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Senator Brandt Hershman  
Indiana State Senate  
200 W. Washington Street  
Indianapolis, IN 46204

***RE: Senate Joint Resolution 7***

Dear Senator Hershman:

This is a response to your request for a legal opinion on the effects of SJR 7, particularly its impact, if any, on domestic violence laws, domestic partner benefits for state employees and/or private employees, and contractual relationships between unmarried senior citizens.

A year ago, we addressed many of the concerns raised with respect to SJR 7

To date, 26 states have passed similar state marriage amendments. This legal opinion draws upon the history of litigation regarding these marriage amendments in other states, as well as general principles of statutory construction, to answer three questions. What is the basic meaning of the text? Will it revoke existing domestic violence protections? Will it limit the rights of public or private employers to offer domestic partner benefits to their employees, or of individuals to enter into private contracts?

**1. What is the basic meaning of the text?**

SJR 7 reads:

- (a) Marriage in Indiana consists only of the union of one man and one woman;
- (b) This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups.

Section (a) of the amendment restates the current definition of marriage in the state of Indiana. In 2004, the Indiana Court of Appeals rejected claims that the marriage law violates the Indiana Constitution, however the case was not appealed and the Indiana Supreme Court has never ruled on the question. *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005). The primary effect of this amendment would be to resolve all future

questions regarding the constitutionality of the state's marriage laws defining marriage as the union of husband and wife under the Indiana Constitution.

Twenty-six other states have adopted a marriage amendment which includes language substantially similar to that of section (a). Eighteen of these state amendments also impose some restriction on benefits the state legislature may grant to nonmarital couples. However, the language of section (b) of SJR 7 is substantively different from these state marriage amendments. Its clear intent is not to restrict the state legislature but rather to limit the judiciary from interpreting the Indiana Constitution or other statutes to require that either (1) marital status or (2) the package of legal rights and responsibilities associated with marriage be extended to unmarried couples or groups.

Section (a), standing alone, leaves open the possibility that an Indiana court may uphold the definition of marriage, while substantively requiring that married and unmarried couples be treated the same as married couples. In *Cornell v. Hamilton*, the plaintiff argued that under Article I, section 23 of the Indiana Constitution unmarried partners are entitled to the same benefits, specifically family funeral leave, as married couples receive. 791 N.E.2d 214 (Ind. App. 2003). Although ultimately denying the claim, the court simultaneously rejected every justification offered by the State for policies preferring marriage, substituting its own justification and suggesting that future litigation might reach a different result:

The State's brief is filled with proffered justifications for the policy; many are connected with promoting marriage and encouraging procreation. . . . We find these justifications unpersuasive in light of the fact that, as was discussed at oral argument, many of the largest employers in this country and this state, including its two largest universities, now provide benefits to same-sex domestic partners....

Instead, the policy exists to strengthen family relationships, and families are different today than they once were. For instance, for many years, marriages between persons of different races were also prohibited. Now such marriages are commonplace. In the same vein, while society formerly regarded childrearing as exclusively the province of couples consisting of one man and one woman, that too has now changed. . . . Curiously, however, Cornell concedes that the policy is rationally related to marriage. Therefore, based on Cornell's framing of the issue, we are not faced with the close question of whether, in this age of changing family relationships, the policy's distinction based on marital status is rational, but whether the privilege is equally available to all persons similarly situated.

*Id.* at 219.

The criticisms levied against SJR 7 focus on section (b), specifically the phrase "legal incidents of marriage." Largely ignored, however, is the fact that the phrase arises as a rule of construction for courts interpreting the Indiana Constitution and statutes. It should not be interpreted as a substantive rule limiting the authority of the legislature or executive branch.

The language of the Indiana amendment is patterned after an early draft of the Federal Marriage Amendment.<sup>1</sup> Like the federal amendment, it is drafted narrowly and does not limit the legislature from extending the legal incidents of marriage to unmarried persons, either as individual benefits or as complete “civil unions” type package.<sup>2</sup> (We also note that legislators who are concerned that courts may misinterpret their intent have the opportunity to establish a legislative history clarifying any potential ambiguity.)

## **2) Would SJR 7 revoke or limit existing domestic violence protections?**

Earlier concerns that SJR 7 might limit or revoke existing domestic violence protections for unmarried couples in Indiana were put to rest with the July 2007 Ohio Supreme Court decision in *State v. Carswell*, 871 N.E.2d 547 (2007). In *Carswell*, the Ohio Supreme Court affirmed the statutory domestic violence protections, denying the claims of an unmarried man charged with abusing his girlfriend that the marriage amendment prohibited the extension of spousal protections to unmarried persons.

For several reasons, this ruling gives us confidence in stating that there is virtually no possibility that SJR 7 would be interpreted to bar domestic violence protections for unmarried cohabitants in the state.

First, out of 27 states to have adopted constitutional amendments defining marriage, Ohio is the only state in which any court has suggested that domestic violence protections run afoul of the marriage amendment. Even in Ohio, just two out of ten state appellate courts to consider the issue concluded that there was any conflict between the amendment and the domestic violence protections, and the Supreme Court ruling in *Carswell* now dispositively answers the question for all Ohio courts. Thus, with nearly all the state marriage amendments having been in effect for at least three years, there is no credible threat to domestic violence protections in any of these states.

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<sup>1</sup> H.J.Res. 56, 108th Cong. (introduced May 21, 2003 by Rep. Musgrave), and S.J.Res. 26, 108th Cong. (introduced Nov.25, 2003 by Sen. Allard) (“Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”).

<sup>2</sup> Some would perhaps argue that section (b) would make unenforceable even a statute which on its face extends spousal benefits to unmarried couples. The plain, common-sense reading of the amendment however, clearly indicates that the text was drafted to prevent judges from applying other statutory or constitutional provisions (e.g., non-discrimination statutes or equal protections) as requiring the extension of marital incidents to unmarried couples. *See, e.g., Sholes v. Sholes*, 760 N.E.2d 156, 159 (Ind. 2001) (“[W]hen a statute is unambiguous, a court must apply the plain and obvious meaning, and not resort to other rules of construction.”). Committee hearings and reports, particularly if authorized for publication, provide an opportunity to further clarify this reading of the amendment text. *O’Laughlin v. Barton*, 582 N.E.2d 817, 821 (Ind. 1991) (“When legislation is susceptible to several widely different constructions, a court may look to the journals of the two legislative bodies to infer legislative intent.”); *see also Shell Oil Company v. Meyer*, 705 N.E.2d 962, 974 at n.14 (Ind. 1998) (noting that a conference committee report provides more persuasive evidence of collective legislative intent than does the testimony of individual legislators at a hearing).

Secondly, the Ohio marriage amendment is among the broadest of the state marriage amendments, significantly broader in scope than SJR 7, and thus more likely to pose a conflict with other statutory protections for unmarried couples. Ohio's amendment reads in relevant part:

This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Ohio Const., Art. XV. Sec 11.

Ohio's amendment restricts any state or local government from creating domestic partnership benefits for nonmarital couples, while Indiana's text reserves the power to create domestic partnership benefits to the legislative branch. The Ohio amendment's much broader language prohibits recognition of a legal status for unmarried individuals if that status "intends to approximate the design, qualities, significance or effect of marriage" while Indiana only prevents courts from mandating the legal consequences ("incidents") of marriage, meaning those consequences that legally depend upon the act of marrying, not every law that affects married people among others.

Finally, the text of the domestic violence statutes themselves makes the Indiana statute less likely to conflict with a marriage amendment than was the Ohio statute. Indiana domestic violence law does not confer a marital status on unmarried couples simply by extending its coverage to those "similarly situated" to a married person, and domestic violence protection is clearly not predicated upon marriage in Indiana state law.<sup>3</sup> Indeed, the domestic violence statutory language specifically distinguishes married and unmarried couples, and grants domestic violence protection to individuals in both situations. The statute thus clearly extends domestic violence protections to four other categories of people besides the married: parents, guardians, a "person with whom the defendant shared a child in common" and a "person who was or had been similarly situated to a spouse, parent, or guardian of the defendant."

SJR 7 would not bar domestic violence protection for any Indiana resident currently covered under Indiana law.

### **3) Would SJR 7 deny unmarried couples the right to contract or to receive domestic partner benefits?**

In our opinion, SJR 7 would prevent courts from *mandating* domestic partnership benefits on constitutional grounds, but it would have no impact on the ability of state agencies, local government, public universities, or private business to continue to choose to offer domestic partner benefits for their employees.

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<sup>3</sup> Indiana Code § 35-41-1-6.3.

Nor would it in any way limit the right of persons to privately contract for health care benefits, establish medical decisionmaking authority, or to establish estate planning documents.

Some states (notably, Ohio and Michigan) have adopted amendments which do preclude state and local governments from offering domestic partner benefits to public employees, at least if such benefits are predicated on a marriage-like relationship.<sup>4</sup> SJR 7, meanwhile, imposes no limits on the legislature's ability to authorize domestic partner benefits for state employees; instead it attempts to restrict the courts from imposing on unwilling state and local governments an obligation to provide nonmarried couples' benefits on constitutional grounds.

As to private employees and corporations, no state amendment, even those significantly broader than SJR 7, has been held to limit (a) the rights of private employers to offer domestic partner benefits,<sup>5</sup> or (b) the rights of individuals to enter into private contractual agreements. Virginia's attorney general concluded, when concerns were raised about language specific to that amendment (and not at all similar to SJR 7) concluded "It is my opinion that passage of the marriage amendment will not affect the current legal rights of unmarried persons involving contracts, wills, advance medical directives, shared equity agreements, or group accident and sickness insurance policies. . . ." Opinion of the Virginia Attorney General at 2, Sept. 14, 2006 (requested by Sen. Stephen Newman, et al.) (available at <http://www.vaag.com/OPINIONS/2006opns/06-003Newmanetal.pdf>).

In our opinion, there is no plausible basis for concerns that SJR 7 would in any way limit existing rights of private contract, whether by employers or by individuals. SJR 7 is not a mandate, but a protection for employers and individuals who would choose *not* to offer domestic partner benefits. "This Constitution or any other Indiana law may not be construed to *require* that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups" (emphasis added). In this way, SJR 7 is a response not only to *Cornell v. Hamilton*, but also to recent court decisions in Alaska, New Jersey, Oregon and Vermont holding that the constitutions of those states guarantee unmarried couples the right to be treated as though they were married.<sup>6</sup> The proposed Indiana amendment would make clear that the Indiana Constitution does not *mandate* nonmarital

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<sup>4</sup> See *Nat'l Pride at Work, Inc. v. Governor of Mich.*, No. 265870, 2007 Mich. App. LEXIS 240 (Feb. 1, 2007). The specific wording relied on by the Michigan court ("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") does not appear in the Indiana amendment. While the Michigan amendment prohibits the creation of any kind of marriage alternative, the Indiana amendment is directed only at attempts to read some existing provision of Indiana law to require extending benefits to unmarried couples.

<sup>5</sup> Certain private employer health and pension plans are subject to federal ERISA regulation, which may limit the ability to provide domestic partner benefits, but which exist independent of state amendment language. 29 U.S.C. § 1001, *et seq.*

<sup>6</sup> See *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Tanner v. OHSU*, 971 P.2d 435 (Or. Ct. App. 1998).

partnership benefits, while leaving state and local governments free to make diverse decisions about these benefits.

## **Conclusion**

The primary effect of this amendment would be to resolve the outstanding legal question of whether the state's marriage laws defining marriage as the union of husband and wife is constitutional under the Indiana constitution. The secondary effect is to prevent courts from mandating that the benefits of marriage must be given to nonmarital couples, without the express approval of the legislative branch.

The text of SJR 7 is substantially different from state marriage amendments that have raised concerns about domestic violence protections, private contracting rights, and the power of state and local governments to create domestic partnerships laws.

In our opinion, SJR 7 would prevent courts from *mandating* domestic partnership benefits on constitutional grounds, but it would have no impact on the ability of state agencies, local government, public universities, or private business to continue to choose to offer domestic partner benefits for their employees.

Nor would it in any way limit the right of persons to privately contract for health care benefits, assign medical decisionmaking authority, or establish estate planning documents.

Nor would SJR 7 bar domestic violence protection for any Indiana resident currently covered under Indiana law.

Sincerely,

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