MEMORANDUM

TO: House Majority Leader Paul Stam
North Carolina House of Representatives

RE: Meaning of proposed Marriage Amendment,
including impact on private business and contracts

DATE: September 12, 2011

The proposed amendment to the North Carolina Constitution regarding marriage provides:

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

This language is premised on the idea that granting legal status to non-marital relationships (opposite-sex or otherwise) undermines marriage. In contrast, the granting of benefits to an unmarried individual(s), without regard to his or her personal relationships, does not undermine marriage because it is not an official sanction of a relationship.

Although unnecessary, the second sentence of the amendment affirms the narrowness of its scope and application as being only to the State of North Carolina and its political subdivisions. The constitution does not generally govern private matters and is a limitation on the power of the state.

Therefore, this proposed amendment protects the meaning of marriage, permits statutory rights or benefits to be extended to all individual citizens (though only to
married couples on the basis of a relational status), and affirms the absence of its application to private contracts, businesses, and affairs.

**What is a “domestic legal union”?**

Neither the General Assembly nor the courts of North Carolina have ever used the phrase “legal union.” Because legislative history is of minimal judicial value in North Carolina, see, e.g., *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 657 (1991), the clear meaning of “legal union” in other contexts and usages may be instructive. This is because the aim of any reviewing court will be “to discover the connotation which the legislature attached to the words, phrases, and clauses employed, (thus) the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the statute must be construed as it was intended to be understood when it was passed.” *Southern Bell Tel. & Tel. Co. v. Clayton*, 266 N.C. 687, 689, 147 S.E.2d 195, 196 (N.C. 1966) (citations omitted).

First, the word “legal” is a term of art, *Lorillard v. Pons*, 434 U.S. 575, 583 (1978), and its usage confines the reach of the amendment to those unions or statuses that derive their existence from the law. *See, e.g., Griffin v. U.S.*, 502 U.S. 46, 58 (1991)

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1 Neither the legislature nor any local governmental entity can extend benefits to a “couple” without creating a legal status for them. As further described below, any governmental recognition of a legal status for an unmarried couple would violate the “only domestic legal union” limitation.


For purposes of federal law, “‘marriage’ means only a legal union between one man and one woman as husband and wife . . . .” 1 U.S.C. § 7 (2005) (emphasis added). This federal definition of marriage, enacted in 1996, is consistent with the long-standing definition in Black’s Law Dictionary: marriage is the “[l]egal union of one man and one woman as husband and wife.” BLACK’S LAW DICTIONARY 876 (5th ed. 1979) (emphasis added). The phrase “legal union” has never been challenged as vague in the context of a governmentally recognized family status. Thus, in the context of a marriage provision, with the additional modifier of “domestic,” “legal union” could not reasonably be construed to refer to some other kind of union, such as a trade or labor union, or even a credit union. In fact, no trade union, credit union, or other form of union has ever been referenced by a court as a “domestic legal union.” Both the verbiage itself, coupled with the context of its usage, makes the meaning of “legal union” in the proposed amendment quite clear.
Additionally, the phrase “legal union” also encompasses civil unions, domestic partnerships, same-sex marriages, and any other variety of governmentally recognized familial relationship. For example, in California, the phrase “legal unions” is well defined in both statutory and case law to mean any kind of officially recognized status for biologically unrelated adults joined together in an intimate relationship. The California Family Code states as follows:

A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.

Cal. Fam. Code § 299.2 (emphasis added). In commenting on this statute, the California Court of Appeal stated: “a same-sex legal union that is valid in another jurisdiction will be recognized by California as a domestic partnership (§ 299.2), but not as a marriage (§ 308.5).” Knight v. Superior Ct., 128 Cal. App. 4th 14, 21 (Cal. Ct. App. 2005) (emphasis added). Thus, the California Family Code and the Court of Appeal call same-sex relationships with official status “legal unions.” Indeed, in Knight, the Court of Appeal referred to officially recognized domestic partnerships (including opposite-sex domestic

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5 See Bishop, 447 F. Supp. 2d at 1249-50 (referencing a Canadian “same-sex marriage” as a “legal union”).
partnerships) as “unions” or “legal unions” eleven times. See Knight, 128 Cal. App. 4th at 18 (referring to “such unions”); 19 (describing marriage and domestic partnerships as “two types of unions”); 21 (quoting the “legal union” language of the statute and again referring to any state-recognized same-sex relationship as a “legal union”); 24 (“such unions”); 25 (referring to intent of laws of other states as being “to prohibit the recognition of other types of domestic unions or partnerships”); 29 (“such unions”); 31 (referring to a registered domestic partnership as a “legal union”; to “children of the union”; to “the benefits associated with their [domestic partners’] union”; and to “the two types of unions [marriage and domestic partnerships]”) (emphasis added).

Given the longstanding usage of “legal union” to refer to marriage, and the explicit use of “legal union” to refer to any kind of officially recognized domestic partnership or same-sex relationship in the law of other states or countries (e.g., California, Massachusetts, or even Canada), it would seem specious to argue that the phrase “legal union” is vague when used in the context of a marriage amendment. In other words, the concept of a “legal union” is well settled as an all-encompassing kind of officially recognized status for biologically unrelated adults joined together in an intimate relationship. Its usage in the context of a marriage amendment would only serve to bolster the strength and clarity of the amendment.

**Constitutional Principles**

As previously stated, the proposed amendment would not regulate the private interactions of individuals and businesses. This is true even if the proposed amendment contained only its first sentence. This is because the constitution applies only to
government action and does not govern interactions between private parties. The North Carolina Supreme Court has made this abundantly clear:

As a matter of fundamental jurisprudence the Constitution itself does not recognize or create rights which may be asserted against individuals. Instead, the Constitution is the instrument by which “We, the people of the State of North Carolina,” first acknowledge our individual rights and liberties and then create a government to better secure our enjoyment of those rights and liberties. The significant fact is that “We, the people,” created the Constitution and the government of our State in order to limit our actions as the body politic. The Constitution is intended to protect our rights as individuals from our actions as the government. The Constitution is not intended to protect our rights vis-a-vis other individuals.


**Forbid Private Contracts?**

Beyond general constitutional principles, the second sentence of the proposed amendment makes clear that the scope of the amendment does not impact private dealings. Even if the second sentence did not exist, the amendment could not be construed to impact private contracts. This is because a “legal union” should not be confused with the private conduct and/or contracts of private entities. *See, e.g., State v. Holm*, 137 P.3d 726, 743 (Utah 2006) (“We agree with the dissent’s statement that any
two people may make private pledges to each other and that these relationships do not receive legal recognition . . .

Of course, a marriage is not merely a private contract as it involves both the individuals purporting to marry as well as the state. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414, 415 (1945) ("There are three parties to a marriage contract—the husband, the wife and the State. For this reason marriage is denominated a status, and certain incidents are attached thereto by law which may not be abrogated without the consent of the third party, the State."); *Dudley v. Dudley*, 225 N.C. 83, 86, 33 S.E.2d 489, 491 (1945) (“Marriage is not a private affair, involving the contracting parties alone. Society has an interest in the marital status of its members . . ."). Conversely, the parties to a contract do not necessarily carry a joint legal status like “spouse,” but carry certain *individual* rights and remedies arising at law to each.

Likewise, the proposed amendment would not prohibit private employers from contracting or otherwise extending benefits based on its own internal policies. Any status employed by the company for the extension of benefits is not one derived at law, but created by the company to do business as it sees fit. Thus, if a company in North Carolina wanted to extend certain privileges or benefits to one of its employees because that employee possessed a same-sex marriage license from another jurisdiction, the proposed amendment would not impede that company's ability to do so.7

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7 Thus, employers like Duke Power and others who presently offer same-sex domestic-partner benefits will not have to cease so doing upon adoption of the proposed amendment. See http://www2.journalnow.com/news/opinion/2011/sep/09/wsopin02-victor-flatt-guest-columnist-gops-discrim-ar-1369979/.
Finally, the proposed amendment would protect private companies from being forced by government to accord a status to unmarried relationships, since such government action would give legal status to the relationships. Therefore, the proposed amendment protects private businesses in both (a) preventing forced recognition of non-marital relationships, and (b) assuring their freedom to recognize relationships in a manner that is consistent with their business plan or practices.

**Concerned With Benefits?**

The proposed amendment does not proscribe the dissemination of any form of benefit or privilege, even if such benefits support the same-sex partner of a governmental employee. The proposed amendment is, by its own language, unconcerned with benefits. What the proposed amendment does is limit to only marriage the types of domestic legal unions that may form the basis for the dissemination of benefits.

For example, under the proposed amendment, the State of North Carolina could allow its employees to designate any one additional person as a beneficiary of any retirement benefits they might receive, or as a beneficiary of their health coverage. The fact that the same-sex partner of a state employee might be designated as that beneficiary would be completely permissible under such a scheme since the dissemination of the benefits is not premised on any domestic legal union, but only the employee’s designation of the beneficiary.

**Judicial Enforcement?**

The proposed amendment would not interfere with the enforcement of private contracts, nor prohibit the creation of a set of default rules for a private contract, so long
as the government and courts do not accord official status to any domestic relationship created by the contract, but rather treats the individuals as individual parties to a contract. The judicial enforcement of the individual rights of the parties to a private contract remains completely permissible under the proposed amendment.

**The Idaho Experience**

In 2006, the State of Idaho enacted a marriage amendment virtually identical to North Carolina’s proposed amendment. When the Idaho Attorney General was asked in 2006 to interpret Idaho’s then-proposed constitutional language to determine whether it would prevent private-sector recognition of same-sex relationships, he concluded that it would not. “[E]mployers and employees” would be able to “contract for the provision of, for example, health care benefits or leave benefits to be provided to same-sex couples where one of the individuals works for the employer.” See Idaho Attorney General Opinion No. 06-1 at 20. Two years later, after the Idaho amendment’s passage, the Attorney General affirmed that interpretation. See February 4, 2008 Letter to Senator Fulcher RE: File No. 08-21508 (interpreting the Idaho amendment in the context of a municipal health insurance program for same-sex domestic partners).  

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8 No private contract, terminable by its terms or the will by either party, can qualify as a domestic legal union of two persons. A domestic legal union is created only when the state designates an official domestic relationship through licensing and/or regulation. Unmarried persons entering a private contract of any nature would not run afoul of the proposed amendment any more than unmarried persons to execute a standard power-of-attorney form.