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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

July 20, 2005

Representative Jeff Merkley
House Democratic Leader
900 Court Street NE H395
Salem OR 97301

Re: Senate Bill 1000-A

Dear Representative Merkley:

This opinion responds to your question whether Senate Bill 1000-A (2005) is constitutional as written. We understand your question to be limited to the provisions of the bill relating to civil unions and whether the bill is constitutional under the recent amendment to the Oregon Constitution by Ballot Measure 36 (2004)—section 5a, Article XV, Oregon Constitution.

We believe Senate Bill 1000-A is constitutional as written.

Section 5a, Article XV, Oregon Constitution (Ballot Measure 36 (2004)), provides: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

Section 67 (1), Senate Bill 1000-A, provides that: "Partners in a civil union have substantially equivalent privileges, immunities, rights, benefits and responsibilities under the laws of this state . . . as are granted to or imposed on spouses joined in a marriage."

Section 67 (4), Senate Bill 1000-A, provides: "This section shall be construed to secure for partners in a civil union a legal status that is substantially equivalent to that conferred upon spouses in a marriage, with the privileges, immunities, rights, benefits and responsibilities that are substantially equivalent to those of marriage."

The question is whether it is constitutional under section 5a, Article XV, Oregon Constitution, to give partners in a civil union a legal status that is "substantially equivalent" to that conferred upon spouses in a marriage.

If the question were litigated, we believe the challenge would be unsuccessful because nothing in the text of section 5a, Article XV, Oregon Constitution, limits the Legislative Assembly's authority to enact legislation regulating civil unions.

The Court of Appeals in California recently decided a case raising a similar challenge to California's newly-enacted domestic partnership law.[1] In March 2000, California voters approved Proposition 22, which provides: "Only marriage between a man and a woman is valid or

[1] *Knight v. Superior Court*, 128 Cal. App. 4th 14, 18 (2005), *petition for review denied by Supreme Court*, ___ Cal. App. 4th ___ (June 29, 2005).

recognized in California."[2] In 2005, the California legislature enacted a law that gives registered domestic partners the same rights, protections and benefits and subjects them to the same responsibilities, obligations and duties under California law as are granted to and imposed upon spouses.[3] Because of the similarities between the laws of California and those of Oregon (if Senate Bill 1000-A were enacted), we believe the California court's opinion is persuasive and that Oregon courts would rule on a challenge to SB 1000-A in a similar way.

The California court held that the plain and unambiguous language of Proposition 22 "shows that the initiative was intended only to limit the status of marriage to heterosexual couples and to prevent the recognition in California of homosexual marriages that have been, or may in the future be, legitimized by laws of other jurisdictions."[4]

Likewise, we believe that the plain and unambiguous language of Ballot Measure 36 "shows that the initiative was intended only to limit the status of marriage to heterosexual couples and to prevent the recognition in [Oregon] of homosexual marriages that have been, or may in the future be, legitimized by laws of other jurisdictions."[5] The words of Ballot Measure 36 do not limit the Legislative Assembly's authority to enact legislation on civil unions.

Ballot Measure 36 does not state that the Legislative Assembly is precluded from recognizing or fostering same-sex relationships. If that had been the measure's purpose, the measure "easily and effectively could have accomplished that goal by using language akin to words used in laws from other states."[6] The plain language of the laws of other states "demonstrates an indisputable intent (1) to limit the benefits associated with marriage to marriages between men and women, and (2) to prohibit the recognition of other types of domestic unions or partnerships."[7] Ballot Measure 36 contains no similar language. Instead, Ballot Measure 36 unambiguously limits its scope to whether Oregon and its political subdivisions "will recognize the validity of marriages between persons of the same sex; it says nothing about whether other types of relationships may be permitted to enjoy the rights typically conferred upon married couples."[8]

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[2] California Family Code, section 308.5.
[3] California Family Code, section 297.5.
[4] *Knight v. Superior Court*, 128 Cal. App. 4th at 18.
[5] *Id.*
[6] *Id.*, at 24-25. The court provided these examples: Article I, section 29 of the Nebraska Constitution provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. 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 also*, Ark. Const., Amend. 83, § 2 ["Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the Legislature may recognize a common law marriage from another state between a man and a woman"]; Ga. Const., art. 1, § 4, ¶ I(b) ["No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage"]; Ky. Const., § 233a ["Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized"]; La. Const., art. 12, § 15 ["No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized"]; Ohio Const., art. XV, § 11 ["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 relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage"]; Tex. Fam. Code, § 6.204 [a marriage between persons of the same sex or a civil union granting to the parties of the relationship the legal protections, benefits, or responsibilities granted to the spouses of a marriage is contrary to public policy and void].)
[7] *Id.*, at 25.
[8] *Id.*

Senate Bill 1000-A does not create a "marriage" by another name because:

1. Under section 5a, Article XV, Oregon Constitution (Ballot Measure 36 (2004)), partners in a civil union may not marry. This limitation ensures that Oregon will not permit same-sex couples to validly marry within the state and will not legitimize or recognize same-sex marriages from other jurisdictions, as it might otherwise be required to do under the federal Full Faith and Credit Clause of the United States Constitution.

2. Section 67 (3) recognizes that many Oregon laws are intertwined with federal law, which, under the federal Defense of Marriage Act, recognizes "marriage" and "spouse" to include only partners of the opposite sex. The federal government provides many benefits to married couples, "such as marital benefits relating to social security, Medicare, federal housing, food stamps, veterans' benefits, military benefits and federal employment benefit laws."[9] None of those benefits will flow to partners in a civil union.

3. The bill does not repeal any law related to marriage or adversely affect any other ways in which marriages are recognized or treated in Oregon.

4. Unlike a marriage, a civil union will not be recognized by the federal government or other states. Therefore, if partners in a civil union move from Oregon, the privileges and immunities granted to them under Senate Bill 1000-A disappear. They will not have the same freedom to travel and retain the benefits associated with their union as do married persons.

These differences between a civil union and a marriage show that Senate Bill 1000-A does not create a "same-sex marriage" under the guise of another name.[10]

In conclusion, we believe Senate Bill 1000-A is constitutional as written.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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Acting Legislative Counsel

By 
Doug McKean

[9] *Id.* at 20.
[10] *Id.* at 31.