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MEMORANDUM

To: Indiana State Senate Judiciary Committee

From: James Bopp, Jr., Brian L. Buchanan

Date: January 31, 2007

Re: Opponents' claims about SJR 7

Opponents of the marriage amendment to the Indiana Constitution make five claims on their website, stoptheamendment.org, about how the amendment will affect other rights of unmarried persons. They claim that the amendment will weaken domestic violence protections, challenge contractual care agreements, ignore the best interests of children (by preventing their adoption by unmarried persons), diminish the quality of higher education (because universities will be forced to cancel domestic partner benefits), and make Indiana's economy less competitive (because private employers will be forced to cancel domestic partner benefits). The second sentence of the constitutional amendment is directed at the judiciary, not the legislature or government agencies, and prevents the judiciary from *construing* Indiana law or Indiana's Constitution to require that marital status or the incidents of marriage be conferred upon unmarried couples or groups. Therefore, all of these claims are either false because the rights are not affected by the amendment, or they are misleading because the rights can be protected by the legislature.

Argument 1: The amendment weakens domestic violence protections.

Indiana Code 35-42-2-1.3(a) says that domestic battery is committed by a person who (1) is or was a spouse of the person; (2) is or was living as if a spouse of the other person as provided in subsection (c); or (3) has a child in common with the other person. Subsection (c)

says "In considering whether a person is or was living as a spouse of another individual in subsection (a)(2), the court shall review the following: (1) the duration of the relationship; (2) the frequency of contact; (3) the financial interdependence; (4) whether the two individuals are raising children together; (5) whether the two individuals have engaged in tasks directed toward maintaining a common household; and (6) other factors the court considers relevant.

Since the domestic battery statute includes both spouses (and former spouses) and people who live or lived "as if a spouse of the other person," the statute clearly includes a distinct category for people who are not now, and never were, married. Since the constitutional amendment only prevents the courts from construing laws to require domestic partner protections, but does not stop the legislature from explicitly granting such protections, the domestic battery law would continue to protect unmarried persons living as if a spouse. There is no way for the court to construe this statute to provide benefits of the incident of marriage to unmarried couples, because the law already explicitly protects unmarried couples.

The amendment opponents mention that two lower Ohio appeals courts have ruled that that state's marriage amendment makes it unconstitutional to apply domestic violence statutes to unmarried couples. However, the Ohio amendment was different than the Indiana proposed amendment because the Ohio amendment does not allow *the state* to create or recognize a special status, whereas the Indiana amendment only prevents *the courts* from construing laws or the constitution to include a special status. Also, the Ohio rulings have been characterized as "poorly-reasoned" and eight of 10 Ohio appellate courts have found that applying domestic violence statutes to unmarried couples *is* constitutional. See Official Advisory Opinion of Virginia Attorney General Robert McDonnell, p.9-12.

Of course, if the legislature wanted to be extra careful that unmarried persons are protected by the domestic battery statute, nothing would prevent it from making the language of this statute even more explicit in its protection of the unmarried, though that appears unnecessary.

Argument 2: The amendment challenges contractual care agreements.

The proposed marriage amendment prohibits courts from construing state laws or the state constitution from requiring that the legal incidents of marriage be conferred upon unmarried couples. It does not regulate private contracts or private behavior. Contracts, wills, advance medical directives, shared equity agreements, etc. are all rights that do not arise from marriage. They are currently available to the unmarried and will continue to be because the amendment does not affect the rights of private parties to enter into a contract.

The law concerning contracts is well settled in Indiana. An offer, acceptance, plus consideration make up the basis for a contract. *Zimmerman v. McColley*, 826 N.E.2d 71 (Ind.App 2005). The right to contract is not based on marriage.

Indiana Code 29-1-5-1 states the requirements for making a will: any person of sound mind age 18 or older may make a will. The right to make a will is not based on marriage.

Indiana Code 30-5-4-1 lists the conditions for creating a valid power of attorney. None of these conditions relate to marital status in any way.

Argument 3: The amendment ignores the best interests of children

This argument incorrectly states that the amendment will prevent single persons from adopting children in Indiana. Single persons are allowed, and will continue to be allowed, to adopt children. Indiana Code 31-19 allows adoption by single adults, married couples and stepparents. The law does not currently allow *joint* petitions for adoption by unmarried couples.

The opponents incorrectly imply that the Indiana Supreme Court has allowed unmarried couples to jointly adopt under Indiana law. The Indiana Court of Appeals, in *In re Infant Girl W.*, 845 N.E.2d 229 (Ind.Ct.App.2006), allowed a same-sex couple to file a joint petition to adopt a child. The Indiana Court of Appeals was not considering whether the status of marriage or the legal incidents of marriage must be conferred on unmarried couples; it construed the word "resident" in the adoption statute, which allows *single* persons to adopt in Indiana, to also mean *residents*. So the amendment would not affect this Court of Appeals ruling allowing same-sex couples to apply for adoption in any way. The Indiana Supreme Court denied transfer of the Court of Appeals case, and denial of transfer does not constitute approval of the Court of Appeals decision and has no legal effect other than to terminate the litigation between the parties in the Supreme Court. The law on this issue has not been settled by the Indiana Supreme Court.

Of course, the passage of the amendment would not prevent the legislature from explicitly allowing unmarried or even same-sex couples to file jointly for adoption, or for that matter, reversing the decision in *In re Infant Girl W.*, by amending the adoption statute.

Argument 4: The amendment diminishes the quality of higher education

Again, this amendment prevents the courts from construing that the Indiana Constitution or state statutes require that marital status or the legal incidents of marriage be conferred upon unmarried couples. It does not prevent the legislature or state agencies from creating or recognizing a special legal status, and it does not prevent the universities from providing such benefits to people of a special status. Many Indiana universities currently give domestic partner benefits to their employees legally. Nothing in the amendment will change their ability to continue to do so.

Argument 5: The amendment makes Indiana's economy less competitive.

Benefits of employees of private companies will be unaffected because these matters are private contracts between employers and their employees. Private employers and private

contracts are unaffected by the proposed amendment, as the constitution controls the behavior of government, not of private individuals. As Chris Stovall notes on page three of his white paper, no person in any state that has passed a marriage amendment has ever had his or her benefits cut off because of his or her marital status.

Conclusion

The opponents' five arguments made at stoptheamendment.org are false allegations aimed at scaring people who would otherwise support the amendment into opposing it. These arguments employ two tactics: 1) they make comparisons with states that passed marriage amendments that used a completely different second sentence, one that forbids the state or its subdivisions from creating or recognizing a special legal status for unmarried persons, or 2) they make allegations that are completely unfounded and have not been substantiated in any state that has passed a marriage amendment (such as the claim that private employers will no longer be able to give domestic partner benefits). None of these arguments justify opposition to SJR 7.