added)). Texas uses almost the same language, barring creation or recognition of any “legal status *identical or similar to marriage*.” (TEX. CONST. art. I, § 32 (italics added)). Similarly, Florida forbids recognition of a “legal union *that is treated as marriage or the substantial equivalent thereof*.” (FLA. CONST. art. I, § 27 (italics added)); Georgia forbids recognition of “a relationship between persons of the same sex *that is treated as a marriage* under the laws of such other state or jurisdiction.” (GA. CONST. art. I, § 4 (italics added)); Kansas states that “[n]o relationship, other than a marriage, shall be recognized by the state as *entitling the parties to the rights or incidents of marriage*.” (KAN. CONST. art. XV, § 16 (italics added)); North Dakota uses terminology similar to North Carolina’s in focusing on “domestic unions,” but, it states that such unions may not “*be recognized as a marriage or given the same or substantially equivalent legal effect*.” (N.D. CONST. art. XI, § 28 (italics added)); Ohio forbids creation or recognition of “a legal status for relationships of unmarried individuals *that intends to approximate the design, qualities, significance or effect of marriage*.” (OHIO CONST. art. XV, § 11); Utah states that “[n]o other domestic union, however denominated, *may be recognized as a marriage or given the same or substantially equivalent legal effect*.” (UTAH CONST. art. I, § 29 (italics added)); Virginia’s constitutional amendment bars only the creation and recognition of relationships that “*approximate the design, qualities, significance, or effects of marriage*.” (VA. CONST. art. I, § 15-A (italics added)).

¹³ IDAHO CONST. art. III, § 28.

¹⁴ S.C. CONST. art. XVII, § 15.

one woman in marriage shall be the only agreement recognized as a marriage or similar union *for any purpose*.”¹⁵ That language, although containing the “marriage or similar union” clause, which could potentially have limited the amendment’s effect to prohibiting awarding similar packages of protections to unmarried couples, also includes the “for any purpose” clause, suggesting that the amendment should extend more broadly. In doing so, its language would have the same effect as a broad interpretation of North Carolina’s language would have. Indeed, as discussed *infra*, courts have interpreted Michigan’s provision broadly.¹⁶

B. Because the Amendment’s Language is Novel and Unclear, North Carolina Courts Would Be Unable to Decipher Its Meaning from the Text Itself or Prior Court Decisions.

The text of North Carolina’s proposed Amendment states that “[m]arriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”¹⁷ What the phrase “domestic legal union” means, however, and what it would mean to “validate” or “recognize” such unions, is not immediately clear. As a result, the meaning of the text would have to be interpreted by North Carolina courts, using established principles to determine the Amendment’s meaning and scope.

Courts generally interpret constitutional provisions according to the same standards that they use to interpret other legal writings, such as statutes.¹⁸ In interpreting a constitutional provision, the court’s role is to “effectuate the manifest purposes of the instrument.”¹⁹ Courts do so in the first instance by looking at the provision’s language.²⁰ In doing so, they may rely on the dictionary definitions of particular words.²¹ They may also look to their own past decisions interpreting the same or similar language.²² Yet none of these tools yield clear answers about the meaning of the proposed Amendment:

“domestic legal union”: The phrase “domestic legal union” is not defined in the proposed Amendment. No legislative enactment in North Carolina has used this term before. The phrase has never been used by a North Carolina court, either as a matter of common law or in interpreting a legislative enactment.²³ In the absence of such authority regarding its meaning, the phrase “domestic legal union” must be interpreted based on its constituent parts. North Carolina law, however, also provides no guidance when it comes to interpretation of subsections of the

¹⁵ MICH CONST. art. I, § 25 (italics added).

¹⁶ See *infra* notes 33-37 and accompanying text.

¹⁷ An Act to Amend the Constitution to Provide that Marriage Between One Man and One Woman is the Only Domestic Legal Union that Shall be Valid or Recognized in this State, Session Law 2011-409 (2011), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S514v5.pdf>

¹⁸ *Coley v. State*, 360 N.C. 493, 497-8, 631 S.E.2d 121, 125 (2006).

¹⁹ *Id.* at 498, 631 S.E.2d at 125 (citing *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944))).

²⁰ See *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932).

²¹ *Nat’l Pride at Work v. Governor of Mich.*, 481 Mich. 56, 69, 748 N.W.2d 524, 533 (2008).

²² *Elliott*, 203 N.C. at 753, 166 S.E. at 921 (“[W]e may have recourse to former decisions, among which are several dealing with the subject under consideration.”); *cf. In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1976).

²³ An electronic search of the term “domestic legal union” produced no results in a LEXIS or Westlaw search of both the court and statutory databases for North Carolina.

phrase. Like the term “domestic legal union,” the phrase “legal union” has never been used or interpreted in any North Carolina legislative enactment or any judicial decision. Neither has the phrase “domestic union.”

This leaves the meaning of the phrase to be construed based on the meaning of the individual words within it. The *Merriam-Webster Dictionary* defines the word “domestic” as “of or relating to the household or the family.”²⁴ In turn, it defines “legal” alternatively as “deriving authority from or founded on law;” or “having a formal status derived from law often without a basis in actual fact.”²⁵ Finally, it defines the word “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.”²⁶

Taking these words together, the Amendment certainly pertains to unmarried individuals who have united to form a household. How the word “legal” relates to the rest of the phrase is unclear, however. Construing the word as meaning “deriving authority from or founded on law,” the phrase “domestic legal union” potentially refers to any domestic relationship that receives any legal recognition, protection, or rights from the state. Construing the word “legal” more narrowly to refer to a “formal status derived from law,” it refers only to formal statuses granted by the government, such as the domestic partnership statuses currently granted by a number of municipalities. Courts, however, could construe the meaning of the phrase either way.

“valid”: The *Merriam-Webster Dictionary* defines the word “valid” as “having legal efficacy or force.”²⁷ The Amendment’s prohibition against considering domestic legal unions to be valid could therefore be construed to deprive courts of the ability to enforce legal commitments that unmarried partners make, as well as deprive them of other legal protections currently granted to unmarried partners, such as domestic violence protections.

“recognize”: The *Merriam-Webster Dictionary* lists two different definitions of the word “recognize” that might apply in the case of the Amendment:

1: to acknowledge formally: as . . . b : to admit as being of a particular status . . .
.[:] d : to acknowledge the de facto existence or the independence of. 2: to
acknowledge or take notice of in some definite way: as a : to acknowledge with a
show of appreciation <recognize an act of bravery with the award of a medal> b :
to acknowledge acquaintance with <recognize a neighbor with a nod>.²⁸

Depending on which definition a court adopts, the Amendment could be construed to bar only the creation of a formal legal status, such as a civil union, or, alternatively, any legal protections that acknowledge the existence of nonmarital domestic relationships. While nonmarital relationships are not currently entitled to anything approaching the levels of protection accorded

²⁴ *Domestic*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/domestic> (last visited Oct. 29, 2011).

²⁵ *Id.*, Legal.

²⁶ *Id.*, Union.

²⁷ *Id.*, Valid.

²⁸ *Id.*, Recognize.

marital relationships, in various areas such as domestic violence protections, the General Assembly has accorded limited rights based on a recognition that the relationship exists. If courts adopt the broader reading of the term “recognize,” the Amendment would likely be construed as prohibiting these protections.

In sum, the scope of the Amendment’s prohibition on nonmarital relationships is not clear from the language itself, but it has the potential to be construed broadly to prohibit *any* rights or protections from being accorded to unmarried couples based on their relationship. As Idaho’s Attorney General stated before that state passed its amendment, “[A]n amendment that not only defines marriage but also bars recognition of other domestic relationships carries a greater risk of claims of interference with such relationships. Terms in marriage amendments . . . such as ‘domestic union,’ ‘legal union,’ . . . may require judicial interpretation to determine their effect on other domestic relationships.”²⁹ The Attorney General also counseled that “the broader the net that a marriage amendment casts over domestic relationships outside of marriage, the more uncertain the amendment’s effect will be on [nonmarital] relationships.”³⁰ In prohibiting the validity or recognition of domestic legal unions besides heterosexual marriage, North Carolina’s Amendment casts a very broad net, whose scope would be uncertain.

C. Case Law in Other States Suggests that the Proposed Amendment Would Be Construed Broadly to Prohibit Any Relationship Protections for Unmarried Couples.

Where the language of a North Carolina law is unclear, courts will look to the interpretation of similar language by courts in other states.³¹ Unfortunately, no court in any other state has interpreted the term “domestic legal union.”³² However, a significant body of case law is developing in our sister states regarding what it means for a state to be prohibited from “recognizing” “unions,” “domestic partnerships,” and other non-marital relationships. This case law suggests that North Carolina’s prohibition would be construed broadly to forbid the limited number of protections currently available to members of non-marital relationships, as well as to prohibit the state from instituting any protections for committed couples in the future.

For example, the Michigan Supreme Court interpreted Michigan’s constitutional amendment, which states 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,”³³ to preclude public employers from offering health insurance benefits to their employees’ domestic partners.³⁴ At the time the Michigan amendment was passed, several state universities and various city and county governments had policies that extended such health-insurance benefits. In analyzing the range of relationships affected by the amendment, the Michigan Supreme Court stated:

²⁹ Regarding Proposed Amendment to the Idaho Constitution, Idaho Op. Atty. Gen. No. 06-1, 19 (2006),

³⁰ *Id.* at 21.

³¹ *Incoe v. De Rose Indus.*, 30 N.C. App. 1, 10, 226 S.E.2d 201, 206 (1976); *State v. Robbins*, 253 N.C. 47, 49, 116 S.E.2d 192, 194.

³² A LEXIS and Westlaw search of the multi-state court database yielded no results for the term “domestic legal union.”

³³ MICH. CONST. art. I, § 25.

³⁴ *Nat’l Pride at Work v. Governor of Mich.*, 481 Mich. 56, 748 N.W.2d 524 (2008).

The pertinent question is . . . whether the public employers are recognizing a domestic partnership as a union similar to a marriage. A "union" is "something formed by uniting two or more things; combination; . . . a number of persons, states, etc., joined or associated together for some common purpose." *Random House Webster's College Dictionary* (1991). Certainly, when two people join together for a common purpose and legal consequences arise from that relationship, i.e., a public entity accords legal significance to this relationship, a union may be said to be formed. When two people enter a domestic partnership, they join or associate together for a common purpose, and, under the domestic-partnership policies at issue here, legal consequences arise from that relationship in the form of health-insurance benefits. Therefore, a domestic partnership is most certainly a union.³⁵

The court then held that Michigan's amendment prohibited the state from giving legal effect to such domestic partnerships.

Importantly, the Michigan high court held that the fact that the state granted domestic partners only health insurance benefits, rather than the full range of benefits granted through heterosexual marriage, would not save the challenged policies from the amendment's prohibition. Instead, the Court held, *any* benefits accorded to a relationship by the state or its affiliates would constitute recognition in violation of the amendment, so long as the relationship at stake was a non-marital conjugal relationship:

[T]he pertinent question for purposes of the marriage amendment is not whether these relationships give rise to identical, or even similar, legal rights and responsibilities, but whether these relationships are similar in nature in the *context* of the marriage amendment . . . , i.e., for the purpose of a constitutional provision that prohibits the recognition of unions similar to marriage "for any purpose." If they are, then there can be *no* legal cognizance given to the similar relationship.³⁶

According to the Court:

"Only" means "the single one . . . of the kind; lone; sole[.]" *Random House Webster's College Dictionary* (1991). Therefore, a single agreement can be recognized within the state of Michigan as a marriage or similar union, and that single agreement is the union of one man and one woman. A domestic partnership does not constitute such a recognizable agreement."³⁷

Under this interpretation, the language of North Carolina's proposed Amendment, which states that heterosexual marriage "is the only domestic legal union that shall be

³⁵ *Id.* at 68-69, 748 N.W. 2d at 533.

³⁶ *Id.* at n.6.

³⁷ *Id.* at 77, 748 N.W. 2d at 538.

valid or recognized in this state,” would prevent the state from assigning any legal benefits or protections to cohabiting relationships.

Similarly, seven Ohio state trial courts and two appellate courts, in at least 27 cases, also construed the language of the Ohio marriage amendment broadly, holding its state’s domestic violence statute unconstitutional insofar it protected unmarried cohabitants.³⁸ Ohio’s amendment declares that the state “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.”³⁹ In limiting the bar on state action only to creation or recognition of a status “that intends to approximate the design, qualities, significance or effect of marriage,” the language of the Ohio amendment was less amenable to a broad interpretation than North Carolina’s proposed

³⁸ State v. Burk, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Cuyahoga Co. Mar. 23, 2005), *rev'd*, 843 N.E.2d 1254 (Ohio App. 8d. Dec. 20, 2005), *aff'd*, In re Ohio Domestic-Violence Statute Cases, 114 Ohio St.3d 430, 872 N.E.2d 1212 (Ohio Sep. 19, 2007); State v. Wain, No. CR-467055 (Ohio Ct. Com. Pl. Cuyahoga Co. Aug. 23, 2005), *rev'd*, No. 86960, 2006 WL 2299205 (Ohio App. 8d. Aug. 10, 2006), *aff'd*, In re Ohio Domestic-Violence Statute Cases; State v. Douglas, Nos. 465702 & 463822 (Ohio Ct. Com. Pl. Cuyahoga Co. 2005), *rev'd*, Nos. 86567 & 86568, 2006 WL 1304860 (Ohio App. 8d. May 11, 2006), *aff'd*, In re Ohio Domestic-Violence Statute Cases; City of Cleveland v. Voies, No. 2005 CRB 002653, 2005 WL 1940135 (Ohio Mun. Ct. Cuyahoga Co. Mar. 23, 2005), *rev'd*, No. 86317, 2006 WL 440341 (Ohio App. 8d. Feb. 23, 2006), *aff'd*, In re Ohio Domestic-Violence Statute Cases; State v. Ward, Case No. 05-CR-0269 (Ohio Ct. Com. Pl. Greene Co.), *aff'd*, 849 N.E.2d 1076 (Ohio App. 2d. Mar. 24, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Peterson, No. 2004 CR 873, 2005 WL 1940114 (Ohio Ct. Com. Pl. Greene Co. Apr. 18, 2005), *aff'd*, No. 2005 CA 44, 2006 WL 925158 (Ohio App. 2d. Apr. 7, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Dixon, No. 2005 CR 0091, 2005 WL 1940110 (Ohio Ct. Com. Pl. Greene Co. Apr. 26, 2005), *aff'd*, No. 2005-CA-47, 2006 WL 827395 (Ohio App. 2d. Mar 31, 2006); State v. Steineman, No. 2005 CR 0068, 2005 WL 1940104 (Ohio Ct. Com. Pl. Greene Co. Apr. 26, 2005), *aff'd*, No. 2005-CA-46, 2006 WL 925166 (Ohio App. 2d. Apr. 7, 2006); State v. Woullard (Ohio Ct. Com. Pl. Greene Co.), *aff'd*, No. 2005 CA 61, 2006 WL 925160 (Ohio App. 2d. Apr. 7, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. James (Ohio Ct. Com. Pl. Greene Co. 2005), *aff'd*, No. 2005 CA 83, 2006 WL 1984616 (Ohio App. 2d. July 14, 2006); State v. Davis (Ohio Ct. Com. Pl. Greene Co. June 7, 2005), *aff'd*, No. 2005 CA 60, 2006 WL 1453112 (Ohio App. 2d. May 19, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Robinson (Ohio Ct. Com. Pl. Greene Co. June 9, 2005), *aff'd*, No. 2005 CA 62, 2006 WL 1461075 (Ohio App. 2d. May 19 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Ward (Ohio Ct. Com. Pl. Greene Co. Aug. 17, 2005), *aff'd*, No. 2005 CA 96, 2006 WL 2044242 (Ohio App. 2d. July 21, 2006); State v. Phillips, 2006 WL 827400 (Ohio App. 2d, March 31, 2006), *rev'd*, In re Ohio Domestic-Violence Statute; Gough v. Triner, No. 05 DR 41 (Ohio Ct. Com. Pl. Columbiana Co. Apr. 4, 2005), *rev'd*, No. 05 CO 33, 2006 WL 1868330 (Ohio App. 7d. June 28, 2006); State v. McCaslin, No. 05 CR 71 (Ohio Ct. Com. Pl. Columbiana Co. July 14, 2005), *rev'd*, No. 05 CO 44, 2006 WL 459261 (Ohio App. 7d. Feb. 21, 2006); State v. Pasco, No. 05 CR 127 (Ohio Ct. Com. Pl. Columbiana Co.), *rev'd*, No. 2005 CR 151 (Ohio App. 7d. Dec. 31, 2005); State v. Goshorn (Ohio Ross Co. Mun. Ct. Nov. 15, 2005), *rev'd*, No. 05CA2879, 2006 WL 1495256 (Ohio App. 4d. May 23, 2006); State v. Carswell, No. 05CR22077 (Ohio Ct. Com. Pl. Warren Co. Mar. 30, 2005), *rev'd*, No. CA2005-04-047, 2005 WL 3358882 (Ohio Ct. App. 12d. Dec. 12, 2005), *aff'd*, In re Ohio Domestic-Violence Statute Cases; State v. Renner, No. CRB 05 00288 (Ohio Chillicothe Mun. Ct. Apr. 29, 2005); State v. McIntosh, No. 21093, 2006 WL 925179 (Ohio App. 2d. April 7, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Maddox, No. 21133, 2006 Ohio 2127 (Ohio App. 2d Dist. Apr. 28, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Wagoner, No. 21225, 2006 WL 2044173 (Ohio App. 2d. July 21, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Newman, No. 21264, 2006 WL 2336626 (Ohio App. 2d. Aug. 11, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. McKinley, No. 8-05-14, 2006 WL 1381635 (Ohio App. 3d. Dist. May 22, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Shaffer, No. 14-05-55, 2006 WL 1459769 (Ohio App. 3d. May 30, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases; State v. Logsdon, No. 13-05-29, 2006 WL 1585447 (Ohio App. 3d. June 12, 2006), *rev'd*, In re Ohio Domestic-Violence Statute Cases.

³⁹ OHIO CONST. art. XV, § 11.

language. Despite this, Ohio’s domestic violence protections were thrown into doubt as courts repeatedly held that they could no longer constitutionally apply to unmarried partners.

For example, in *State v. Ward*, the Ohio Court of Appeals for the Second District construed Ohio’s amendment to bar the state from giving *any* protections to unmarried partners, rather than more narrowly reading its amendment to bar the state only from giving a package of similar rights and benefits to marriage to unmarried couples.⁴⁰ In the Court’s words:

The deep issue in this appeal is whether a statute giving *one* effect of a de jure marriage – the protection afforded a spouse from domestic violence by the other spouse – to a de facto marital relationship runs afoul of the amendment, or whether it, or other statutes or laws, would be required to give *all* of the effects of marriage to a quasi-marital relationship before running afoul of the amendment. In our view, the only reasonable interpretation of the second sentence of the amendment is the former.

Let us suppose that the amendment were given the more restrictive interpretation. To begin with, it is difficult to imagine any act by the state of Ohio, or any of its political subdivisions, that would, in fact, give all of the effects of marriage to a quasi-marital relationship. Secondly, the evident purpose behind the second sentence of the amendment – to prohibit the indirect recognition of nontraditional marriages – could die the death by a thousand cuts. . . . At what point would the second sentence of the amendment be deemed to have been violated? Would only the last in the series of legislative enactments, common-law rulings, and administrative or judicial rule-making be voided for unconstitutionality? . . .

In our view, the jurisprudence contemplated by the hypotheticals recited above would be unworkable. The general principle evident in the second sentence to the Defense of Marriage amendment is that a legal status of a de facto marital relationship shall neither be created nor recognized in Ohio as having the same effect as the legal status of a de jure marital relationship. It is tempting to speculate which potential exceptions to this general principle would have found favor with a majority of the Ohioans who voted for the Defense of Marriage Amendment, but this would be mere speculation. In our view, the second sentence was intended to avoid the prospect of the Ohio General Assembly, or the Ohio courts, establishing exceptions to its reach. In this connection, it is useful to remember that the Defense of Marriage Amendment was proposed and adopted amidst concerns that the concept of traditional marriage was being eroded by judicial rulings, among other factors.⁴¹

The Court of Appeals for the Third District followed suit in *State v. McKinley*, declaring that Ohio had unlawfully “recognized the legal status of cohabitation” in violation of its amendment by including in its domestic violence protections cohabiting unmarried couples.⁴² To add to the

⁴⁰ *State v. Ward*, 849 N.E.2d 1076 (Ohio App. 2d. Mar. 24, 2006), *rev’d*, In re Ohio Domestic-Violence Statute Cases, 114 Ohio St.3d 430, 872 N.E.2d 1212 (Ohio Sep. 19, 2007).

⁴¹ *Id.* at ¶¶ 24- 25, 27. (italics added).

⁴² *State v. McKinley*, No. 8-05-14, 2006 WL 1381635, ¶ 24 (Ohio App.3d. 2006), *rev’d*, In re Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007).

disarray that the Amendment caused in Ohio, the Court of Appeals for the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Districts declared that the domestic violence protections were constitutional.⁴³

It was only after two years and ten months of uncertainty that the Ohio Supreme Court resolved this confusion, determining that the domestic violence protections did not violate Ohio's amendment.⁴⁴ According to the Court:

[T]he second sentence of the amendment means that the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage—a

marriage substitute. . . . It is clear that the purpose of [the Ohio amendment] was to prevent the state, either through legislative, executive, or judicial action, from creating or recognizing a legal status deemed to be *the equivalent of* a marriage of a man and a woman. The first sentence of the amendment prohibits the recognition of marriage between persons other than one man and one woman. The second sentence of the amendment prohibits the state and its political subdivisions from circumventing the mandate of the first sentence by recognizing a legal status similar to marriage (for example, a civil union).⁴⁵

The Court then held that the simple award of domestic violence protections to domestic partners did not violate the Ohio amendment because the right fell far short of the benefits granted by marriage. This decision, importantly, turned on the limitation in the Ohio amendment barring the creation or recognition of a legal status only for “relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”⁴⁶ No similar requirement appears in North Carolina's proposed Amendment. Accordingly, a North Carolina court following the Ohio Supreme Court's rationale would find unconstitutional *any* legal protections accorded to unmarried couples under our more broadly-worded language, including domestic violence protections.

The Nebraska Attorney General, too, has construed the Nebraska amendment's language broadly. In response to a query from the state legislature concerning the constitutionality of proposed legislation to afford domestic partners the right to determine the disposition of a deceased partner's remains, the Attorney General opined that the statute would violate the

⁴³ State v. Goshorn, No. 05 CA2879, 2006 WL 1495256 (Ohio App. 4d. 2006); State v. Adams, 2005 WL 3196850 (Ohio App. 5d. 2005); State v. Newell, 2005 WL 1364937 (Ohio App. 5d. 2005); City of Uhrichsville v. Losey, No. 2005 AP 03 0028, 2005 WL 3361100 (Ohio App. 5d. 2005); State v. Hare, No. 05 CAA06038, 2006 WL 2141587 (Ohio App. 5d. 2006); State v. Rexroad, Nos. 05 CO 36, 2005 WL 3489726 (Ohio App. 7d. 2005); State v. Pasco, No. 05 CR 151 (Ohio App. 7d. Dec. 31, 2005); State v. McCaslin, No. 05 CO 44, 2006 WL 459261 (Ohio App. 7d. 2006); State v. Burk, 164 Ohio App.3d 740, 843 N.E.2d 1254 (Ohio App. 8d. 2005), *aff'd*, In re Ohio Domestic-Violence Statute Cases, 114 Ohio St.3d 430, 872 N.E.2d 1212, 2007-Ohio-4552 (2007); Cleveland v. Voies, 2006 WL 440341, 2006-Ohio-815 (Ohio App. 8d. 2006), *aff'd*, In re Ohio Domestic-Violence Statute Cases; State v. Nixon, 165 Ohio App.3d 178, 845 N.E.2d 544 (Ohio App. 9d. 2006); State v. Rodgers, 166 Ohio App.3d 218, 850 N.E.2d 90 (Ohio App.10d. 2006); State v. Jenson, 2006 WL 2796284 (Ohio App. 11d. 2006); State v. Carswell, 2005 WL 3358882, (Ohio App. 12d. 2005), *aff'd*, In re Ohio Domestic-Violence Statute Cases.

⁴⁴ See Ohio v. Carswell, 114 Ohio St. 3d 210, 871 N.E.2d 547 (2007).

⁴⁵ *Id.* at 213, 871 N.E.2d at 551 (italics added).

⁴⁶ See *supra* note 39 and accompanying text.

amendment's prohibition on recognition of same-sex relationships.⁴⁷ The legislation did not attempt to confer the bundle of rights and duties conferred by marriage, simply the authority to determine the disposition of a loved one's remains. Nonetheless, the Attorney General said that because such decisions were traditionally reserved for surviving spouses, granting domestic partners such rights would violate the amendment:

[S]uch legislation would create new rights which spring from recognition of a domestic partnership; a partnership which could comprise same sex couples. And the rights being created are placed on the same plane as rights which arise as a consequence of the marital relationship. This would be giving legal effect to a same sex relationship, thereby validating or recognizing it, which runs counter to [the Nebraska amendment].⁴⁸

Finally, the Idaho Attorney General offered an advisory opinion on its state's new constitutional provision, whose language is the same as North Carolina's. The Idaho Attorney General noted that all three courts that have considered what the term *recognition* means in interpreting marriage amendments concluded that the "extension of benefits based upon a personal relationship constituted *recognition* of that relationship. There is little doubt that an Idaho court would as well."⁴⁹

Sponsors of the Amendment have argued that it simply seeks to prevent North Carolina judges from striking down our laws barring same-sex marriage.⁵⁰ However, if the sponsors of the Amendment intended to limit its scope to barring same-sex marriage, they could have drafted its language explicitly to do so, as other states have done.⁵¹ Because the Amendment's prohibitions go beyond same-sex marriage, using new and untested language, the courts would be left to determine the scope of the proposed language. The eventual meaning is certain to extend beyond a prohibition on same-sex marriage. Further, based on the treatment of somewhat similar provisions in other states, North Carolina courts could construe the language of North Carolina's proposed Amendment broadly, to bar all relationship protections for unmarried couples.

III. THE AMENDMENT'S CERTAIN IMPACT

A. The Amendment Would Prohibit Civil Unions and Domestic Partnerships under State Law.

It is not clear how broadly courts would construe the scope of our Amendment. However, at a minimum, it is clear that the Amendment would prohibit not only same-sex marriage, but other formal statuses for same-sex couples and other unmarried couples. This means that North Carolina would be prohibited from passing legislation authorizing civil unions and domestic

⁴⁷ Compatibility of Legislation to Vest Rights in Domestic Partners and Neb. Const. Art 1, Section 29, Neb. Op. Att'y Gen 03004 (2003).

⁴⁸ *Id.* at *2.

⁴⁹ City of Moscow, Health Insurance Policy, Idaho Op. Att'y Gen. 9 (2008), *available at* <http://oldsite.alliancedefensefund.org/userdocs/IdahoAGOpinion.pdf>.

⁵⁰ *See supra* note 3.

⁵¹ *See supra* note 10, and accompanying text.

partnerships. Nine states currently allow same-sex couples to enter “civil unions,” which give them the rights and protections that married couples receive, albeit without the name “marriage.”⁵² As one of its sponsors acknowledged, the Amendment would prohibit North Carolina from allowing civil unions in the future.⁵³

The Amendment would also forbid North Carolina from creating any more limited status for same-sex couples or other unmarried couples that gives them a lesser range of protections than is accorded to married couples. Notwithstanding policies preferring heterosexual marriage, many states have decided that there are legitimate reasons to extend a more limited set of protections to other relationships. These states have created domestic partnership statuses that allow a limited range of protections to unmarried couples.⁵⁴ The protections accorded to domestic partners vary from state to state. For example, in Maine, registered domestic partners can inherit from one another without a will, make funeral and burial arrangements for one another, be named a guardian or conservator if their partner becomes incapacitated, and make organ and tissue donations on behalf of their deceased partner. These legal protections ensure that, in the event of a catastrophic illness or death, partners can make decisions and care and provide for one another even in the absence of having completed individual designations such as wills or powers-of-attorney. If North Carolina’s Amendment were passed, its ban on “domestic legal unions” would prohibit the state from creating any such status in the future.

B. The Amendment Would Outlaw the Domestic Partner Insurance Benefits Municipalities Now Offer to Public Employees.

The Amendment would also invalidate the domestic partner benefits that several North Carolina municipalities currently offer to their employees. Seven local governments within North Carolina now offer such benefits. The Town of Carrboro, Town of Chapel Hill, City of Durham, and County of Orange offer benefits to both straight and same-sex domestic partners. The County of Durham, City of Greensboro, and County of Mecklenburg offer benefits just to same-sex domestic partners. These benefits are viewed as an important tool for recruiting talented

⁵² These states include California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington. Delaware and Hawaii will make this status available to same-sex couples on Jan. 1, 2012. Some of these states call this status “domestic partnerships,” although their legal effect is different than the domestic partnerships that other states have created, which allow same-sex couples who entered them a more limited package of rights than married couples.

⁵³ See N.C. House Majority Leader Paul Stam, Gay Marriage Debate at UNC Law (Sept. 21, 2011), *available at* <http://www.wral.com/news/state/nccapitol/video/10162998/#/vid10162998>.

⁵⁴ These include Colorado (COLO. REV. STAT. ANN. §15-22-105 (West 2011)), Hawaii (HAW. REV. STAT. ANN. §572C-4 (West 2011)), Maine (ME. REV. STAT. ANN. tit. 22, § 2710 (2009)), Maryland (MD. CODE ANN., TAX-PROP. §12-101 (West 2010)), Vermont (VT. STAT. ANN. tit. 15§ 1301 (West 2010)), Wisconsin (WIS. STAT. §§770.001-18 (West 2011)), and Washington, D.C. (D.C. CODE §§32-701-2 (2011)). The legal names of these relationships vary from state to state. Hawaii (1997) and Vermont (1999), for example, enacted “reciprocal beneficiary” statuses, while Maine (2004), Maryland (2008), Washington, D.C. (2002), and Wisconsin (2009) opted for “domestic partnerships,” and Colorado (2009), “designated beneficiaries.”

Maine has since adopted civil unions and Vermont and D.C. have adopted full marriage equality, but all states’ domestic partnership statuses are still available to two unmarried adults who are living together and responsible for the other’s welfare. See D.C. CODE §46-401 (2011); ME. REV. STAT. ANN. tit. 22, §2710 (2011); VT. STAT. ANN. tit. 15, §8 (West 2011).)

employees.⁵⁵ The proposed Amendment, however, would strip these local governments of their authority to do so, and invalidate the domestic partner benefits currently offered.

The experience of public employers in the State of Michigan sheds light on how the proposed Amendment in North Carolina would eliminate local governments' ability to offer domestic partner benefits to their employees. In 2004, Michigan amended its constitution to state 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."⁵⁶ In the 2008 case of *National Pride at Work v. Michigan*, described in detail above,⁵⁷ the Michigan Supreme Court held that the amendment "prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners."⁵⁸ Although that case only addressed same-sex unions, a 2005 opinion from the Michigan Attorney General's Office concluded that Michigan's amendment prohibits public employers from recognizing opposite-sex domestic partners as well.⁵⁹

North Carolina's proposed Amendment, in barring recognition of any domestic legal union – not simply "similar unions" to marriage, as Michigan's does – more clearly bars domestic partnerships than the language of the Michigan amendment. Indeed, in interpreting the same language as North Carolina's Amendment, the Attorney General of Idaho came to this conclusion, determining that the term "domestic legal union" included domestic partnerships, and that Idaho's amendment therefore barred a municipality's "policy of extending health care benefits to the domestic partners of its employees and the dependents of those domestic partners."⁶⁰ If North Carolina adopted this Amendment, courts would undoubtedly interpret our Amendment the same way.

IV. THE AMENDMENT'S POSSIBLE IMPACT

Beyond the relative certainty that the Amendment would prohibit states and municipalities from creating or retaining formal statuses that allow benefits to same-sex and opposite-sex unmarried couples, the Amendment's impact is less certain. But courts could interpret the language of the Amendment to bar far more protections to unmarried couples, including domestic violence protections, child custody and visitation protections, medical decision-making for their partners, and estate planning.

⁵⁵ See, e.g., Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?*, 17 VA. J. SOC. POL'Y & L. 83, 94 (2009) ("many employers choose to offer partner benefits as a mechanism for recruiting and retaining talented workers and to gain a competitive advantage over employers who do not offer these benefits.").

⁵⁶ MICH. CONST. art. I, § 25.

⁵⁷ See *supra* notes 34-37 and accompanying text.

⁵⁸ *Nat'l Pride at Work, Inc., v. Governor of Mich.*, 481 Mich. 56, 60, 748 N.W.2d 524, 530 (2008).

⁵⁹ *Constitutionality of City Providing Same-Sex Domestic Partnership Benefits*, Op. Mich. Att'y Gen. 7171 (2005).

⁶⁰ Op. Neb. Att'y Gen., *supra* note 49, at 10-11.

A. The Amendment Would Jeopardize Existing Domestic Violence Protections for Unmarried Couples.

If the Amendment is approved, the continued application of North Carolina’s domestic violence laws to members of unmarried couples would be placed in jeopardy. Additionally, the work done by numerous State agencies relying upon our current domestic violence laws will be thrown into question, and the protections and resources afforded North Carolinians in abusive relationships could be seriously and dangerously eroded.

1. State domestic violence laws currently give domestic violence protections to particular relationships, including those of unmarried partners.

Chapter 50B of the North Carolina General Statutes defines domestic violence for the purposes of the civil protections afforded by that statute and for numerous other statutes and agency work throughout our State. That chapter defines domestic violence as attempted or actual bodily injury, fear of imminent serious bodily injury, stalking, and/or sexual assault between people who are in a “personal relationship.”⁶¹ The statute then defines the meaning of the term “personal relationship” in terms of six categories: (1) current or former spouses; (2) persons of the opposite sex who live together or have lived together; (3) parents and children and grandparents and grandchildren, including persons acting in loco parentis to a minor child; (4) people who have a child in common; (5) current or former household members; and (6) people of the opposite sex who are in a dating relationship or have been in a dating relationship.⁶² North Carolina courts have routinely applied domestic violence protections to unmarried opposite-sex couples, based on the second, the fourth, and the sixth definitional categories. Courts have also extended the statute’s protections to members of same-sex couples who fall into the fifth category of “current or former household members.”

In including unmarried couples within the law’s coverage, North Carolina has recognized that domestic violence victims deserve protection whether or not they are married to their abusers. Chapter 50B sets out a process by which victims of physical abuse, sexual assault, and stalking can obtain a civil remedy in court.⁶³ Under that statute, a victim of abuse may sue a person with whom they are or have been in a personal relationship for a domestic protection order. Courts are authorized by chapter 50B to issue emergency *ex parte* orders against persons accused of physical abuse, sexual assault, or stalking which, pending a hearing on the matter, may prevent them from having contact with their accuser, require that they vacate their home or shared residence, temporarily relinquish custody of their children, and surrender firearms and ammunition. A hearing is typically held within ten days of the entry of these *ex parte* orders, and at this 10-day hearing, the Court, upon a finding that an act of domestic violence has occurred between eligible parties, must enter an order of protection. The order may be entered for up to one year and may provide for no-contact and no-assault provisions, as well as possession of a shared residence for the victim, possession of personal or marital property, temporary spousal and/or child support, temporary child custody and visitation provisions, and year-long

⁶¹ N.C. Gen. Stat. 50B-1 (2009).

⁶² *Id.*

⁶³ N.C. GEN. STAT. §50B-1 et. seq.

restrictions on firearms. Additionally, the Court has the authority to enter such other relief as may assist the plaintiff. This type of relief may include turning over essential personal documentation such as birth certificates, health insurance documentation, immigration papers, and Food Stamp and Medicaid cards, depending upon on the parties' individual circumstances and the Plaintiff's needs. Courts are explicitly empowered to include in orders "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child."⁶⁴

Under chapter 50B, both an *ex parte* domestic violence protective order and an order entered after the "10-day hearing" are enforceable by the criminal justice system and by the contempt powers of the court.⁶⁵ The primary method of enforcement employed throughout North Carolina is criminal process, and law enforcement officers are obligated to arrest, with or without a warrant, any suspect for whom they have probable cause to believe knowingly violated a domestic violence protective order. Violation of a domestic violence protective order is a Class A1 misdemeanor, and our legislature has provided for enhanced penalties for persons who have been convicted of two prior violations, for persons who engage in other felonious conduct while violating an order, and for persons who are in the possession of a deadly weapon while violating an order.⁶⁶

In addition to these remedies, civil protections for victims of domestic violence are also available in the area of housing and employment law, North Carolina's Address Confidentiality Program, and numerous other areas of the law that reference domestic violence.⁶⁷ These statutes are all predicated on the definition of domestic violence laid out in Chapter 50B and would thus be open to wide interpretation should this definition be deemed unconstitutional by the proposed Amendment, as discussed below. Moreover, victims of physical abuse, sexual assault, and stalking who had not been married to their partners would not be able to avail themselves of these protections simply by virtue of the fact that they had not married their abusers.

Not only do North Carolina's civil protections rely on the definition of domestic violence and the categories of personal relationship set out in Chapter 50B, so do numerous North Carolina criminal statutes designed to protect victims of domestic violence. North Carolina General Statute §14-8.2 provides for penalties for injuring a pregnant woman with enhanced penalties where the perpetrator commits "an act of domestic violence as defined in Chapter 50B of the General Statutes." North Carolina General Statute §14-134.3 defines and prohibits "domestic criminal trespass," and is directed at "any person who enters after being forbidden to do so or remains after being ordered to leave by the lawful occupant, upon the premises occupied by a present or former spouse or by a person with whom the whom the person charged has lived *as if married*" (emphasis added). Mirroring federal law, North Carolina General Statute § 14-269.8 prohibits the purchase or possession of a firearm by a person subject to a domestic violence protective order. Additionally, in a rare act of codified legislative intent, the State's most recently enacted stalking statute clearly underlines the General Assembly's heightened concern for victims of domestic violence in this preamble to the stalking prohibition:

⁶⁴ N.C. GEN. STAT. § 50B-3(2)(13)

⁶⁵ N.C. GEN. STAT. § 50B-4-4.1.

⁶⁶ *Id.*

⁶⁷ N.C. GEN. STAT. §§ 42-40, 42-42.2, 42-42.3, 42-45.1, 50B-5.5, 15C-1.

The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.⁶⁸

In addition to these substantive prohibitions, our statutes are also designed to hold perpetrators of domestic violence to a heightened standard of accountability. To that end, domestic violence is referenced by our statutes relating to bond, pretrial release, and even the imposition of the death penalty.⁶⁹ All of these areas of the law, from arrest to prosecution, to sentencing, would be open for challenge should our current definition of domestic violence be called into question.

Heightened civil and criminal protections are only part of North Carolina's commitment to protecting victims of domestic violence as currently defined by North Carolina General Statute Chapter 50B. Indeed, our State has invested large resources in numerous programs aimed at alleviating the effects of domestic violence as it is defined by Chapter 50B of the General Statutes. The North Carolina Conference of District Attorneys recognizes domestic violence as a significant public safety issue and employs a Statewide Violence Against Women Resource Prosecutor who provides training and support for the numerous dedicated-domestic violence Assistant District Attorneys throughout the State. Additionally, North Carolina judges and magistrates are trained to recognize and understand the complexity and pervasiveness of domestic violence and the laws that pertain to protection and prosecution, and numerous judicial districts hold specialized domestic violence sessions on a regular basis.

Our State has also devoted resources to the Governor's Commission on Domestic Violence and the Governor's Crime Commission, both of which have created, among other resources, models for best practices for the judiciary and law enforcement in the area of domestic violence. The work of these agencies, as well as the work of the North Carolina Coalition against Domestic Violence and Legal Aid of North Carolina, both of which receive funds from the State to combat domestic violence, rely almost exclusively on the definition of domestic violence set forth in Chapter 50B of the North Carolina General Statutes.

Indeed with little exception, all of the legal protections and resources our State has devoted to victims of domestic violence rely on the coherent definition of domestic violence set out in Chapter 50B. The proposed Amendment, limiting our State's recognition of domestic violence only to marital unions, risks stripping away important protections for the already-vulnerable victims of domestic violence, and could create chaos for the numerous State workers who have sworn a duty to protect the peace.

⁶⁸ N.C. GEN. STAT. § 14-277.3A .

⁶⁹ N.C. GEN. STAT. §§ 15A-534.1, 15A-2000.

2. The amendment could be interpreted to bar giving domestic-violence protections to unmarried couples.

Yet North Carolina's protection of both straight and same-sex unmarried couples is jeopardized by the Amendment. It would not be a stretch for North Carolina courts to find domestic-violence protections unconstitutional when applied to unmarried couples: as described above, the passage of Ohio's 2004 amendment threw the constitutionality of that state's domestic violence protections into question for almost three years as courts struggled to resolve whether unmarried couples could be protected.⁷⁰ Before this issue was resolved by the Ohio Supreme Court, lower courts ordered at least 27 indictments dismissed or convictions of batterers to be reversed on the ground that the state could not lawfully give such protections to members of unmarried couples.⁷¹

For example, Dallas McKinley was arrested in December of 2004 in Ohio after a physical altercation with his live-in girlfriend. After his arrest, he admitted hitting her and throwing objects at her while on a drinking binge. McKinley was indicted on a felony count of domestic violence because he had three prior convictions for domestic violence. After pleading no contest and being sentenced, he appealed on the ground that the domestic violence statute violated the state's newly-passed marriage amendment. The Ohio Court of Appeals for the Third District agreed with McKinley and voided his conviction.⁷² According to the Court, the domestic violence statute, in protecting unmarried couples, recognized cohabitation as a legal status, and was therefore unconstitutional.⁷³

Similarly, the Court of Appeals for the Second District overturned one count of the conviction of Donald Steineman.⁷⁴ Steineman had originally been convicted of two felony counts after abusing his live-in girlfriend and three year-old adopted son. Because the court found domestic violence protections to be prohibited by Ohio's marriage amendment, it upheld the defendant's conviction for abusing his son, but overturned the conviction for abusing his girlfriend.⁷⁵ On the same rationale, the Ohio Court of Appeals for the Third District overturned the conviction of David McIntosh, who had been sentenced to a year in prison after violating a protective order and beating his girlfriend.⁷⁶

The confusion caused in the courts by the amendment's language provoked one trial judge to write:

Obviously, only the Ohio Supreme Court can ultimately and definitively interpret what the Ohio Constitution intends and means. It is the fervent hope of this Court that the Ohio

⁷⁰ See *supra* notes 38-45 and accompanying text.

⁷¹ See *supra* note 38.

⁷² *State v. McKinley*, No. 8-05-14, 2006 WL 1381635 (Ohio App.3d. 2006), *rev'd*, *In re Ohio Domestic-Violence Statute Cases*, 872 N.E.2d 1212 (Ohio 2007).

⁷³ *Id.*

⁷⁴ *State v. Steineman*, No. 2005-CA-46, 2006 WL 925166 (Ohio App.2d. 2006).

⁷⁵ *Id.*

⁷⁶ *State v. McIntosh*, No. 21093, 2006 WL 925179 (Ohio App. 2d. 2006), *rev'd*, *In re Ohio Domestic-Violence Statute Cases*, 872 N.E.2d 1212 (Ohio 2007).

Supreme Court will do so in the very near future. This Court is well aware that courts across the State of Ohio have rendered decisions both finding this statute constitutional and unconstitutional. Until the Supreme Court finally rules, there shall be, as has been stated by Governor Taft, as many interpretations of this Amendment as there are Judges.⁷⁷

The Ohio Supreme Court eventually determined that the domestic violence protections did not violate Ohio's amendment.⁷⁸ However, as noted above,⁷⁹ the Court did so based on the Ohio amendment's language barring recognition only of "relationships... that intend[] to approximate the design, qualities, significance or effect of marriage."⁸⁰ This language does not appear in North Carolina's Amendment; its absence makes the North Carolina Amendment's effects significantly broader.

If a North Carolina court followed the Ohio Supreme Court's rationale, it would find that our existing domestic violence protections violated our Amendment. This would mean not only that North Carolina's civil remedies for domestic violence would be invalidated, and could no longer be accessed by victims who had not married their abusers, it would also mean that criminal remedies that rely on the same statutory definitions would be invalidated. This would mean that arrests, prosecutions, and sentencing of defendants would all be open for challenge in any case in which the abuser had not been married to his victim. Before these issues could be resolved definitively, there would no doubt be conflicting constructions of the statute in our thirty-nine judicial districts and numerous state agencies, just as there had been conflicting constructions in Ohio. This period of uneven application and uncertainty would result in fewer protections for the already vulnerable, chaos for state workers, as well as an enormous waste of judicial resources.

B. The Amendment Could Alter North Carolina's Child Custody and Visitation Laws for Unmarried Parents in Ways that Harm Children's Best Interests.

The proposed Amendment could also alter custody and visitation laws relating to unmarried parents that seek to protect children's best interests. This section discusses two principles of existing North Carolina custody law that could be affected by the Amendment. First, under current law, courts will not hold the fact that a parent is in a non-marital relationship against them for custody or visitation purposes unless the relationship affects the child's best interests. Second, courts will allow the former unmarried partner of a parent custody or visitation with the child if doing so is in the child's best interest. The proposed Amendment could undermine both these principles.

⁷⁷ State v. Steineman, No. 2005 CR 0068, 2005 WL 1940104, at *4 (Ohio Ct. Com. Pl. 2005), *aff'd in part*, No. 2005- CA-46, 2006 WL 925166 (Ohio App. 2d. 2006).

⁷⁸ In re Ohio Domestic-Violence Statute Cases, 114 Ohio St. 3d 430, 2007 Ohio 4552, 872 N.E.2d 1212 (Ohio 2007).

⁷⁹ See *supra* notes 44-45, and accompanying text.

⁸⁰ See Ohio v. Carswell, 114 Ohio St. 3d 210, 213, 871 N.E.2d 547, 551; see also *supra* note 39.

1. The Amendment Could Punish Unmarried Parents by Withdrawing Custody or Visitation of Their Children

In North Carolina, courts make custody and visitation determinations based on their assessment of the best interests of the child.⁸¹ When disputes arise between two legal parents, the child's best interests are the "polar star" that guides a court's decision-making.⁸² In making a custody or visitation determination, a trial judge is vested with wide discretion to consider any and all relevant factors to this end. Additionally, when a court determines that there has been a substantial change of circumstances that affects a child, it applies this best-interest rule to requests for modifications of existing custody or visitation orders.

Presently, the fact that a parent is living with a same-sex or opposite-sex partner without being married to them is not a reason for a court to deny them custody or visitation with their child. As the North Carolina Court of Appeals explained in determining that a parent's adultery did not make her an unfit custodian, "in a custody proceeding it is not the function of the courts to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interest and welfare of the minor child."⁸³ Based on this principle, North Carolina courts have refused to hold a parent's cohabiting relationship against them in a custody suit, absent evidence that it had an adverse impact on the child.⁸⁴ Further, North Carolina courts will not presume harm based on the fact of cohabitation.⁸⁵

However, should the proposed Amendment pass, judges may interpret it as an expression of public policy against all non-marital relationships. This could cause courts to presume that these relationships have a *per se* negative impact on the child, which would require courts to deny custody to parents in these relationships. This would mean that a court could feel compelled to remove custody from a parent simply because of the parent's unmarried relationship, even though the child had lived with that parent all his or life, and even though the court believed that the child would be better off with the parent. Moreover, the passage of this Amendment could also cause courts to consider cohabitation as a substantial change of circumstances that would cause them to reconsider previously-settled custody orders. The result could be a flood of litigation in North Carolina's already busy family courts.

⁸¹ See generally SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 13.3 (5th ed. 2002).

⁸² *In re Peal*, 305 N.C. 640, 290 S.E.2d 664, *overruled on other grounds*, Pulliam v. Smith, 384 N.C. 616, 501 S.E.2d 898 (1998).

⁸³ *In re McCraw Children*, 3 N.C. App. 390, 395, 165 S.E.2d 1, 4-5 (1969); see also *In re Williamson*, 32 N.C. App. 616, 622, 233 S.E.2d 677, 681 (1977); *Kenney v. Kenney*, 15 N.C. App. 665, 669, 190 S.E.2d 650, 653 (1972).

⁸⁴ See, e.g., *Williford v. Williford*, 303 N.C. 178, 277 S.E.2d 515 (1981).

⁸⁵ *Browning v. Helff*, 136 N.C. App. 420, 424-25, 524 S.E.2d 95, 98-99 (2000); see also REYNOLDS, *supra* note 81, at § 13.14.

2. The Amendment Could Limit the Ability of Nonmarital Partners Who Have Acted as Parents to Retain a Relationship With the Child When It is In the Child's Best Interests.

The Amendment could also disrupt North Carolina law that establishes when a nonmarital partner who has acted in a parenting role can retain a relationship with the child. In North Carolina, because parents have a constitutional interest in the custody of their children, courts normally allow them to make decisions about custody and visitation of their children. Because of this, courts will not generally apply the “best interest of the child” test when it comes to custody or visitation disputes between a parent and a nonparent. Yet courts have carved out an exception to this doctrine that allows the best-interest test to apply between a parent and a nonparent where the parties “jointly decided to create a family and intentionally took steps to identify [the nonparent] as a parent of the child.”⁸⁶ On this basis, in *Boseman v. Jarrell*,⁸⁷ the North Carolina Supreme Court awarded joint custody to the former same-sex partner of a biological mother with whom she had established a family.

If the Amendment passed, however, applying the best-interest test based on the relationship between unmarried partners could be deemed by courts to be an impermissible validation or recognition of a “domestic legal union” other than heterosexual marriage. Interpreted in this way, the Amendment would strip deserving caregivers of their relationships with these children, many of whom they have raised since birth, as well as cut these children off from people they have long known as their parents. At a minimum, passage of the Amendment would encourage re-litigation of previously settled prior custody and visitation determinations, thus creating uncertainty and confusion in family courts and bringing instability to families.

C. The Amendment Could Limit Protections for Committed Unmarried Couples by Restricting Hospital Visitation Privileges, Emergency Medical Decision Making, and Decision Making on End-of-Life Issues for their Partners.

The Amendment would also restrict intimate partners’ ability to make decisions when they are facing a serious medical crisis, or important end-of-life decisions must be made. Currently, a domestic partner must execute legal documents in order to give their partner hospital visitation privileges, medical decision making powers, or powers to direct their financial affairs. However, few people currently execute these documents in advance of emergencies. Passage of the Amendment would restrict the state from giving partners more adequate protections during times of medical crisis. Further, courts or hospitals might even refuse to enforce the directives of those few who execute them in advance.

⁸⁶ *Boseman v. Jarrell*, 704 S.E.2d 494, 503 (2010) (italics omitted) (quoting *Mason v. Dwinnell*, 190 N.C. App. 209, 222, 660 S.E.2d 58, 67 (2008)); see also *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) (holding that best interest test applied between mother and non-parent defendant, who had acted as father, because of mother fostering father-child relationship between child and defendant).

⁸⁷ 704 S.E.2d 494 (2010).

1. Hospital Visitation Privileges

Under current North Carolina rules, family members are entitled to special hospital visitation privileges that are automatic, meaning that the patient does not have to execute any form for the relative to receive them. Domestic partners are not currently automatically recognized as family for hospital visitation purposes. However, individuals can currently designate anyone, including a domestic partner, to receive the same visitation privileges as a family member.⁸⁸ To do so, they must execute an advance medical directive. Unfortunately, few people have the foresight to make these arrangements before experiencing a medical crisis. Yet if a patient hasn't made such a designation beforehand, and is too sick to make such a designation on entry into a hospital, his or her partner has no visitation rights.

Because of this, many states have added committed partners to the list of those who automatically have the same visitation privileges as family members.⁸⁹ Passage of the Amendment would likely prohibit North Carolina from adopting such a rule in the future, however, because it would be deemed to constitute state recognition of a domestic legal union.

Further, if the Amendment were passed, there is even some possibility that public hospitals would refuse to recognize the designation of an unmarried partner under our existing rules on the ground that it would constitute recognition of a domestic legal union in violation of the Amendment. Although the proposed Amendment's second sentence allows individuals to execute a private contract, such a designation is not a private contract. Public hospitals may therefore not recognize an otherwise valid designation of a domestic partner. The consequence would be that a person in a medical crisis would not have their partner with them.

2. Medical Decisionmaking

Under current North Carolina law, all persons – whether married or unmarried – can designate persons to make important medical decisions for them if they are incapacitated through executing a healthcare power of attorney. Such a power of attorney can also delegate decisions relating to the disposition of remains upon the death of the incapacitated person, funeral arrangements, and organ donation.⁹⁰ In the event that an individual has not executed such a document, North Carolina sets out a list of persons who can, by default, act as surrogate decision

⁸⁸ North Carolina Patients' Bill of Rights, 10A N.C.A.C. 13B.3302(25) (2011), *available at* <http://ncrules.state.nc.us/ncac/title%2010a%20-%20health%20and%20human%20services/chapter%2013%20-%20nc%20medical%20care%20commission/subchapter%20b/10a%20ncac%2013b%20.3302.pdf>. *See also* 42 C.F.R. §482.13(h) (requiring all hospitals who participate in Medicaid or Medicare to inform patients of their right to designate which individuals to receive as family visitors, including same-sex domestic partners).

⁸⁹ *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1261 (West 2011) (“A health facility shall allow a patient’s domestic partner, the children of the patient’s domestic partner, and the domestic partner of the patient’s parent or child to visit . . .”); MD. CODE ANN., HEALTH-GEN. §6-201 (West 2011) (“A hospital . . . shall allow a patient’s or resident’s domestic partner, the children of the . . . domestic partner, and the domestic partner of the patient’s or resident’s parent or child to visit . . .”); N.J. STAT. ANN. § 26:2H-12.22 (West 2011) (“A health care facility . . . shall allow a patient’s domestic partner . . . the children of the domestic partner, and the domestic partner of the patient’s parent or child to visit . . .”); WASH. REV. CODE. ANN. §26.60.070 (West 2011) (“A patient’s state registered domestic partner shall have the same rights as a spouse with respect to visitation of the patient in a health care facility . . .”).

⁹⁰ N.C. GEN. STAT. § 32A-25.1 (2009).

makers.⁹¹ Spouses and other family members are on this list currently, but not domestic partners.⁹² What this means is that, in contrast to married couples, unmarried couples who do not have the foresight or resources to prepare such legal documents before an emergency or illness of a partner – and the vast majority do not⁹³ – have no ability to have their partners make medical decisions. Furthermore, same-sex marriages or couples who have entered civil unions in other states, who would likely not have these forms prepared since they have such protections automatically in their home state, also lack any protections while in North Carolina. This could deter them from travelling or doing business in the state.

Recognizing the problems that this situation creates, many states in recent years have included domestic partners on the list of surrogate medical decision makers for a person who is incapacitated, if the person has not executed a healthcare power of attorney.⁹⁴ Passage of the Amendment, however, would likely preclude North Carolina from being able to add domestic partners to the list of those with surrogate decision making priority in the future, since it would be deemed as an unlawful recognition of a domestic legal union.

In the event that the Amendment passes, even those domestic partners who have executed healthcare powers of attorney under the current N.C. system face a small but not insignificant chance that hospitals or courts would refuse to enforce these powers. As discussed above,⁹⁵ the Nebraska Attorney General concluded that the state's according domestic partners the right to dispose of a deceased person's remains and donate organs violated Nebraska's amendment's prohibition on recognizing same-sex relationships. It is possible that, in the context of a challenge to a power of attorney, a North Carolina court would similarly construe as unenforceable an individual's designation of his or her unmarried partner. Like designations for hospital visitation purposes, powers of attorney are not contracts between unmarried persons. Accordingly, they are not authorized by the second sentence of the proposed Amendment. Regardless of the ultimate disposition of this matter before a court, the patient and his or her domestic partner would be forced to endure potentially critical delay and intrusion into their personal affairs at a time when they should be allowed to focus on furthering the express wishes of the patient.

3. Financial Decision Making if a Partner is Incapacitated

The Amendment would produce similar consequences for financial decision making of domestic partners if one of the partners were incapacitated. Currently, in order to ensure that their partners have the authority to deal with financial matters during periods of incapacity, members of unmarried couples must execute a durable financial power of attorney. These agreements allow

⁹¹ N.C. GEN. STAT. § 90-322 (2009).

⁹² *Id.*

⁹³ Rebecca K. Glatzer, *Equality at the End: Amending State Surrogacy Statutes to Honor Same-Sex Couples' End-Of-Life Decisions*, 13 ELDER L.J. 255, 261 (2005) (“[O]nly eighteen percent of Americans have executed advanced directives . . .”).

⁹⁴ See, e.g., ALASKA STAT. §47.24.016 (West 2011); ARIZ. REV. STAT. ANN. §36-3231 (2011); CAL. PROB. CODE §4716 (West 2011); MD. CODE ANN., HEALTH-GEN. §5-605 (West 2011); N.J. STAT. ANN. §26:14-5 (West 2011); N.Y. PUB. HEALTH LAW §2994-d (McKinney 2011).

⁹⁵ See *supra* note 47 and accompanying text.

the person designated to ensure that bank accounts, property, and other assets are properly managed if the person who executes the power is unable to do so themselves.

Passage of the Amendment would prevent North Carolina from making it easier for domestic partners to manage their partners' financial affairs in the event they cannot do so themselves. As with healthcare powers of attorney, most people do not execute durable powers of attorney before they become incapacitated. Because of this, North Carolina has constructed a list of those persons who have priority to be appointed to administer an estate.⁹⁶ Since spouses are at the top of the list, a married person who has not executed a durable power of attorney will still have their partner be able to manage their property. However, domestic partners are not on the list. Accordingly, they have no priority to be appointed to manage their partners' property. A number of states have moved to close this gap in recent years, and have added domestic partners to their priority lists.⁹⁷ If North Carolina were to choose to do so in the future, the Amendment could prevent this.

Even if North Carolina did not change its laws, the current system of powers of attorney could be threatened when it comes to unmarried partners. Currently, there is little cause for concern that a North Carolina court will invalidate these designations. If the Amendment were passed, however, as with health care powers of attorney, there is a small chance that courts would determine enforcement of such powers to be unconstitutional on the ground that it constituted recognition of a non-marital relationship. Again, the second sentence of the Amendment would not prevent such a determination because powers of attorney are not contracts. Even if courts did not determine powers of attorney to be unenforceable under the Amendment, it is likely that litigation challenging them in favor of unmarried partners would increase because the Amendment would create an atmosphere of suspicion toward all unmarried relationships.

4. Determining the Disposition of a Deceased Partner's Remains

The Amendment could also interfere with domestic partners' ability to determine the disposition of their partner's remains. Currently, in the absence of a health care power of attorney, written will or written statement by the deceased individual, this decision making power is given based on a priority list set out in state law.⁹⁸ The relevant law empowers family members to make such decisions in the following order of priority: the surviving spouse, a majority of the surviving children over 18 years of age, the surviving parents, a majority of the surviving siblings over 18 years of age, a majority of the persons in the classes of the next degrees of kinship, and, last, a person who has exhibited special care and concern for the decedent and is willing and able to make decisions about the disposition.⁹⁹ Under the current system, domestic partners can make these decisions under the last priority category, but only if no one with higher priority wishes to make the decisions.

⁹⁶ N.C. GEN. STAT. § 28A-4-1(b) (2009).

⁹⁷ *See, e.g.*, D.C. CODE § 20-303 (2011); N.J. STAT. ANN. § 3B:10-2 (West 2011); WASH. REV. CODE ANN. § 11.28.120 (West 2011).

⁹⁸ N. C. GEN. STAT § 130A-420 (2009).

⁹⁹ *Id.*

Under the existing scheme, courts could deem the empowerment of a domestic partner unconstitutional even in this last category if the Amendment were passed on the ground that the disposition of remains is considered a spousal right. Giving rights to a partner based on their relationship would therefore constitute unconstitutional recognition of the relationship. Further, North Carolina would be precluded from specifically adding domestic partners to the priority list in the future. Several states have done so on the view that, in the absence of a spouse, a domestic partner is in the best position to execute the wishes of the deceased.¹⁰⁰ Adding domestic partners to North Carolina's priority list could be considered unlawful recognition of a domestic legal union. The Nebraska Attorney General reached such a conclusion when considering a similar law proposed in Nebraska.¹⁰¹ The Attorney General said that because such decisions were traditionally reserved for surviving spouses, granting domestic partners such rights would be akin to recognizing same-sex unions. Certainly the same conclusion could follow from North Carolina's proposed Amendment, thereby precluding the state from ever giving such rights to domestic partners.

D. The Amendment Could Impact Estate-Planning Arrangements for Unmarried Couples.

The proposed amendment could also interfere with unmarried partners' ability to grant their partner property through a will or trust. While that outcome would be a far-reaching one, there is some authority that could support this result. If a court held that a will or trust arose from an unmarried cohabitant relationship that constituted a "domestic legal union" other than marriage, it could deem court enforcement to constitute an unconstitutional "validation" or "recognition" of the relationship by the state, or, alternatively, to violate the public policy of the state. This result would be more likely to the extent that the will or trust made clear on its face that it was based on a non-marital relationship.

Support for the view that judicial enforcement of a will or trust could constitute unconstitutional state action comes from the landmark case of *Shelley v. Kraemer*.¹⁰² In that case, the U.S. Supreme Court held that while a private restrictive covenant prohibiting non-Caucasians from owning certain property did not itself violate the Fourteenth Amendment, judicial enforcement of the restrictive covenant did, because the enforcement constituted action by the state. State action, the court held, "extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.'"¹⁰³ It concluded that the fact that the judicial action concerned a private agreement was irrelevant as to whether state action had occurred.

While the principle set out in *Shelley* has not frequently been applied to judicial enforcement of trusts and wills, it has been on a few occasions. For example, in *In re Estate of Feinberg*, the Illinois Court of Appeals struck down a testamentary provision that barred any of the testator's

¹⁰⁰ For example, before legalizing same-sex marriage, New York amended its disposition of remains statute to list the decedent's surviving domestic partner after the decedent's surviving spouse in the line of people to make decisions about burials. N.Y. PUB. HEALTH LAW § 4201 (McKinney 2011); *see also* ME. REV. STAT. ANN. tit. 22, §2843-A (2011); N.J. STAT. ANN. § 45:27-22 (West 2011); R.I. GEN. LAWS ANN. § 5-33.2-24 (West 2011); WASH. REV. CODE ANN. §68.50.160 (West 2011).

¹⁰¹ *See supra* notes 47-48 and accompanying text.

¹⁰² 334 U.S. 1, 68 S. Ct. 836 (1948).

¹⁰³ *Id.* at 14, 843 (quoting *The Civil Rights Cases*, 109 U.S. 3, 17 (1883)).

grandchildren who married outside the Jewish faith from receiving property unless their spouse converted to the Jewish faith.¹⁰⁴ The court found the provision to be unenforceable because it was contrary to public policy. It explicitly left open the issue of whether enforcing the provision would constitute state action in violation of the Constitution. The concurring opinion of Justice Quinn described the link between the Constitution and the court's refusal to enforce the will:

In *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948), the Supreme Court relied on the fourteenth amendment in striking down privately executed restrictive covenants prohibiting real property from being used or occupied by any persons except those of the Caucasian race. In doing so, Chief Justice Vinson noted, "These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." *Shelley v. Kraemer*, 334 U.S. at 13, 92 L. Ed. at 1180-81, 68 S. Ct. at 842. I am aware that *Shapira* rejected the applicability of *Shelley* to cases such as the instant one, holding: "In the case at bar, this court is not being asked to enforce any restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance." *Shapira v. Union National Bank*, 39 Ohio Misc. at 31, 315 N.E.2d at 827. However, I believe that this rationale may be a distinction without a difference.¹⁰⁵

The *Feinberg* opinion was reversed, but on other grounds: the Illinois Supreme Court held that since no grandchild had a vested interest in the trust assets, and because the distribution plan adopted by the grandmother had no prospective application, there was no violation of public policy.¹⁰⁶

Further, in *In re Estate of Ruth Snively Walker*,¹⁰⁷ a woman devised her estate to Stanford University School of Medicine for the establishment of a doctoral fellowship subject to the following provision: "Recipients must be of the white race, protestant religion, and citizens of the United States, Canada, England, Scotland, Ireland, or Wales." The university would not accept the legacy and requested the court to delete the religion requirement. The attorney general also urged that the race requirement be stricken. The court ordered removal of all restrictive provisions saying that the court could not lend its hand in aid of discrimination; that, while an individual trustee was constitutionally free, as a private individual, to discriminate, the court was not; and that state courts cannot promote or give effect to private contracts that deny the equal protection of the laws.¹⁰⁸

Based on the same legal rationale laid out in these opinions, if the N.C. Amendment passed, a court could construe enforcement of a will or trust in favor of an unmarried partner as state action. If it deemed the enforcement to be "recognition" of the domestic legal union, it could refuse to enforce the provision on the ground that enforcement is barred by the Amendment. Even if it did not conclude that the Amendment directly barred enforcement, it could refuse to enforce the will or trust on the ground that doing so would violate the state's public policy

¹⁰⁴ 383 Ill. App. 3d 992, 891 N.E.2d 549 (2008), *rev'd*, 235 Ill. 2d 256, 919 N.E.2d 888 (2009).

¹⁰⁵ *Id.* at 999, 891 N.E.2d at 554 (Quinn, P.J., concurring).

¹⁰⁶ 235 Ill. 2d 256, 919 N.E.2d 888 (2009).

¹⁰⁷ No. 70195 (Cal. Super. Ct. 1965).

¹⁰⁸ *Id.*

against recognition and validation of such relationships. As the Supreme Court of North Carolina stated, “the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it *unless it violates some rule of law, or is contrary to public policy.*”¹⁰⁹

Even if courts ultimately do not void these provisions of wills and trusts, the passage of the Amendment could still unsettle North Carolina estate planning. The Amendment could create an atmosphere of uncertainty and suspicion regarding wills and trusts entered into by members of unmarried couples, which could result in these agreements being challenged in court. Estate planning documents entered into by unmarried couples are already sometimes challenged by disgruntled blood relatives of the individual executing the document.¹¹⁰ Even if a court ultimately were to uphold a challenged agreement, passage of the Amendment would increase the likelihood that the parties would have to contend with the painful prospect of a protracted lawsuit. Not only is this time-consuming and expensive, but it is inevitably an unwanted intrusion into one’s personal life at a particularly vulnerable time.¹¹¹

In summary, rather than upholding people’s decisions about the disposition of their property as North Carolina law now does, the Amendment could result in those decisions being ignored. The likelihood of this would increase if a person seeking to leave property expressly referred to a partner as “partner,” “domestic partner,” “companion,” or any other term indicating that the two had a domestic relationship and evincing an intent to make the bequest based on this relationship. In this way, the Amendment could have nonsensical results, such as invalidating wills and trusts naming an unmarried partner as a beneficiary, but upholding identical conveyances that name a cat or dog as the primary beneficiary.

V. CONCLUSION

If approved by North Carolina General Assembly, the proposed Amendment’s impact on North Carolina citizens and on the state could be extensive and severe. The Amendment does not simply ensure that judges cannot overturn North Carolina’s existing prohibitions against same-sex marriage, as supporters claim. It would also bar civil unions and other protections for unmarried couples, including the domestic partnership benefits that several municipalities currently offer to their unmarried public employees. More than that, the vague and untested language of the Amendment could be interpreted to prohibit the government from recognizing a broad spectrum of legal rights and protections for all unmarried couples – whether straight or same-sex. The Amendment could invalidate domestic violence protections for unmarried couples; undermine current custody and visitation laws constructed in the best interest of children; and prevent courts from enforcing end-of-life arrangements, such as wills, trusts and powers of attorney executed by unmarried couples.

It is impossible to predict how courts would finally resolve the issues raised by this vague and untested language. However, two things are clear: First, it would take years of expensive

¹⁰⁹ Clark v. Connor, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960) (italics added).

¹¹⁰ See Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U.L. REV. 359, 394-395 (1995).

¹¹¹ CCH FINANCIAL AND ESTATE PLANNING GUIDE ¶ 625 (1991).

litigation to settle the Amendment's meaning. Second, when the dust clears, unmarried couples would have fewer rights over their most important life decisions than they would have had otherwise.