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July 10, 2004

The Federal Marriage Amendment Preserves Marriage as the Union of One Man and One Woman and is Consistent with Constitutional Jurisprudence and Federalism

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We write this letter on behalf of a broad coalition of policy, religious and legal organizations and individuals to address several issues raised in a June 24, 2004 Covington & Burling memorandum (the “Covington Memo”). When read in conjunction with a July 2, 2004 letter we prepared concerning the legal attacks being waged against marriage in the courtrooms, it becomes clear that the federal marriage amendment must pass.¹

In an effort to provide a ready reference to the arguments raised in the Covington Memo,

¹ The July 2 letter discusses in great detail the 33 lawsuits taking place in 12 states – with lawsuits in 9 of those states commenced since February 12, 2004, when San Francisco Mayor Gavin Newsom began issuing certificates to same-sex couples. In many cases, the most shocking aspect is the willingness of some judges to abdicate their role as judge to become legislator, and the willingness of some state attorney generals to abdicate their role as law enforcement officials to become political activists. Without question, there is a culture-changing debate taking place in this country, but it is not taking place in the state legislatures where elected representatives can debate the issue. Instead, the battle is in the courtrooms of America. Although the fact that courts, and not legislators, have been the ones making the laws granting same-sex couples legal benefits is itself shocking. The disturbing reality is that those who believe marriage should be limited to the union of one man and one woman are frequently not allowed to participate in the courtroom battles. Instead, those who support traditional marriage are often kept out of the litigation by courts, state attorney generals, and the homosexual advocacy organizations on the erroneous theory that same-sex marriage does not concern them and will not harm marriage or the country. Thus, some courts are rushing ahead without the opportunity for debate, dialogue, and with absolutely no evidence concerning the impact same-sex marriage would have on the culture.

we will address each of their arguments in order. Contrary to the conclusions reached in the Covington Memo, the Federal Marriage Amendment (“FMA”) preserves marriage as the union of one man and one woman in a way that is consistent with constitutional jurisprudence and federalism. Accordingly, in the first section of this letter, we rebut the argument that “The FMA is Ambiguous and Self-Contradictory.” The second section exposes the intellectual dishonesty in the argument that “The FMA Would Threaten Private Recognition of Marriage of Same-Sex Couples, Even By Religious Bodies.” The third and fourth sections reveal the analytical error in the arguments that “The FMA Displaces Democratic Decision-making” and the “The FMA is Inconsistent with Principles of Federalism.” The fifth section addresses the argument that “The FMA Would Constrain All Three Branches of Government.” The final section discusses the current legal battles taking place, which undermines the argument, that “The FMA Would Precipitate Continuing Struggle.”

I. THE TWO SENTENCES IN THE CURRENT FMA ARE CONSISTENT.

The two sentences in the current FMA are consistent with each other. The current FMA provides that

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, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

The first sentence is a broad declaration that marriage throughout the country is limited to a union of one man and one woman. It also acts as a broad prohibition on conferring the legal status of marriage on any relationship other than that of a man and a woman. The second sentence reinforces the first sentence. It reinforces the first by expressly stating that neither the U.S. Constitution nor a state constitution may be construed to require same-sex marriage. The decision in *Goodridge v. Department of Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003), exemplifies the necessity of that portion of the second sentence.

In *Goodridge*, the Massachusetts Supreme Judicial Court (“SJC”) stated that “[t]he everyday meaning of ‘marriage’ is ‘the legal union of a man and woman as husband and wife,’ and the plaintiffs do not argue that the term ‘marriage’ has ever had a different meaning under Massachusetts law.” *Id.* at 319.² However, the SJC “reformulated “marriage” to mean the “union of two persons.” Significantly, under the Massachusetts’ constitution, the SJC was without authority to redefine the indisputable understanding of marriage from the “union of a man and a woman” to the “union of two persons.” See *Opinion of the Justices to the Senate*, 324 Mass. 746, 85 N.E.2d 761 (1949) (unambiguous words in the constitution must be interpreted according to their meaning at the time they were added to the constitution). Nevertheless, four of the seven judges held that it would “construe civil marriage to mean the voluntary union of two persons as

² The word “marriage” appears in the Massachusetts constitution in the only section that places an express restriction on the authority of the judiciary.

spouses, to the exclusion of marriage.” *Goodridge*, 440 Mass. at 343.³

The second sentence of FMA makes clear, for those looking for wiggle room in the language of the first sentence, that the FMA prohibits a repeat of the *Goodridge* decision. While the Covington Memo describes the first part of the second sentence as inconsistent with the first sentence, the level of judicial activism currently taking place across the country mandates a clear expression that marriage at the state and federal level is limited to the union of a man and a woman. The second sentence closes the door to any argument that the first sentence applies only to rights arising under the federal constitution, and therefore allows courts and legislatures to permit same-sex marriage under their state constitutions. This is particularly necessary given the fact that in the state marriage cases, those challenging the marriage laws as unconstitutional rely heavily on the argument that state constitutions grant broader individual rights than the federal constitution. *See* Covington Memo at 5 (“state courts are absolutely free to interpret state constitutional provisions to afford greater protections to individual rights than do similar provisions of the United States Constitution”). Whether or not a state constitution affords broader individual rights, the FMA reserves marriage in all fifty states as the union of one man and one woman.

The second sentence also prohibits a repeat of the *Baker v. State*, 744 A.2d 864 (Vt. 1999) decision by the Vermont Supreme Court. In that case, the court construed the state constitution to require the state to grant the same legal incidents of marriage to same-sex couples as are granted to marriages entered into by a man and a woman. After passage of the FMA, no court could render such a decision.⁴ The two sentences of the FMA accomplish the same purpose – to reserve marriage for a union of a man and a woman. The two sentences are consistent.

II. THE FMA DOES NOT REACH PRIVATE CONDUCT NOR DOES IT THREATEN PRIVATE RECOGNITION OF SAME-SEX RELATIONSHIPS.

The FMA does not reach private action nor does it prohibit private recognition of same-sex relationships. Marriage is a unique institution with a distinct definition and with distinct requirements for entry into the relationship. Two individuals may not simply declare themselves married and thus obtain the legal status of marriage. In all fifty states, a marriage may only be entered into with state sanction and approval.

A private religious group may conduct a religious ceremony to “unite” two persons of the same-sex, but such a union is not a marriage for legal purposes. Marriage is a public legal status.

³ A federal lawsuit challenging the *Goodridge* decision as violating the federal guarantee of a republican form of government – i.e., the court usurped the powers of the legislature – was unsuccessful before the First Circuit Court of Appeals. The Court of Appeals held that absent extreme cases, such as *abolishing* the Legislature or creating a *monarchy*, there is no violation of the federal Guarantee Clause. *See Largess v. Supreme Judicial Court for State of Massachusetts*, 2004 WL 1453033, 1st Cir.(Mass.).

⁴ That which a legislative body “may” enact on its own is far different than being “required” to act pursuant to a court mandate.

See Maynard v. Hill, 125 U.S. 190, 205 (1888) (marriage is the “most important union in life, having more to do with morals and civilization of a people than any other institution” and its status is conferred by the legislature); *see also Loving v. Virginia*, 388 U.S. 1, 7 (1967) (stating, “[M]arriage is a social relation subject to the State's police power.”).

The Covington Memo argues that the FMA would be interpreted as the Thirteenth Amendment (regarding slavery) has been interpreted to prohibit private conduct. The Thirteenth Amendment is distinguishable from the FMA. Unlike marriage slavery does not require a state sanction – it is a purely private relationship. Because slavery may exist without state sanction or recognition, the Thirteenth Amendment applies to private conduct. Marriage, in contrast, cannot exist without government sanction. The FMA does not reach private conduct, nor would it regulate private ceremonies. A ceremony conducted by a private group is merely ceremonial or symbolic, not legal. The Second, Fourth, Fifth and Eighth Amendments are not limited by their text to state action, but it is clear they apply only to state action

A thirteen-year-old child may not make a “driver’s license” on a home computer and then protest when stopped by the police for driving without a license. Because the thirteen-year-old may not legally drive does not mean that private acts of playing driver off the public highways or creating a “license” for non-legal purposes are prohibited. However, if this person used the fake license to obtain access to a bar, then that action would come within the law. In the same way, it is impossible for a same-sex couple to conduct a private religious ceremony that legally results in marriage, and therefore, the FMA doesn’t apply to the private action or ceremonies.

The FMA cannot “punish” religious organizations that conduct ceremonies recognizing same-sex relationships. Nor would the FMA deny government funds to religious groups or deny charitable tax status to those organizations. The FMA also does not apply to private employment agreements providing health insurance to same-sex couples or other private contractual rights.⁵ The FMA simply does not apply to private conduct.

⁵ The Covington Memo cites the case of *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) in support of its argument that the FMA would apply to private conduct. This case suggests nothing of the sort. In *Shahar*, the Attorney General of Georgia withdrew a job offer from an attorney who had participated in a same-sex “marriage” ceremony. Absent the FMA, an Attorney General would prevail when choosing to hire or retain staff attorneys. The government as an employer is given great deference in hiring/firing under the application of the *Pickering* balancing test used in *Shahar*. The FMA would change nothing with regard to how employees are treated. The statement that people could be “punished” under the FMA for private ceremonies cannot be supported by the facts of *Shahar* – the fact is that the employee was not “punished” for entering into a “same-sex” marriage. It was a well-publicized, controversial ceremony that was attended by people in the department. *Id.* at 1101. The revelation that she was “marrying” a woman “caused quite a stir” in the office, causing staff attorneys to wonder about the employee’s decision-making ability under the facts of the case. *Id.* at 1105-06.

III. THE FMA REPRESENTS THE VERY ESSENCE OF DEMOCRATIC DECISION-MAKING.

The Covington Memo argues that the FMA would displace democratic decision-making. The argument seems to be that the FMA would usurp the power of the people to decide for themselves whether to allow same-sex marriage. In fact, the FMA, and the amendment process, represents the very essence of democratic decision-making. The people of the United States have the right to amend their Constitution. Once the FMA is passed through the Senate and the House, 38 states must ratify the amendment. It is the people, acting through their elected representatives, who have the right to amend the United States Constitution. This act represents the democratic process at its apex.

The Covington Memo also cites Justice Scalia's dissent in *United States v. Virginia*, 518 U.S. 515, 566 (1996) for the proposition that amending the Constitution prohibits the people from changing their perceptions and opinions. This argument demonstrates a lack of understanding of the democratic process. Moreover, the statement by Justice Scalia is taken out of context and twisted to mean something he did not say.⁶ Justice Scalia dissented from the *Supreme Court* removing of the debate from the public over whether women should be admitted to military schools.

Instead of supporting the position of the opponents of the FMA, Justice Scalia's dissent supports the position of the FMA's supporters. The FMA puts the debate right where it should be – with the people and their elected representatives. The FMA represents the highest and best of the democratic decision-making process.⁷

IV. THE FMA IS CONSISTENT WITH THE PRINCIPLES OF FEDERALISM.

Marriage has always been a national policy between one man and one woman. Utah's battle over polygamy is instructive. In 1862, the United States Congress passed the Morrill Act, which prohibited polygamy in the territories, disincorporated the Mormon church, and restricted the church's ownership of property. *See Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 19 (1890). In *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court upheld the Morrill Act, stating that polygamy has always been "odious" among the Northern and Western nations of Europe, and from "the earliest history of England polygamy has been treated as an offense against society." *Id.* at 164. The court noted "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 166. To further

⁶ In fact, one need look no further than the Constitution itself to recognize the absurdity of this argument. The Eighteenth Amendment was ratified in 1919 to prohibit the "manufacture, sale, or transportation of intoxicating liquors...." However, fourteen years later, the people ratified the Twenty-first Amendment that repealed the ban on liquor. Even a Constitutional Amendment may be changed over time by another Constitutional Amendment.

⁷ To the extent that the Thirteenth, Fourteenth and Fifteenth Amendments violated federalism, the states consented to this act by the passage of these amendments.

the national policy of one man and one woman, Congress passed the Edmunds Act in 1882, and later passed the Edmunds-Tucker Bill in 1887. *See Late Corporation of the Church*, 136 U.S. at 19. *See also Davis v. Beason*, 133 U.S. 333 (1890).

As a condition to be admitted to the Union, Congress required the inclusion of anti-polygamy provisions in the constitutions of Arizona, New Mexico, Oklahoma, and Utah. *See* ARIZONA ENABLING ACT, 36 STAT. 569; NEW MEXICO ENABLING ACT, 36 STAT. 558; OKLAHOMA ENABLING ACT, 34 STAT. 269; UTAH ENABLING ACT, 28 STAT. 108. *See also Murphy v. Ramsey*, 114 U.S. 15 (1885). For Arizona, New Mexico and Utah, the Enabling Acts permitting these states to be admitted to the Union required that the anti-polygamy provisions be “irrevocable,” and that in order to change their laws to allow polygamy, each state would have to persuade the entire country to change the marriage laws. *See Romer v. Evans*, 517 U.S. 620, 648-49 (1996) (Scalia, J., dissenting). Idaho adopted the constitutional provision on its own, and the 51st Congress, which admitted Idaho into the Union, found its constitution to be “republican in form and...in conformity with the Constitution of the United States.” ACT OF ADMISSION OF IDAHO, 26 STAT. 215. To this day, Arizona, Idaho, New Mexico, Oklahoma and Utah state in their constitutions that polygamy is “forever prohibited.” *See* ARIZ. CONST. art. XX, ¶ 2; IDAHO CONST. art. I, § 4; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; Utah Const. art. III, § 1.

When commenting on the national policy of marriage as the union of one man and one woman, the Supreme Court declared the following:

[C]ertainly no 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 civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy, 114 U.S. at 45.

The national ban on polygamy, or put another way, the national policy of marriage between one man and one woman, is enforced in many ways. A juror who has a conscientious belief that polygamy is right may be challenged for cause in a trial for polygamy, and anyone who practices polygamy is ineligible to immigrate to the United States. *See Witherspoon v. Illinois*, 391 U.S. 510, 536 (1968) (citing *Reynolds*, 98 U.S. at 147, 157); 8.U.S.C. § 1182(A). That is to say, a polygamous relationship recognized in a foreign jurisdiction will not be legally recognized in the United States.⁸

⁸ If same-sex marriage were sanctioned it would be virtually impossible to ban polygamy. When Tom Green was put on trial for polygamy in Utah in 2001, several articles and editorials appeared in various newspapers supporting the practice of polygamy (*The Village Voice*, *Washington Times*, *Chicago Tribune*, and the *New York Times*). Although the ACLU initially

Although states have traditionally regulated the edges of marriage (divorce, alimony, support, custody and visitation), they have historically never regulated or altered the essence of marriage (the union of one man and one woman). The recent exception is Massachusetts, and the act by that court now threatens the rest of the nation on this central issue of marriage. The FMA merely carries forward the longstanding national policy that marriage is the union of one man and one woman, and thus is consistent with the history of marriage in this country.

V. THE FMA CONTINUES THE NATIONAL POLICY OF MARRIAGE AS ONE MAN AND ONE WOMAN AMONG ALL BRANCHES OF GOVERNMENT.

The FMA is designed to maintain the historic status quo regarding marriage as the union of one man and one woman. This core marriage policy therefore applies to all branches of government. If the Executive, Legislative or Judicial branch sought to order, enact or decree same-sex marriage, the FMA would prohibit such action. However, the FMA does not prohibit the legislature from extending legal protection or benefits to same-sex couples.

The argument in the Covington Memo that opines the FMA would tell a state court how to interpret its constitution is undercut by the admission contained in the same paragraph. The memo concedes that “a state constitution may not permit something that an otherwise valid federal law forbids. . . .” Our constitutional form of government has never permitted states to interpret their constitutions in a manner that conflicts with the federal constitution. The United States Constitution obviously preempts any state law to the contrary. *See Good News Club v. Milford Central Sch.*, 533 U.S. 98, 107 n.2 (2001) (contrary state law must yield to the United States Constitution); *Romer v. Evans*, 517 U.S. 620 (1996) (contrary state constitutional provision must yield to the United States Constitution); *Falwell v. Miller*, 203 F.Supp.2d 624 (W.D. Va. 2002) (same). The FMA is consistent with constitutional jurisprudence.

tried to minimize the idea of the slippery slope between gay marriage and polygamy, the ACLU itself defended Tom Green during his trial and declared its support for the repeal of all “laws prohibiting or penalizing the practice of plural marriage.” Polyamory (group marriage) is also an inevitable consequence of sanctioning gender-blind marriage. *See* Deborah Anapol, POLYAMORY: THE NEW LOVE WITHOUT LIMITS. Paula Ettlbrick, former legal director for Lambda Legal Defense and Education Fund, supports same-sex marriage and state-sanctioned polyamory. Ettlbrick teaches law at the University of Michigan, New York University, Barnard and Columbia. A number of other law professors similarly promote polyamory, including Nancy Polikoff at American University, Martha Fineman at Cornell University, Martha Ertman at the University of Utah, Judith Stacey, the Barbara Streisand Professor of Contemporary Gender Studies at the University of Southern California, and David Chambers at the University of Michigan.

VI. THE FMA WOULD DECREASE LITIGATION OVER MARRIAGE.

The FMA would limit the judicial chaos that is currently escalating throughout the country.⁹ There are currently about 40 separate court challenges over same-sex marriage pending, most of which began since February 12, 2004, the day San Francisco Mayor Gavin Newsom issued licenses to same-sex couples. This number increases daily. Two more suits were filed July 12 in Florida, where three other suits were filed within the past several weeks. The suits throughout the country have one thing in common – a claim that the state and federal constitution require a state to permit two people of the same sex to marry.¹⁰ The FMA would ensure the maintenance of the longstanding national policy of marriage as the union of one man and one woman. The FMA is designed to bring order and stability to the marriage union and thus to halt the current litigation frenzy.

VII. CONCLUSION.

The FMA preserves marriage as the union of one man and one woman, and places the decision on this important matter with the people. Passage of the FMA is the only way to protect marriage and it is entirely consistent with constitutional jurisprudence and federalism.

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⁹ The Civil Rights Act of 1964 began an explosion of litigation. A current search on Westlaw for only the employment provision section of the Act (Title VII) reveals 10,000 federal cases, which is the maximum number of cases Westlaw can retrieve. All of the federal and state cases would amount to several tens of thousands of cases. However, the fact that the Civil Rights Act spawned litigation is not sufficient reason to refrain from passing the Act. In the case of the FMA, the litigation is sure to decrease.

¹⁰ One Utah case argues that polygamous marriage should be permitted.