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## **Legal Memorandum in Support of West Virginia Marriage Protection Amendment**

The West Virginia Marriage Protection Amendment states: *“Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for same-sex relationships to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”*

The need for such an amendment is obvious. Massachusetts, Connecticut, Vermont, New Hampshire, Iowa, and the District of Columbia have already legalized same sex marriage. In California, the courts first overturned a ban on same-sex marriage adopted by the people, but the voters once again approved a state constitutional amendment limiting marriage to only one man and one woman. However, a federal court has since declared even that amendment unconstitutional under both the due process clause and the equal protection clause of the federal constitution. That decision is currently on appeal.

In response to the onslaught against traditional marriage, 30 states have adopted amendments to their constitutions defining marriage as only between one man and one woman. Although West Virginia does have a Defense of Marriage Law (“DOMA”), it has not yet adopted a constitutional amendment protecting marriage. As a result, the institution of marriage remains vulnerable in West Virginia.

### **A. Marriage is Entitled to the Best Possible Protection.**

The institution of marriage is absolutely essential to a healthy society. As the United States Supreme Court has stated:

[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilizations.

*Murphy v. Ramsey*, 114 U.S. 15, 46 (1885) (rejecting constitutional challenge to a federal statute denying franchise in federal territories to those engaged in polygamous cohabitation). That “sure foundation” is under constant attack today.

The courts in three states, Massachusetts, Connecticut, and Iowa, either directly or indirectly legalized same-sex “marriage.” In another, California, the courts tried to do so, but were unsuccessful, as stated above. In New Hampshire and Vermont, same-sex marriage was ushered in by means of the legislative process.

Because marriage is so essential to civilization itself, it is entitled to the best possible protection from all threats. The well-being of society is inextricably tied to the well-being of marriage. As such, we must do everything in our power to place marriage beyond the reach of social engineers, activist courts, and even well-intended legislators.

### **B. Marriage is Under Assault via Backdoor Attacks.**

Not only is marriage under attack by means of direct frontal assaults, it is also threatened by backdoor efforts. The institution of marriage and the family is weakened by virtue of the granting of parental rights to same-sex partners. Sadly, this erosion of marital rights has already begun in West Virginia.

In 2005, in the case of *In re Clifford K.*, 619 S.E.2d 138 (W.Va. 2005), the Supreme Court of Appeals awarded custody of the biological child of a lesbian’s deceased partner to the lesbian over the claim of the child’s grandparents. Although the decision was premised on the theory that the lesbian partner was a “*psychological parent*” and not the child’s “*legal parent*,” the effect on marriage and the family was equally harmful.

Nor is West Virginia’s case an isolated example. In fact, these types of legal challenges are being filed all over the country. As of this writing, some 16 other state courts have also recognized “*de facto*” or “*psychological parenthood*” in the context of same-sex relationships.<sup>1</sup> *In re Clifford K.* may have been the first such case in West Virginia, but it will likely not be the last.

### **C. Marriage is Under Assault by Same-Sex “Marriages” Obtained in Foreign States.**

In addition to these imminent threats against traditional marriage, it is also threatened by same-sex couples obtaining “marriages” in a foreign state and returning to West Virginia to demand legal recognition of those “marriages.” Some states have already succumbed to this threat, most recently New York. Even though same-sex marriages could not be obtained in New York, the courts ruled in the case of *Martinez v. County of Monroe*, 50 A.D.3d 189 (Sup. Ct. N.Y.), *app. dismissed*, 850 N.Y.S.2d 740 1562, 06-02591 889 N.E.2d 496 (Ct. App. N.Y. 2008), that once a same-sex marriage is obtained elsewhere it is entitled to full legal recognition in New York.

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<sup>1</sup> Those states are: North Carolina (2008), Delaware (2006), California (2005), Indiana (2005), Washington (2005), Colorado (2004), Maine (2004), Nebraska (2002), Pennsylvania (2001), Minnesota (2000), New Jersey (2000), Rhode Island (2000), Massachusetts (1999), Missouri (1996), Wisconsin (1995), and New Mexico (1992).

Although West Virginia has enacted a Defense of Marriage Law (DOMA), W.V. Stat. Ann. §48-2-603, that provides some protection against this type of threat, litigation brought by the ACLU of West Virginia has challenged that statute, and the issue has not been fully and finally resolved. Indeed, even the viability of the federal Defense of Marriage Act has been called into question by the courts, and part of it has been struck down as unconstitutional.<sup>2</sup>

The surest and best protection from all these threats is a state constitutional amendment defining marriage as between one man and one woman only, and erecting a barrier against creation or recognition of all counterfeits. The Marriage Protection Amendment is the only proposal that accomplishes these goals.

#### **D. A One-Sentence Amendment Leaves Marriage Vulnerable.**

While a one-sentence amendment may at first glance appear sufficient to protect marriage against all these challenges, experience has proved it is not. It may be argued that the language proclaiming that “only the union of one man and one woman shall be valid or recognized as marriage” would preclude recognition of a same-sex relationship as marriage. However, case law has made it clear that such language will not operate to preclude recognition of civil unions or domestic partnerships.

In the case of *Knight v. Superior Court*, 128 Cal. App. 4th 14 (Cal. Ct. App. 2005), the California appellate court was faced with this very question. Voters had approved Proposition 22, which stated: “Only marriage between a man and a woman is valid or recognized in California.” The legislature nevertheless enacted a domestic partnership scheme into law whereby all the rights, benefits, and protections of marriage were granted to registered domestic partners. The legal question presented asked whether the domestic partnership law violated the marriage protection law. The court ruled that it did not.

Among other things, the court held that a domestic partnership is not a “marriage,” and therefore the marriage protection law, prohibiting recognition of any other relationship as a “marriage” did not apply. The court compared and contrasted the one-sentence California law with other marriage protection laws that included a second sentence, such as Nebraska’s, that specifically stated: “The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” *See id.* at 24-25 (quoting Neb. Const. art. I, sec. 29).

Accordingly, the court wrote, if the citizens of California had intended to protect not only the name of marriage alone but also the benefits and privileges of marriage, they could easily have included this second sentence, or one like it. Because they did not, the court logically inferred that they did not so intend. Other courts have reached similar conclusions. *See, e.g., B.S. v. F.B.*, 25 Misc. 3d 520, 883 N.Y.S.2d 458 (N.Y. Sup. Ct.) (finding that a civil union “was not a marriage” in

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<sup>2</sup> *See, e.g., Massachusetts v. U.S. Dept. of Health and Human Svcs.*, 698 F.Supp.2d 234 (D. Mass. 2010) (striking section 3 of DOMA), *app. pending.*

the context of a petition urging recognition of a same-sex divorce).

In addition, a strong argument was made in California that the one-sentence amendment was intended to protect only against recognition of same-sex marriages obtained *outside* the state, and did not address marriages created *inside* the state. After all, the plain language of the law said “valid or *recognized* in California.” Although this argument was not ultimately successful in California, it was forcefully made and had a certain plausible logic to it. A one-sentence amendment thus remains vulnerable to the same sort of argument in a different court.

In West Virginia, then, enacting a one-sentence amendment would serve only to protect the word “marriage,” and leave open the conferral of everything else -- all the benefits and privileges of marriage -- on same-sex couples simply by using another name, such as “civil union.” This exposure can also lead in turn to an equal protection challenge in court, in which the proponents of same-sex marriage would argue that having given same-sex couples everything but the name, there is no rational basis for not giving them the name “marriage,” too. Such arguments have already been proven effective. *See, e.g., In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008) (upholding equal protection challenge to one-sentence marriage protection law).

### **Conclusion**

The need for a constitutional amendment protecting marriage in West Virginia is obvious. The question that remains to be answered is whether a comprehensive amendment should be adopted, protecting not just marriage in name only but all the benefits and privileges of marriage, or instead a one-sentence amendment should be enacted, leaving the all-important institution of marriage vulnerable to counterfeit relationships that ultimately undermine it altogether.

Liberty Counsel urges that the comprehensive, two-sentence Marriage Protection Amendment be adopted. Marriage is simply too vital to society to leave it unprotected against all possible challenges.