

**Potential Legal Impact of the Proposed Same-Sex Marriage Amendment
to the North Carolina Constitution**

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EXECUTIVE SUMMARY*

On February 22, 2011, a bill was introduced in the North Carolina Senate to amend the North Carolina Constitution.¹ The proposed Amendment states, "Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." If passed by the General Assembly and approved by voters, it will become effective on January 1, 2013. This report assesses the potential legal impact of the Amendment.²

The proposed Amendment would not simply place this state's current statutory prohibition of same-sex marriage into the North Carolina Constitution, as its sponsors seek.³ Instead, the proposed language is problematically vague, untested, and threatens to upend years of settled law. In prohibiting state recognition or validation of "domestic legal unions," the proposed Senate bill would introduce into the Constitution a phrase that has never been used in any prior statutory law in North Carolina, never been interpreted by its courts, and never been interpreted by courts in any other state. Taken as a whole, the bill's language is sufficiently vague, and its scope significantly unclear, that it would enmesh our courts in years of litigation to untangle its appropriate meaning. Moreover the eventual result of judicial interpretation of the Amendment would be uncertain. It could, however, be interpreted to upend completely the very minimal legal rights, obligations, and protections now available to unmarried couples, whether same-sex or opposite-sex.

The Amendment could be construed by courts to:

- Prevent the courts from enforcing private agreements between unmarried couples, therefore encouraging the wealthier members of couples to avoid marriage so that they will not be subject to obligations to transfer property;
- Interfere with child custody and visitation rights that seek to protect the best interests of children;
- Invalidate protections against domestic violence to members of unmarried couples;

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¹ S. 106, N.C. Gen. Assem., 2011-2012 Sess. (N.C. 2011).

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

A related bill was introduced in the North Carolina House of Representatives. *See* H. 777, N.C. Gen. Assem., 2011-2012 Sess. (N.C. 2011). The language of the proposed amendment in the House bill is narrower; it would amend the North Carolina Constitution only to prohibit same-sex marriage. It states: "Article 14 of the North Carolina Constitution is amended by adding the following new section: . . . Marriage is the union of one man and one woman at one time. No other relationship shall be recognized as a valid marriage by the State." *Id.* This report discusses only the Senate's proposed bill.

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

- Interfere with end-of-life arrangements, such as wills, trusts and medical powers of attorney, executed by unmarried couples;
- Invalidate domestic partnership benefits currently offered to same-sex and opposite-sex couples by local municipalities;⁴
- Prevent courts from enforcing private employers' agreements to provide benefits such as health insurance to employees' domestic partners.

The vague and untested language of the Amendment would therefore cause real harm to a broad range of North Carolina citizens. The proposed Amendment could be interpreted to strip the increasing number of unmarried heterosexual couples of their ability to order their relationships and property through contract, deny legal protection against domestic violence, and cut them off from custody of their children. By the same token, committed same-sex couples in North Carolina, who are already precluded from marrying, would also no longer have access to these minimal protections. Even if courts did not ultimately adopt a broad interpretation of the Amendment's language, these couples' rights would be uncertain during the inevitably long period of time that it took for these issues to work their way through the courts. The Amendment's broad sweep would also interfere with municipalities' freedom to determine domestic partnership benefits for their own employees. It could also undermine private employers' efforts to attract top employees to North Carolina by providing employee benefits to domestic partners, as the courts and public medical facilities may not be permitted to recognize those benefits. Finally, the breadth of the Amendment's language and its untested terminology will significantly tax the resources of North Carolina courts, which will be charged with interpreting its scope.

⁴ North Carolina Const. art. VII, § 1 states that "The General Assembly . . . may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable." N.C. CONST. art. VII, § 1. This provision reserves the State the power to grant particular municipalities certain authority. Accordingly, North Carolina municipalities do not have the authority to act when they have not been granted authority by the General Assembly.

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I. INTRODUCTION

On February 22, 2011, a bill was introduced in the North Carolina General Assembly to amend the North Carolina Constitution. The proposed Amendment states, “Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”⁵ The primary sponsors of the bill are Sens. Jim Forrester, R-Gaston; Jerry Tillman, R-Randolph; and Dan Soucek, R-Watauga. If the General Assembly passes this bill by 60% of the legislators in each house, the Amendment will go before the voters for a majority vote in November 2012. If voters approve the Amendment by majority vote, it will become effective on January 1, 2013.

The language of the proposed bill goes well beyond the stated purpose of its sponsors of ensuring that activist judges do not require that same-sex marriage be accepted in this State.⁶ The Amendment does not simply embed the existing statutory prohibitions on same-sex marriage in the North Carolina Constitution.⁷ Instead, the proposed Amendment is directed at all “domestic legal unions” besides marriage, both same-sex and opposite-sex. The phrase “domestic legal union” has never been used before in North Carolina, or interpreted in North Carolina courts. This vague and untested language could be interpreted to prohibit giving legal effect to any relationships aside from heterosexual marriage. In doing so, the proposed Amendment would harm a broad range of North Carolinians in both same-sex and opposite-sex relationships, and potentially affect even more citizens from other states.

⁵ S. 106, N.C. Gen. Assem., 2011-2012 Sess. (N.C. 2011).

⁶ See Lynn Bonner, N.C. Senator Wants Gay Marriage Ban In State's Constitution, <http://www.mcclatchydc.com/2011/03/01/109603/nc-senator-wants-gay-marriage.html#storylink=misearch> (2011).

⁷ North Carolina General Statute 51-1 restricts marriages to “a male and female person.” Further, North Carolina General Statute 51-1.2 states that marriages “performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”

An increasingly large and diverse array of couples live together without marrying. There are currently 186,366 cohabitating unmarried couples in North Carolina, 91 percent of whom are heterosexual.⁸ Between 1960 and 2006, the number of unmarried heterosexual couples living together in the United States increased more than ten-fold.⁹ In all, as of 2008, there were 6,213,534 unmarried partner households in the United States, which represents roughly eleven percent of all coupled households.¹⁰ Of these unmarried cohabitant households, roughly ninety percent are opposite-sex couples, while ten percent are same-sex couples. Couples who cohabitate are increasingly diverse, including young couples who delay marriage, as well as older couples who have been previously married and are hesitant to remarry.¹¹ Young couples, middle-aged couples with children, and elderly couples who have chosen not to marry all may be affected by the Amendment.

Given the vague and untested language of the Amendment, it could take years to clarify its implications. The resulting uncertainty could cast a pall of uncertainty over North Carolina's legal system, discourage same-sex and opposite-sex unmarried couples from living and working in North Carolina, adversely affect North Carolina employers' efforts to attract talented employees, and encourage individuals seeking to avoid their legal obligations to flock to North Carolina's courts for relief. The following sections will review the Amendment's text and interpretation, and then assess its potential legal impact in five areas: family law, domestic

⁸ U.S. Census Bureau, American Community Survey (2009).

⁹ U.S. Census Bureau, Table HH-1, Households, by Type: 1940 to Present, June 12, 2003, available at <http://www.census.gov/population/socdemo/hh-fam/hh1.xls>; U.S. Census Bureau, Table UC-1. Unmarried-Couple Households, by Presence of Children: 1960 to Present, January 2009, available at <http://www.census.gov/population/socdemo/hhfam/uc1.xls>.

¹⁰ IRA ELLMAN, et al., FAMILY LAW: CASES, TEXTS, AND PROBLEMS, 5th ed. 922 (2010), Table 9-2.

¹¹ *Id.* at 919.

violence law, estate planning, the ability to designate an agent to make healthcare and end-of-life decisions, and employee benefits.

II. INTERPRETING THE AMENDMENT

A. The Language of the Amendment

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.¹² Furthermore, North Carolina law also provides that same-sex marriages that are validly entered into in other states are not valid in North Carolina.¹³ These laws prohibit same-sex marriage, but still allow unmarried couples, whether same-sex or opposite-sex, to order their own legal arrangements, including making contracts and giving one another medical decisionmaking rights. Furthermore, under current laws, local government bodies are permitted to give some protections to unmarried persons and same-sex couples short of marriage. In contrast, if the Amendment were passed, it would broaden the current legal prohibition beyond same-sex marriage to forbid the recognition or validity of “domestic legal unions.” What the phrase “domestic legal union” means, however, is not defined in the Amendment. Furthermore, this phrase has never been used in any North Carolina legislative enactment, nor has the term ever been interpreted by North Carolina courts or courts in other states.¹⁴

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

¹² 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 . . .”).

¹³ 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.”).

¹⁴ An electronic search of the term “domestic legal union” produced no results in the North Carolina court database, in the multistate court database, or the federal database on LEXIS.

states. Many of these amendments simply restrict the institution of marriage to opposite-sex couples, thereby prohibiting same-sex couples from marrying in the State, and prohibiting courts from recognizing same-sex marriages celebrated in other states.¹⁵ Most of the remaining states specifically limit the scope of the amendment to marriage and those relationships that are marriage-like. For example, Alabama’s amendment forbids recognition to a “union *replicating marriage* of or between persons of the same sex,”¹⁶ 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.”¹⁷ In contrast to North Carolina, 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 *any* domestic legal union.

¹⁵ These are Alaska (ALASKA CONST. art. I, § 25), Arizona (ARIZ. CONST. art. XXX, § 1), Arkansas (ARK. amend. LXXXIII, § 1), California (CAL. CONST. art. I, § 7.5), Colorado (COLO. CONST. art. II, § 31), Mississippi (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).

¹⁶ ALA. CONST. art. I, § 36.03(g) (italics added).

¹⁷ 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)); Michigan states that “*union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union* for any purpose” (MICH. CONST. art. I, § 25 (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); Oklahoma states that its law and constitution should not be construed to “require that *marital status or the legal incidents thereof* be conferred upon unmarried couples or groups” (OKLA. CONST. art. II, § 35 (italics added)); 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)).

Only two other states have adopted constitutional amendments that approach the breadth of North Carolina's proposed language. Idaho's constitutional amendment, which went into effect in 2007, has identical language to that proposed in North Carolina.¹⁸ Because Idaho courts have yet to interpret that statute, its scope is unclear; its language therefore offers no guidance with respect to the meaning of the proposed North Carolina Amendment. 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."¹⁹ Its scope has also not yet been interpreted by South Carolina courts.

The meaning and scope of the proposed North Carolina language is therefore both untested and unclear. Given the breadth of the Amendment and its novel terminology, it is impossible to predict definitively how the courts of North Carolina will interpret it. But it has the potential to be interpreted extremely broadly. The experience of state courts in other states in interpreting their own amendments banning same-sex marriage is instructive. Before the Ohio Supreme Court ruled on the issue,²⁰ seven Ohio appellate courts employed widely divergent approaches to analyzing the effects of that state's amendment on the narrow issue of the enforceability of Ohio's domestic violence protections for cohabiting unmarried couples.²¹ If the Amendment is approved by North Carolina voters, court challenges to a wide-range of previously settled legal rights and obligations are likely to occur in this State.

¹⁸ IDAHO CONST. art. III, § 28.

¹⁹ S.C. CONST. art. XVII, § 15.

²⁰ *Ohio v. Carswell*, 114 Ohio St. 3d 210, 871 N.E.2d 547 (2007).

²¹ *See State v. Ward*, No. 2005-CA-75, 2006 WL 758540 (Ohio Ct. App. Mar. 24, 2006); *State v. McKinley*, No. 8-05-14, 2006 WL 1381635 (Ohio Ct. App. May 22, 2006); *State v. Rogers*, No. 05AP-446, 2006 WL 827411 (Ohio Ct. App. Mar. 30, 2006); *State v. Adams*, No. 2005-CA-00103, 2005 WL 3196850 (Ohio Ct. App. Nov. 28, 2005); *State v. Rexroad*, No. 05-CO-36, 2005 WL 3489726 (Ohio Ct. App. Dec. 13, 2005); *State v. Nixon*, 845 N.E.2d 544 (Ohio Ct. App. 2006); *State v. Carswell*, No. 2005-CA-04-047, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005), appeal docketed, No. 2006-0151 (Ohio Jan. 24, 2006).

B. Interpreting the Amendment's Language

The text of the 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.”²² This text would have to be interpreted by the North Carolina courts as a matter of first impression, using established principles to determine the Amendment’s meaning and scope.

Interpretation of constitutional provisions is generally governed by the same principles that govern interpretation of other written instruments.²³ In interpreting a constitutional provision, the court’s role is to “effectuate the manifest purposes of the instrument.”²⁴ Courts do so in the first instance by looking at the provision’s language.²⁵ The legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. Where the meaning is clear, courts will look no further.²⁶ However, “[i]n the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute.”²⁷ Further, they will “give every word of the [legislative enactment] effect, presuming that the legislature carefully chose each word used.”²⁸

²² S. 106, N.C. Gen. Assem., 2011-2012 Sess. (NC 2011).

²³ *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121 (2006).

²⁴ *Id.* at 498, 631 S.E.2d 121, 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))).

²⁵ *See Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932).

²⁶ *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989); *Coley v. State*, 360 N.C. at 498, 631 S.E.2d at 126 (citing *Elliott*, 203 N.C. at 753, 166 S.E. at 921); *Martin v. State*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991); *see also Goldston v. State*, 683 S.E.2d 237 (N.C. Ct. App. 2009).

²⁷ *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citations omitted); *see also Southpark Mall Ltd. P'ship v. CLT Food Mgmt.*, 142 N.C. App. 675, 544 S.E.2d 14 (N.C. App. 2001); *State v. Robbins*, 253 N.C. 47, 116 S.E.2d 192 (1970).

²⁸ *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009).

Where the language of an enactment is ambiguous on its face, courts will look further to discover the framer’s intent.²⁹ To do so, they will consider information such as the legislative history of the enactment,³⁰ the purpose of the enactment,³¹ and courts’ past decisions interpreting the same or similar language.³² Moreover, “[i]n discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible.”³³ Finally, where the language of a North Carolina statute is essentially the same as that of a sister state, North Carolina courts may look to the interpretation of that language by courts in that state.³⁴

1. Plain Meaning of the Amendment

In keeping with the principles of statutory construction adopted by the North Carolina courts, we look first to the plain meaning of key terms used in the Amendment. As the Amendment contains no definitions, we must look to other sources of authority to discern its plain meaning.

“domestic legal union”: The phrase “domestic legal union” is not defined in the proposed Amendment. No legislative enactment in North Carolina has ever used this term before. Neither has any North Carolina court ever used the phrase, either as a matter of common law or in

²⁹ Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

³⁰ Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (“The intent of the General Assembly may be found first from the plain meaning of the statute, then from the legislative history.”).

³¹ Coastal Ready-Mix Concrete Co, Inc. v. Board of Com’rs of Town of Nags Head, 299 N.C. 620, 629, 266 S.E.2d 379, 385 (1980) (“The best indicia . . . are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.”).

³² 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).

³³ State v. Jones, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) (citation omitted); *see also* State v. Abshire, 363 N.C. 322, 677 S.E.2d 444 (2009).

³⁴ Insoe v. De Rose Indus., 30 N.C. App. 1, 10, 226 S.E.2d 201, 206 (1976); State v. Robbins, 253 at 49, 116 S.E.2d at 194.

interpreting a legislative enactment. 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 phrase. Like the term “domestic legal union,” the phrase “legal union” has never been used or interpreted in any North Carolina state 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.”³⁵ 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.”³⁶ 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.”³⁷

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 not clear, 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 legal recognition, protection, or rights from the state. Construing the word “legal” more narrowly to refer to a “formal status derived from law,” it more narrowly refers only to formal statuses granted by the government, such as the domestic partnership statuses currently granted

³⁵ MERRIAM-WEBSTER DICTIONARY, domestic, <http://www.merriam-webster.com/dictionary/domestic> (last visited April 14, 2011).

³⁶ *Id.*, Legal.

³⁷ *Id.*, Union.

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.”³⁸ 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>.”³⁹

In forbidding recognition of any domestic legal union besides heterosexual marriage, the Amendment could therefore bar any legal protections that take notice of nonmarital domestic relationships, including legal contracts that arise from these relationships. While nonmarital relationships are not currently entitled to anything approaching the levels of protection accorded marital relationships, they are still permitted limited degrees of legal protection in particular areas. The Amendment could be construed as prohibiting these protections.

³⁸ *Id.*, Valid.

³⁹ *Id.*, Recognize.

2. Interpretation of the Amendment Using Case Law

Insofar as the language of the Amendment is deemed unclear on its face, as it will likely be, courts will turn to case law of North Carolina and its sister states to clarify the Amendment's meaning.⁴⁰ There is no case law in any state thus far that interprets the term "domestic legal union." 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 will be construed broadly to forbid according the limited number of rights currently available to members of non-marital relationships.

For example, the Michigan Supreme Court has 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,"⁴¹ to preclude public employers from offering health insurance benefits to their employees' same-sex partners.⁴² At the time the Michigan amendment was passed, several state universities and various city and county governments had policies or agreements in effect that extended such health-insurance benefits. In analyzing the range of relationships affected by the amendment, the Michigan Supreme Court stated:

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,

⁴⁰ See *supra* notes 29-34.

⁴¹ MICH. CONST. art. I, § 25.

⁴² *National Pride at Work v. Governor of Michigan*, 481 Mich. 56, 748 N.W.2d 524 (2008).

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.⁴³

Put more simply, the Michigan amendment's language barred the state from according legal consequences to *any* conjugal union other than marriage.

Further, the Michigan high court, importantly, held that the state's according same-sex relationships 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 be unconstitutional, 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.*⁴⁴

The Michigan Supreme Court confirmed this view of the amendment's scope by noting that the "*only* agreement that can be recognized as a marriage or similar union is the union of one man and one woman."⁴⁵ 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

⁴³ *Id.* at 68-69, 748 at 533.

⁴⁴ *Id.* at n. 6 (italics added).

⁴⁵ *Id.* at 76, 748 at 538 (italics added).

single agreement is the union of one man and one woman. A domestic partnership does not constitute such a recognizable agreement.”⁴⁶

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

An Ohio appellate court reached a similar interpretation of its state’s marriage amendment in holding that the state’s domestic violence statute violated the amendment by protecting unmarried cohabitants. In *State v. McKinley*,⁴⁷ the Ohio Court of Appeals held that the state of Ohio had unlawfully “recognized the legal status of cohabitation” by including in its domestic violence protections cohabiting unmarried couples. Doing so, according to the Court, violated the amendment’s prohibition on “recognizing” “a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”⁴⁸ It defined the term “recognize” as: “to acknowledge in some definite way: take notice of: as . . . c: to admit the fact or existence of.”⁴⁹ The Court held that “because the statute includes cohabitants within its definition of ‘family or household member’, which extends the protection of the law to cohabitants. . . ., we must find that the State has recognized the legal status of cohabitation.”⁵⁰

A North Carolina court following the *McKinley* court’s rationale would find unconstitutional *any* legal protections accorded to unmarried couples under our more broadly-

⁴⁶ *Id.* at 76-77, 748 at 538.

⁴⁷ *State v. McKinley*, 2006 WL 1381635, 2006 Ohio LEXIS 2379 at *6-10 (Ohio App. 2006), *overruled by* In re Ohio Domestic-Violence Statute Cases, 114 Ohio St.3d 340, 872 N.E.2d 1212 (2007).

⁴⁸ OHIO CONST. art. XV § 11.

⁴⁹ *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2002)).

⁵⁰ *State v. McKinley*, 2006 WL 1381635 at *8.

worded language, if the Amendment were to pass. Although the *McKinley* decision was later overturned by the Ohio Supreme Court,⁵¹ that reversal was based on the limitation in the Ohio amendment barring the creation or recognition of a legal status for “relationships of unmarried individuals *that intends to approximate the design, qualities, significance or effect of marriage.*”⁵² This language limiting recognition of non-marital relationships only to those legal statuses that approximate marriage does not appear in North Carolina’s proposed Amendment. The proposed language in our bill would not call for reversal of a similar broad interpretation.

The Nebraska Attorney General, too, has construed its 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 dispose of a deceased partner’s remains and donate his or her body parts, the Attorney General opined that the statute would violate the amendment’s prohibition on recognition of same-sex relationships.⁵³ The legislation did not attempt to confer the bundle of rights and duties conferred by marriage, simply the authority to dispose of a loved one’s remains.⁵⁴ Nonetheless, 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.⁵⁵

Similarly, the Supreme Court of Virginia struck down a county’s conferral of employee benefits to domestic partners as violating its laws against recognizing same-sex marriage. Although the case was decided on narrow, statutory interpretation grounds, three Virginia Supreme Court Justices, in a concurrence, stated that the conferral was a “disguised effort” by

⁵¹ See *Ohio v. Carswell*, 114 Ohio St. 3d 210, 871 N.E.2d 547 (2007).

⁵² *Id.* at 216, 871 at 554 (italics added).

⁵³ Neb. Op. Att’y Gen. 03004 (2003).

⁵⁴ See *id.*

⁵⁵ *Id.*

the county to “recognize common law marriages or same-sex unions” in violation of Virginia’s statutory prohibitions.⁵⁶ In their view, providing benefits to domestic partners, in itself, evinced an intent to approximate marriage, regardless of whether the legislative body expressed such an intent, and despite the fact that the measure offered only a very limited range of the entire bundle of rights and obligations conveyed through marriage.

Sponsors of the Amendment have argued that it simply seeks to prevent North Carolina judges from striking down our laws barring same-sex marriage⁵⁷ 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.⁵⁸ Because the Amendment’s prohibitions are not limited to the recognition of marriage, the courts will have to determine the scope of the proposed language. Based on the treatment of narrower language in other states, courts could construe the language of North Carolina’s proposed Amendment far more broadly to bar even the modest range of protections currently available to nonmarital couples.

III. THE AMENDMENT’S POTENTIAL IMPACT ON FAMILY LAW MATTERS

Under the proposed Amendment, members of same-sex couples, as well as unmarried heterosexual couples, risk loss of important rights and protections in two primary areas of family law: (1) contractual agreements and equitable claims between unmarried couples who live together; and (2) child custody and visitation determinations. Not only could North Carolina citizens living in cohabitating relationships lose these rights, North Carolina could become a refuge for those fleeing legal responsibilities elsewhere.

⁵⁶ *Arlington County v. White*, 259 Va. 708, 714 528 S.E.2d 706, 709 (Va. 2000) (Hassell, J., dissenting in part and concurring in the judgment) (internal quotation marks omitted).

⁵⁷ *See supra* note 6.

⁵⁸ *See, e.g.*, TENNESSEE CONST. art. XI, § 18 (“The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state.”).

A. Claims Between Unmarried Cohabitants

The Amendment could render unenforceable agreements and other claims between unmarried couples who live together, whether they are between same-sex or opposite-sex couples. Historically, courts refused to enforce contractual claims between unmarried cohabitants on the ground that agreements between the couple violated the public policy against unmarried cohabitation.⁵⁹ However, in response to the rapid increase in the number of unmarried individuals choosing to live together, most states, including North Carolina, now recognize some contractual and equitable claims between unmarried couples.⁶⁰

North Carolina first allowed such claims in the 1988 case of *Suggs v. Norris*.⁶¹ In that case, the North Carolina Court of Appeals rejected the argument that enforcing agreements between unmarried partners would violate the State's public policy:

We now make clear and adopt the rule that agreements regarding the finances and property of an unmarried but cohabiting couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements. Moreover, where appropriate, the equitable remedies of constructive and resulting trusts should be available as should recovery under a quasi-contractual theory on quantum meruit.⁶²

In allowing enforcement of these claims, the North Carolina courts followed the rationale of the California Supreme Court in *Marvin v. Marvin*.⁶³ That case rested on the rationale that cohabitants are “competent . . . to contract respecting their earnings and property rights,” and thus “may order their economic affairs as they choose.”⁶⁴ The *Marvin* court further noted that prohibiting such claims might “cause the income-producing partner to avoid marriage and thus

⁵⁹ See 46 AM. JUR. PROOF OF FACTS 2d 495 §1.

⁶⁰ See ELLMAN, *supra* note 10, at 935.

⁶¹ *Suggs v. Norris*, 88 N.C. App. 539, 364 S.E.2d 159 (1988)

⁶² *Id.*, 88 N.C. App. at 542-43, 364 S.E.2d at 162.

⁶³ *Marvin v. Marvin*, 18 Cal.3d 660 (1976).

⁶⁴ *Id.* at 674.

retain the benefit of all of his or her accumulated earnings.”⁶⁵ Indeed, in a state that does not recognize such claims between cohabitants, an individual with greater wealth and sophistication than his or her partner might avoid marriage altogether in order to escape any chance of having to share his or her property with a spouse following a divorce.⁶⁶

An example of such a situation is provided by the facts in the recent North Carolina case of *Rhue v. Rhue*.⁶⁷ In that case, the plaintiff and defendant were briefly married then divorced, after which they reconciled and lived together for 25 years. During that time, the plaintiff became the primary caregiver for defendant’s son by a prior marriage and, on the death of defendant’s son, defendant’s minor grandchild. Plaintiff also contributed labor to build the couple’s home, which was titled in defendant’s name, as well as provided general financial support for the family from her paid work, and financial support to buy several properties that, unbeknownst to plaintiff, were also titled in defendant’s name. Defendant told plaintiff during the course of the relationship that the properties belonged to both of them and that, as long as he had a home, she, too, would have one.

As the North Carolina Court of Appeals recognized, failure to allow claims by the plaintiff based on her relationship would mean that defendant could unjustly reap the fruits of both their labor during the long relationship. While plaintiff would be punished for not being married by not being entitled to bring claims against her partner, defendant would be rewarded. On these facts, the Court held, plaintiff could proceed with her contractual and equitable claims:

⁶⁵ *Id.* at 683. In addition to recognizing express and implied contracts between couples living together, Marvin held that the theories of implied agreements of partnership or joint venture, constructive or resulting trust, quantum meruit, and other remedies are available to support such rights when they would best serve the reasonable expectations of the parties. *Id.* at 684. To the extent that express and implied contracts are threatened by the Amendment, so are these other vehicles for the enforcement of cohabitants’ rights and obligations.

⁶⁶ J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 96, 115 (1984).

⁶⁷ *Rhue v. Rhue*, 189 N.C. App. 299, 658 S.E.2d 52 (2008)

Plaintiff presented sufficient evidence to infer that the parties conducted their daily lives as a partnership. Plaintiff testified she assisted in defendant's business by paying for expenses such as labor and materials from her personal account. She also participated in manual labor for both defendant's business and personal projects including building the home on Parcel C. Plaintiff not only managed the household expenses, and child care, but also paid other expenses such as life insurance payments. All this was done with the understanding that she would be taken care of by the defendant, and that he purchased properties for their retirement. The lack of a formal agreement between the parties is not dispositive of whether a partnership existed.⁶⁸

Passage of the Amendment could render unenforceable claims between unmarried couples on two different rationales. First, judicial enforcement of contract claims or equitable remedies could be deemed to constitute State “recognition” of these relationships, or to deem them “valid,” and therefore prohibited by the Amendment. This interpretation gains force from U.S. Supreme Court precedent establishing that court enforcement of certain private contracts amounted to impermissible state action under the 14th Amendment to the U.S. Constitution. In the landmark case in this area, *Shelley v. Kraemer*,⁶⁹ the U.S. Supreme Court found that while a private, restrictive covenant prohibiting non-Caucasians from owning certain property did not itself violate the 14th Amendment, judicial enforcement of the restrictive covenant did, because the enforcement constituted action by the state.⁷⁰ State action, the court held, “extends to manifestations of state authority in the shape of laws, customs, or judicial or executive proceedings.”⁷¹ In addition, the Court noted that the fact that the judicial action concerned a private agreement was irrelevant as to whether state action had occurred.⁷²

This principle – that the court’s enforcement of a private agreement could constitute impermissible state action – has significant potential implications for the enforcement of private

⁶⁸ *Id.* at 308, 658 S.E.2d at 60

⁶⁹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁷⁰ *Id.* at 18-19.

⁷¹ *Id.* at 14-15 (internal quotations omitted).

⁷² *Id.* at 19.

contracts, conveyances, or other legal instruments between or regarding unmarried couples under the Amendment. Under this analysis, a court could determine that the state or locality would be “recognizing” a union other than heterosexual marriage if the court enforced or otherwise took judicial cognizance of contracts between unmarried cohabitants. In such a case, the Amendment could go beyond prohibiting direct state conferrals of rights, duties or benefits of marriage to unmarried couples – through legislation or otherwise – it would also prevent the enforcement of private agreements between unmarried couples.

Second, even if courts did not construe the Amendment so broadly as to treat all court action recognizing such contracts and equitable claims as state action, it might still determine that these claims between unmarried cohabitants should not be enforced based on public policy grounds. On this view, courts might consider the Amendment to evidence a strong public policy against cohabitation and legal consequences arising from cohabitation. They might therefore reverse the *Suggs* case determination that North Carolina’s public policy was not violated by entertaining such claims.⁷³

The potential consequences if North Carolina courts refused to enforce such private agreements would be significant. Such a determination would impinge upon unmarried persons’ freedom to contract, and would allow individuals to escape responsibilities to their former live-in partners that they had freely assumed. It would also bar courts from finding implied agreements and equitable claims between unmarried partners, which they now enforce on fairness grounds. This would incentivize sophisticated individuals to choose cohabitation rather than marriage in

⁷³ Five states continue to refuse to accept contract claims between unmarried cohabitants on the ground that such agreements are void as against public policy. *See, e.g.*, *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Davis v. Davis*, 643 So. 2d 931 (Miss. 1994); *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983); *Carnes v. Sheldon*, 311 N.W.2d 747 (Mich. Ct. App. 1981); *Lauper v. Harold*, 492 N.E.2d 472, 474, 170 (Ohio Ct. App. 1985); *Tarry v. Stewart*, 649 N.E.2d 1 (Ohio Ct. App. 1994).

order to avoid having to support the less sophisticated partner following a break-up. It would also leave unmarried individuals who tend to the couple's children and homes unprotected from the opportunistic behavior of more sophisticated wage-earning partners. Passage of the Amendment would also threaten the validity of agreements executed outside of North Carolina, thereby making the State an attractive destination for individuals seeking to escape their obligations under express cohabitation agreements or court orders finding implied agreements. Thus, the Amendment may export its prohibitions to other individuals and families across the country, all to the detriment of relatively unsophisticated cohabitants and children who were previously protected by the laws of their states.

B. Custody and Visitation Disputes

The proposed Amendment also threatens to undermine custody rights of unmarried persons in North Carolina. Two principles of North Carolina custody law could be affected by the Amendment. First, under current law, the fact of a parent's nonmarital relationship, whether same-sex or opposite-sex, is not an appropriate factor for consideration by courts apart from the harm to the child it might create. Second, in some circumstances, courts will allow the former unmarried partner of a parent custody rights if doing so is in the child's best interest. The proposed Amendment could undermine both these principles of North Carolina law.

1. Treatment of a Parent's Nonmarital Cohabitation in North Carolina Custody Law

In North Carolina, courts make custody and visitation determinations based on their assessment of the best interests of the child.⁷⁴ When disputes arise between two legal parents, the child's best interests are the "polar star" that guides a court's decision-making. In making a custody or visitation determination, a trial judge is vested with wide discretion to consider any

⁷⁴ See generally SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 13.3 (5th ed., 2002).

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, a parent’s unmarried cohabitation with a same-sex or opposite-sex partner is not, standing alone, a sufficient basis for an adverse custody or visitation determination. 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.”⁷⁵ Based on this principle, North Carolina courts have refused to take a parent’s unmarried cohabitation into account in custody suits, absent evidence that it had an adverse impact on the child.⁷⁶ Further, North Carolina courts will not presume harm based on the fact of cohabitation.⁷⁷

However, should this proposed Amendment pass, judges may interpret it as an expression of public policy against all non-marital relationships. This interpretation may cause judges to view such relationships as having a per se negative impact on a child, and fashion custody orders accordingly. As such, the Amendment threatens to alter the family law landscape in ways not contemplated by its supporters. Moreover, the passage of this Amendment could also cause courts to consider cohabitation as a substantial change of circumstances that would cause them to

⁷⁵ In re McCraw Children, 3 N.C. App. 390, 395, 165 S.E.2d 1, 4-5 (1969). For cases citing this quotation with approval, see, e.g., 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) .

⁷⁶ See, e.g., Williford v. Williford, 303 N.C. 178, 277 S.E.2d 515 (1981).

⁷⁷ Browning v. Helff, 136 N.C. App. 420, 424-25, 524 S.E.2d 95, 98-99 (2000); see also REYNOLDS, *supra* note 74, at § 13.14.

reconsider previously-settled custody orders. The result could be a flood of litigation in North Carolina's already busy family courts.

2. Custody Rights of Nonmarital Partners Who Have Acted as Parents

The Amendment could also disrupt North Carolina law that establishes when a nonmarital partner who has acted in a parenting role can retain his or her relationship with the child if the relationship with the parent ends. 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 determination 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."⁷⁸ On this basis, in *Boseman v. Jarrell*,⁷⁹ 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, basing the partner's custody rights on the family relationship in the household 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

⁷⁸ *Boseman v. Jarrell*, 704 S.E.2d 494, 503 (2010) (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's fostering father-child relationship between child and defendant).

⁷⁹ *Id.*

have long known as their parents. At a minimum, passage of the Amendment will encourage re-litigation of previously settled prior custody and visitation determinations, thus creating uncertainty and confusion in family courts and bringing instability to families.

IV. POTENTIAL IMPACT ON DOMESTIC VIOLENCE LAWS AND RESOURCES

If the Amendment is approved, the application of North Carolina's domestic violence laws to unmarried couples, and the constitutionality of the domestic violence laws themselves, will also be left open for question. Additionally, the work done by numerous State agencies relying upon our current domestic violence laws will be thrown into flux, and the protections and resources afforded North Carolinians in abusive relationships could be seriously and dangerously eroded.

Chapter 50B of the North Carolina General Statutes defines domestic violence for the purposes of the protections afforded by that statute and for the purposes of numerous other statutes and agency work throughout our State. Domestic violence is statutorily defined 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."⁸⁰ 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.⁸¹ North Carolina courts have routinely applied Chapter 50B's protections to

⁸⁰ N.C. GEN. STAT. § 50B-1.

⁸¹ *Id.*

unmarried heterosexual 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."

If the proposed Amendment passes, the protection the statute provides to members of these unmarried couples may be viewed as an unconstitutional recognition of the legal status of unmarried persons. This interpretation would not be a stretch for courts: as discussed *supra*, Ohio courts reached this determination on language less friendly to this interpretation than North Carolina's proposed language.⁸² Yet this interpretation would throw into question whether Chapter 50B in its entirety is constitutional, as well as whether its application to other laws and State work is constitutional. There would no doubt be uneven application of the statute in our 39 judicial districts and numerous State agencies, and it will, ultimately, be a matter for our appellate courts to determine whether our current domestic violence definition, laws, and resources remain constitutional. This period of uneven application and uncertainty will only mean fewer protections for the already vulnerable as well as an enormous waste of State resources.

A. Protections under Chapter 50B

Chapter 50B provides a civil remedy for victims of physical abuse, sexual assault and stalking.⁸³ The statute provides for a civil cause of action in which a victim of abuse may sue a person with whom they are or have been in a personal relationship for a domestic protection order. Under Chapter 50B, persons accused of physical abuse, sexual assault, or stalking may be restrained by emergency *ex parte* orders which, pending a hearing on the matter, initially restrain

⁸² See *supra* note 21, and notes 47-52.

⁸³ N.C. GEN. STAT. §50B-1 et. seq.

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, possession of personal or marital property, temporary spousal and/or child support, temporary child custody and visitation provisions, and year-long 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."⁸⁴

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.⁸⁵ 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

⁸⁴ N.C. GEN. STAT. § 50B-3(2)(13)

⁸⁵ N.C. GEN. STAT. § 50B-4-4.1.

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.⁸⁶

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.⁸⁷ 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.

B. Protections under the Criminal Code

Relying on the definition of domestic violence and the categories of personal relationship set out in Chapter 50B, numerous North Carolina criminal statutes are similarly 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

⁸⁶ *Id.*

⁸⁷ N.C. GEN. STAT. §§ 42-40, 42-42.2, 42-42.3, 42-45.1, 50B-5.5, 15C-1.

General Assembly's heightened concern for victims of domestic violence in this preamble to the stalking prohibition:

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.⁸⁸

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.⁸⁹ 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.

C. State Resources

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

⁸⁸ N.C. GEN. STAT. § 14-277.3A .

⁸⁹ N.C. GEN. STAT. §§ 15A-534.1, 15A-2000.

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 relations only to marital unions, risks stripping away important protections to unmarried people, and could create chaos for the numerous State workers who have sworn a duty to protect the peace.

V. POTENTIAL IMPACT ON ESTATE PLANNING ARRANGEMENTS

The proposed Amendment could also severely interfere with estate planning in North Carolina. An inclusive estate-planning process must consider the execution of wills, trusts, and durable and health care powers of attorney.⁹⁰ Yet the Amendment's vague language has the

⁹⁰ TrustCounsel, North Carolina Estate Planning Blog: Wealth Transfer Planning, Asset Preservation, Probate & Taxation, <http://www.ncstateplanningblog.com/articles/estate-planning/powers-of-attorney/> (last visited Apr. 13, 2011).

possibility of being interpreted in a manner that would significantly interfere with the estate-planning process in all these areas. Same-sex couples and unmarried heterosexual couples would be particularly harmed by these changes, since, unlike married couples, they have no automatic legal protections of estate rights, and must therefore rely heavily on estate planning arrangements in order to pass on property.⁹¹

Estate planning is the process of “setting goals and objectives and developing strategies for disposing of assets and providing for family members, friends, and charities at death.”⁹² For most people, the center of the estate-planning process is the will. A will’s purpose is to transfer identifiable property to a specific entity when an individual dies. Under current North Carolina law, an individual is generally free to convey that property to whomever he or she would like.⁹³ As long as the testator complies with the statutory requirements of the state,⁹⁴ he or she may leave that property to a friend, a romantic partner, a child, a parent, or a charity to name a few. Absent a will, the estate will be governed by state statutes of intestate succession.⁹⁵ Intestate succession establishes mechanisms by which decedent’s property passes to relatives in an order set out by the statute.⁹⁶ Because unmarried partners have no place in the intestate succession order, it is of the utmost importance for unmarried partners who wish to leave property to one another to establish the distribution through a will.⁹⁷

⁹¹ See Maureen B. Cohon, *Where the Rainbow Ends; Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania*, 41 DUQ. L. REV. 495, 511 (2003); Ellen, D.B. Riggle et al., *The Execution of Documents by Sexual Minority Individuals*, 11 PUB. POL’Y & L. 138, 139 (2005).

⁹² CCH FINANCIAL AND ESTATE PLANNING GUIDE ¶ 101 (13th ed. 2001).

⁹³ N.C. GEN. STAT. § 31-1 (2003).

⁹⁴ N.C. GEN. STAT. § 31-3.1 (2011).

⁹⁵ N.C. GEN. STAT. 29-1-30 (2011).

⁹⁶ *Id.*

⁹⁷ Cohon, *supra* note 91, at 508

Trusts are an additional method of conveying property to a partner, either during life or after death. Although there are many varieties of trusts, the most commonly used are the testamentary trust and revocable living trusts. The testamentary trust begins functioning as a method of conveyance on the death of the testator;⁹⁸ a revocable living trust places property of the trustor into an account that is administered by that person until his or her death. In either case, at the time of the trustor's death, a trustee takes control of the assets and manages them for the benefit of the named beneficiary.⁹⁹

Currently, those executing wills and trusts in North Carolina are generally assured that their wishes, as expressed in those documents, will be honored if that conveyance is later challenged in court. So long as wills and trusts do not create unreasonable restraints on alienation or offend public policy, the North Carolina courts generally will uphold them. As the Supreme Court of North Carolina stated in *Hollowell v. Hollowell*, "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."¹⁰⁰ In light of its focus on the freedom of individuals to dispose of their property in the manner in which they see fit, North Carolina does not currently have laws that restrict the transfer of property between unmarried couples.¹⁰¹

The passage of the Amendment, however, could unsettle North Carolina estate planning in several different ways. First, the Amendment would create an atmosphere of uncertainty and

⁹⁸ JOAN M. BURDA, ESTATE PLANNING FOR SAME-SEX COUPLES 40 (ABA 2004).

⁹⁹ Riggle, *supra* note 91, at 139.

¹⁰⁰ See *Hollowell v. Hollowell*, 107 N.C. App. 166, 171, 420 S.E.2d 827, 831 (1992) (quoting *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960)).

¹⁰¹ Under the North Carolina General Statutes the only law restricting the free alienation of property is the North Carolina Slayer Statute. This states that an individual who willfully and unlawfully kills the decedent cannot inherit from the decedent either via testate or intestate succession. N.C. GEN. STAT. § 31A-4 (2011). All other testamentary transfers of property are said to be valid as long as complying with the will requirements applicable in North Carolina either at the time the will was written or at the time it is probated. See N.C. GEN. STAT. § 31-46.

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 and other private contracts entered into by unmarried couples are sometimes challenged by disgruntled blood relatives of the individual executing the document.¹⁰² Even if a court ultimately were to uphold a challenged agreement, 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.¹⁰³ For the surviving member of a same-sex couple, such challenges mean being "faced with the prospect of losing everything simply because someone does not like the gender of the person with whom one sleeps."¹⁰⁴

More worrisome is the real risk that courts would no longer uphold otherwise valid wills and trusts because the Amendment would render them unenforceable. While that outcome would be a far-reaching one, it is not altogether far-fetched. If a court held that a will or trust arose from an unmarried cohabitant relationship that constituted a "domestic legal union" other than marriage, which, it could deem court enforcement of the will to constitute an unconstitutional "validation" or "recognition" of the relationship by the state.¹⁰⁵ Under such a scenario, any will or trust bestowing rights upon an individual in an unmarried couple would not be upheld by North Carolina courts.

Finally, it is possible that the Amendment would give North Carolina courts a basis for voiding wills and trusts on public policy grounds. As noted above, while courts typically strive to effectuate the intent of the testator or trustor, provisions that impose certain conditions and

¹⁰² See Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U.L. REV. 359, 394-395 (1995).

¹⁰³ CCH FINANCIAL AND ESTATE PLANNING GUIDE ¶ 625.

¹⁰⁴ Burda, *supra* note 98, at 53.

¹⁰⁵ See *supra* Section IIB (discussing the legal meaning of the term "recognize").

restrictions will held void as against public policy.¹⁰⁶ Examples of such provisions are those that condition a bequest on the separation or divorce of the prospective beneficiary,¹⁰⁷ those that condition a bequest on a prospective beneficiary remaining unmarried,¹⁰⁸ and, in some cases, those that require a prospective beneficiary to adhere to the tenets of a particular religion.¹⁰⁹ If the proposed Amendment became law, it is conceivable that a court could invoke public policy as a basis for voiding one or more provisions of a will or trust naming the testator's or trustor's unmarried partner as beneficiary.

In summary, rather than upholding testators' or trustors' decisions for 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 testator expressly referred to a partner as "partner," "domestic partner," "companion," or any other term indicating that the two had a conjugal relationship and evincing an intent to make the bequest based on this relationship. In this way, the Amendment could have peculiar 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.

VI. POTENTIAL IMPACT ON POWERS OF ATTORNEY

Like wills and trusts, a power of attorney is a planning tool that can provide security for committed unmarried partners. A power of attorney is a written instrument by which one person, the principal, appoints another as their agent or attorney-in-fact and confers upon them authority

¹⁰⁶ See *supra* note 100, and accompanying text.

¹⁰⁷ See RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) § 7.1 (2003).

¹⁰⁸ See *id.* § 6.1.

¹⁰⁹ See *id.* § 8.1.

to perform certain specified acts.¹¹⁰ There are generally two types of powers of attorney that can be executed in North Carolina: those that authorize the attorney-in-fact to make decisions relating to the principal's healthcare,¹¹¹ and those that authorize the attorney-in-fact to make decisions relating to the principal's financial matters.¹¹²

A healthcare power of attorney is a useful tool for unmarried couples, because it can provide legal certainty with respect to precisely who is authorized to make decisions on behalf of the incapacitated individual, a frequent area of disagreement between unmarried couples and their blood relatives.¹¹³ In addition to provisions relating to medical treatment, comprehensive healthcare powers of attorney in North Carolina may contain provisions relating to the disposition of remains upon the death of the incapacitated person, funeral arrangements, and organ donation.¹¹⁴ In the absence of such a document, the individual's next of kin will have authority over these decisions since a non-married partner is not legally recognized as family.¹¹⁵ North Carolina's Health Care Powers of Attorney statute states that any competent person not engaged in providing health care to the principal for remuneration, and who is 18 years of age or older, may act as a health care attorney-in-fact.

In order to ensure that their partners will have the authority to deal with financial matters during periods of incapacity, members of unmarried couples execute a durable financial power of attorney.¹¹⁶ A durable financial power of attorney can be used by unmarried couples to

¹¹⁰ See N.C. GEN. STAT. § 32A1-2 (2011).

¹¹¹ N.C. GEN. STAT. §§32A15-27 (2011).

¹¹² N.C. GEN. STAT. §§ 32A1et seq.

¹¹³ Gwendolyn L. Snodgrass, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 78 (1997 - 1998).

¹¹⁴ N.C. GEN. STAT. § 32A-25.1.

¹¹⁵ Cohon, *supra* note 91, at 509-510.

¹¹⁶ N.C. GEN. STAT. §§ 32A8-14 (2011).

ensure that their bank accounts, property, and other assets are properly managed if they become unable to do so.¹¹⁷ As with healthcare powers of attorney, these agreements allow individuals to appoint anyone they wish to serve as their agents in whatever capacity the particular agreement dictates.¹¹⁸ Currently, courts strictly construe powers of attorney to ensure that the “object to be accomplished” by the instrument – be it healthcare or financial decision-making – is honored as far as possible.¹¹⁹ Powers of attorney can be as specialized or unconventional as an individual wishes. Generally, there is little cause for concern that a North Carolina court will invalidate the designation.¹²⁰

The effect of passage of the Amendment upon healthcare and financial powers of attorney, however, risks undercutting these settled statutory schemes. The Amendment’s prohibition on state recognition of “domestic legal unions” other than marriage could be construed to invalidate court enforcement of such agreements. As discussed above, 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 an individual’s designation of his unmarried partner as attorney in-fact as unenforceable. It is also possible that a state-run medical facility or other governmental entity would take the position that it is prohibited from giving effect to an otherwise valid power of attorney on the basis that doing so would constitute state recognition of a couple’s domestic union. Regardless of the ultimate disposition of the matter

¹¹⁷ Burda, *supra* note 98, at 77.

¹¹⁸ Cohon, *supra* note 91, at 509.

¹¹⁹ 1-16 MICHIE ON ESTATES, *supra* note 209 § 4.

¹²⁰ Id. § 2 (“[T]he general rule is that the donor may impose particular conditions and requirements upon the power and the manner in which it must be exercised.”)

before a court, the validly appointed agent 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 their partner.

VII. POTENTIAL IMPACT ON EMPLOYEE BENEFITS FOR DOMESTIC PARTNERS

A substantial number of employers in North Carolina currently extend benefits to their employees' domestic partners, including both same-sex and different-sex partners. These employers include city and county governments as well as private entities. Domestic partner benefits are often viewed as an important tool for recruiting talented employees.¹²¹ The proposed Amendment threatens these benefits, especially in the context of public-sector employment.

In the public sector, seven local governments within North Carolina currently offer domestic partner benefits to their employees.¹²² The Town of Carrboro, Town of Chapel Hill, City of Durham, and County of Orange offer benefits to both same-sex and opposite-sex domestic partners.¹²³ The County of Durham, City of Greensboro, and County of Mecklenburg offer benefits to same-sex domestic partners.¹²⁴ At present, the North Carolina General Statutes authorizes these localities to extend benefits to their employees' domestic partners.¹²⁵ The proposed Amendment, however, would likely strip these local governments of that authority.

¹²¹ 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").

¹²² For background on these public employers' domestic partner benefits, see Paul Tharp, *More North Carolina Municipalities Mulling Domestic Partner Benefits*, N.C. LAW. WKLY., available at 2010 WLNR 11059660. In 2010, Asheville's City Council voted in favor of domestic partner benefits, but the city has yet to implement such benefits. See *id.* Asheville would become the eighth locality in North Carolina to offer domestic partner benefits.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See Diane M. Juffras, *May North Carolina Local Government Employers Offer Domestic Partner Benefits?*, PUB. EMPLOY. L. BULL., Nov. 2009, available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/pelb37.pdf> (UNC

The experience of public employers in the State of Michigan sheds light on how the proposed Amendment in North Carolina threatens public employment benefits. In 2004, Michigan amended its constitution so 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.”¹²⁶ In the 2008 case of *National Pride at Work v. Michigan*, the Michigan Supreme Court held that the amendment “prohibits public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners.”¹²⁷ Although that case only addressed same-sex unions, a 2005 opinion from the Michigan Attorney General’s Office suggested that Michigan’s amendment prohibits public employers from recognizing opposite-sex domestic partners as well.¹²⁸ North Carolina’s proposed Amendment is worded more broadly than Michigan’s existing amendment. Its language bars *any* recognition of domestic legal unions, not simply those that seek to approximate marriage. As such, it is very possible that North Carolina courts would interpret the Amendment as prohibiting public employers from offering domestic partner benefits.

Although less likely, the Amendment might also render private employers’ domestic partner benefits unenforceable. Courts could reach this result on the broadly-worded Amendment in three different ways. First, courts might view judicial enforcement of private employees’ domestic partner benefits as a type of state action that the proposed Amendment directly bars.¹²⁹

School of Government).

¹²⁶ MICH CONST. art. I, § 25.

¹²⁷ *National Pride at Work, Inc. v. Michigan*, 748 N.W.2d 524, 529, 543 (Mich. 2008).

¹²⁸ 2005 Mich. OAG No. 7171, 2005 WL 639112 (Mich. A.G.). *See also* Graham, *supra* note 121, at 86, 126-27 (discussing the Michigan Attorney General’s opinion and noting that the Idaho Attorney General issued a similar opinion in 2008).

¹²⁹ *See* Darrell A.H. Miller, *State DOMAs, Neutral Principles, and the Möbius of State Action*, 81 TEMP. L. REV. 967, 969-84 (2008), *citing* *Shelley v. Kraemer*, 334 U.S. 1 (1948):

The very arguments that the [Michigan Supreme Court] accepted to strike down public provision of benefits for same-sex partners are easily used to challenge public enforcement of benefits for

In this view, judicial enforcement would amount to “recognition” of a “domestic legal union,” which the Amendment forbids. Second, even if the Amendment’s text does is not deemed directly to bar judicial enforcement of private employment benefits, courts in North Carolina might view the Amendment as evidence that North Carolina has adopted a public policy position against recognizing unmarried couples. On this reading, courts would conclude that private employment agreements that guarantee domestic partner benefits are void on public policy grounds. Third, beyond the courts, state-operated healthcare providers might refuse to implement private employers’ domestic partner benefits, concluding that the Amendment prohibits them, as state actors, from recognizing relationships between unmarried couples. Anyone who seeks to challenge these healthcare providers in court would face the potential judicial hurdles described above.

VIII. 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. Rather, the vague and untested language of the Amendment could be interpreted to prohibit the government from recognizing legal rights and protections for all unmarried couples – same-sex or opposite sex. The Amendment could prevent courts from enforcing private agreements between unmarried couples, and end-of-life arrangements, such as wills, trusts and powers of attorney executed by unmarried couples; unsettle current custody law; invalidate rights and protections currently provided to unmarried couples under North Carolina’s domestic violence laws; undercut municipalities’ decisions to recognize domestic partnerships,

same-sex partners provided in the private sector. That is particularly true if the Michigan Supreme Court accepts a *Shelley*-type analysis of its own role in adjudicating private same-sex agreements.

and undermine private employers' efforts to attract top employees to North Carolina by providing employee benefits to domestic partners. It certainly will spur litigation, discourage same-sex and opposite-sex unmarried couples from living and working in North Carolina, adversely affect the ability of North Carolina businesses to attract talented employees, and encourage individuals seeking to undo their legal obligations to flock to North Carolina courts for relief.