April 20, 2000

Honorable Bobby E. Denton
Member, Alabama State Senate
2206 Lisa Avenue
Muscle Shoals, Alabama 35661-2673

Marriages – Marriage Licenses

The State of Alabama, its subdivisions, businesses doing business in the State, and the citizens of Alabama would not be required to recognize the proposed "civil unions" of homosexual couples currently under consideration in the General Assembly of the State of Vermont.

The Alabama Marriage Protection Act clearly expresses the State's legitimate public policy not to recognize such "civil unions."

Dear Senator Denton:

This opinion of the Attorney General is issued in response to your request as a member of the Alabama State Senate.

QUESTION 1

If [Vermont House Bill 847], as written, becomes the law of Vermont; and if a homosexual couple or a heterosexual couple takes advantage of the law in Vermont to establish a civil union rather than a marriage; and if such couple demanded the same rights which they were granted under the laws of Vermont; would the state of Alabama and its subdivisions, the
businesses doing business in the state, and the citizens of the state, be required under either federal or state law to recognize the status of the civil union, and grant all the rights appurtenant thereto, either under the “full faith and credit” clause of the United States Constitution or other portion of the Constitution, federal statutory law, the Constitution of Alabama, or the Code of Alabama?

FACTS AND ANALYSIS

As stated in your request for an opinion of this Office, the facts upon which both of your questions are based are as follows:

A. **Marriage in Alabama**

   (1) The Code of Alabama, 1975, Section 30-1-19, defines marriage as an “inherently . . . unique relationship between a man and a woman,” and states that “[a] marriage contracted between individuals of the same sex is invalid in this state.”

   (2) The same Code section characterizes marriage as both a covenant and a civil contract.

   (3) The same Code section prohibits the issuance of an Alabama marriage license to same-sex couples.

   (4) The same Code section prohibits the recognition by the State of Alabama of same-sex marriages that occur outside the State of Alabama.
B. Pending Legislation in Vermont:

(1) On December 20, 1999, the Vermont Supreme Court, in Baker v. State of Vermont, Docket No. 98-032 [744 A.2d 864], held that although Vermont’s Marriage Registration Law (18 V.S.A. Section 5131, et seq.) did not violate the Vermont constitution by restricting legal marriage to the union of one man and one woman[;] nevertheless, it violated the “Common Benefits Clause” by denying homosexual couples the “benefit of marriage.”

(2) On that date, the Court, in an unprecedented decision, ordered the state legislature either to legalize “gay marriage” or create a status with equivalent benefits for same-sex civil unions, whether or not the term “marriage” was used to define such unions. [744 A.2d at 886-87.]

(3) On Thursday, March 16, 2000, by a vote of 76-69, the Vermont House approved a bill that would give homosexuals all the benefits of marriage without actually calling the civil union of such couples a “marriage.” [H. 847, Adjourned Sess. (Vt. 2000), available in <http://www.leg.state.vt.us/docs/2000/bills/house/h-847.doc>.]

* * *

(5) The bill, as passed by the House, allows gay partners to apply for a “civil union” license from town clerks and have the “civil union”
certified by a justice of the peace or a member of the clergy. [Id., sec. 5, §§ 5160-5161, 5164.] Once united, gay couples could legally live together and adopt children, and all laws prohibiting discrimination based on marital status would apply to civil-union couples. [Id., sec. 3, § 1204.] Further, the partners of state employees would be treated as spouses for purposes of insurance and other benefits. [Id., sec. 3, § 1204(e)(5).]


As your letter suggests, your questions involve the Full Faith and Credit Clause of the United States Constitution. That clause provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

Two statutes are also particularly relevant to your questions. The first is the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C.A. § 1738C (West Supp. 2000) and 1 U.S.C.A. § 7 (West 1997)). The Defense of Marriage Act defines “marriage,” when used in any Act of Congress or federal administrative materials, as “only a legal union between one man and one woman as
husband and wife.” 1 U.S.C.A. § 7. In addition, the Defense of Marriage Act provides:

    No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C.A. § 1738C.

The second statute relevant to your questions is, as you stated in your letter, the Alabama Marriage Protection Act, ALA. CODE § 30-1-19 (1998). That act provides, in relevant part, as follows:

    (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

    (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.

    (d) No marriage license shall be issued in the State of Alabama to parties of the same sex.

    (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred
as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

Id.

The Full Faith and Credit Clause of the United States Constitution was intended as "a very convenient instrument of justice" which would be "an evident and valuable improvement on the clause relating to this subject in the articles of confederation." The Federalist No. 42, at 287 (Madison) (Jacob E. Cooke ed., 1961). The clause contains only two brief sentences, and to determine whether the State of Alabama would be required to recognize a Vermont "civil union" under the Full Faith and Credit Clause, each sentence must be analyzed separately.

As noted above, the first sentence of the Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. In its cases interpreting this provision, however, "the U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another State's laws." H.R. Rep. No. 104-664, at 9 & n.27 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2913.

As the Supreme Court has stated, "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1980) (citing Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939)). Thus, "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" Baker v. General Motors Corp., 522 U.S. 222, 232 (1998) (quoting Pacific Employers, 306 U.S. at 501).

The Supreme Court addressed when a State may constitutionally invoke the public policy exception in refusing to apply another State's laws under the Full Faith and Credit Clause (as well as the Due Process Clause of the Fourteenth Amendment) in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), and Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981). In Shutts, the Court summarized the rule recognized in Hague, a plurality decision, as follows:
The plurality recognized . . . that the Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required “that for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” The dissenting Justices were in substantial agreement with this principle. The dissent stressed that the Due Process Clause prohibited the application of law which was only casually or slightly related to the litigation, while the Full Faith and Credit Clause required the forum to respect the laws and judgments of other States, subject to the forum’s own interests in furthering its public policy.

_Shutts_, 472 U.S. at 818-19 (citations omitted) (quoting _Hague_, 449 U.S. at 312-13 (plurality opinion)). The dissenting Justices in _Hague_ concluded that “[a] contact, or a pattern of contacts, satisfies the Constitution when it protects the litigants from being unfairly surprised if the forum State applies its own law, and when the application of the forum’s law reasonably can be understood to further a legitimate public policy of the forum State.” _Hague_, 449 U.S. at 336 (Powell, J., joined by Burger, C.J. and Rehnquist, J., dissenting).

Taken together, _Hague_ and _Shutts_ indicate that a forum State can constitutionally apply its own law instead of another State’s conflicting law, so long as it has a sufficient contact or aggregation of contacts creating State interests such that application of its law: (1) is neither arbitrary nor fundamentally unfair; (2) is not an unfair surprise to the litigants; and (3) serves to further a legitimate public policy. Among the contacts that the Supreme Court has held sufficient to justify the application of a forum State’s public policy are: execution of an employment contract within the forum State with an employer doing business in the forum State, although the work was to be performed in another State, _Alaska Packers Ass’n v. Industrial Accident Comm’n_, 294 U.S. 532, 542 (1935) (discussed in _Hague_, 449 U.S. at 311 & n.15 (plurality opinion)); residence within the forum, together with daily commuting between the foreign State and the forum, and status as an employee of a company
engaged in work in the forum and surrounding areas, Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 471 (1947) (discussed in Hague, 449 U.S. at 312 & n.16 (plurality opinion)); and an insured’s residence within the forum State, together with the insurer’s presence in the forum State and the occurrence of a property loss within the forum State, Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 180, 183 (1964) (discussed in Hague, 449 U.S. at 312 (plurality opinion)).

There are numerous Alabama cases discussing and interpreting the Full Faith and Credit Clause, but rather few discussing the credit due to out-of-state marriages specifically. The Supreme Court of Alabama has relied on the holdings in Nevada v. Hall and Pacific Employers “in determining the law applicable to a controversy,” and refused to allow another State’s law to override Alabama law in a fraud and breach of contract action brought in Alabama against an out-of-state university. Faulkner v. University of Tenn., 627 So. 2d 362, 365-66 (Ala. 1992) (quoting Pacific Employers). The court has similarly recognized various public policy exceptions to the general rule that the validity of a marriage is to be determined according to the law of the state where it was celebrated. See Smith v. Goldsmith, 223 Ala. 155, 157-59, 134 So. 651, 652-54 (1931). For example, in Osoinach v. Watkins, 235 Ala. 564, 569, 180 So. 577, 581 (1938), the court held that a marriage of two Alabama residents in Georgia, which was valid under Georgia law but incestuous under Alabama law, was void ab initio and would not be recognized in Alabama.

In general, the extent to which one State will recognize a marriage celebrated in another State is addressed by the field of law known as conflict of laws. While the principles of conflict of laws are relevant to your questions, they are not necessarily dispositive as to the requirements of the Full Faith and Credit Clause. “The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state.” Wells v. Simonds Abrasive Co., 345 U.S. 514, 516 (1953).

The general conflict-of-laws rule, as suggested above, is that a marriage is valid everywhere if it is valid according the law of the place where it was celebrated. Restatement (Second) of Conflict of Laws § 283(2) (1969) [hereinafter “Restatement”]; id., reporter’s note to cmts. e-i (collecting authorities); Krug v. Krug, 292 Ala. 498, 500, 296 So. 2d 715, 717 (1974); Smith v. Goldsmith, 223 Ala. at 157, 134 So. at 652 (quoting 38 C.J. Marriage § 3 (1925)); see H.R. Rep. No. 104-664, at 8,
1996 U.S.C.A.N. at 2912 (referring to this rule as *lex celebrationis*). The United States Supreme Court has recognized exceptions to this rule, however, for marriages that are “polygamous or incestuous, or otherwise declared void by statute.” *Loughran v. Loughran*, 292 U.S. 216, 233 (1934). The *Restatement* likewise recognizes a “public policy” exception to this general rule:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

*Restatement* § 283(2) (emphasis added).

Under the *Restatement*’s limited approach to the public policy exception, a homosexual couple from Alabama could not travel to Vermont, get “married” or obtain a civil union, and then return to Alabama and have that “marriage” or civil union recognized as valid in violation of a strong public policy of Alabama. *Restatement* § 283 cmts. j, k. This is so because Alabama, as the State of domicile of the couple (or even one member of the couple) at the time of the “marriage” or union, would have “the most significant relationship to the spouses and the marriage.” See *id.*, cmt. j; *id.*, reporter’s note to cmts. j-k (collecting cases); see also *Osoinach*, 235 Ala. at 269, 180 So. at 581 (holding that marriage of two Alabama residents who went to Georgia to obtain marriage that violated Alabama’s incest laws was *void ab initio*).

The result under the *Restatement* approach would be less certain, however, with respect to a homosexual couple who were legal residents of Vermont at the time of their civil union, but who moved to Alabama some time later. Here, the *Restatement*’s limited public policy approach suggests that Alabama might not be able to apply its public policy exception because, at the time of the civil union, Alabama might not have had “the most significant relationship to the spouses and the marriage.”

It should be noted, however, that the *Restatement*’s rule is limited to the context of traditional, heterosexual marriage—in the *Restatement*’s words, “whether a man and a woman are husband and wife.” *Id.*, cmt. a. In addition, the *Restatement* expresses a recommended conflict-of-laws approach to recognizing out-of-state marriages, not necessarily a constitutional *requirement* of the Full Faith and Credit Clause.
More importantly, the Restatement’s “at the time of the marriage” qualification to the public policy exception is inconsistent with the Supreme Court of Alabama’s decision in Osoinach. In that case, the court observed that “[t]he Legislature is fully competent to declare what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who left the state of domicile for the purpose of avoiding its statute, when they come or return to the state.” 235 Ala. at 269, 180 So. at 581 (emphasis added); accord Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364, 366-67 (Va. 1939) (quoting Osoinach); United States ex rel. Modianos v. Tuttle, 12 F.2d 927, 927 (E.D. La. 1925) (“It seems to be well settled that each sovereign state . . . has the right to declare what marriages it will or will not recognize, regardless of whether the participants are domiciled within or without its borders, provided that purpose is declared in unmistakable language.”) (emphasis added).

After reviewing the requirements of the Full Faith and Credit Clause and the Due Process Clause, as well as applicable conflict-of-laws principles and Alabama marriage cases, this Office agrees with the House Judiciary Committee that “a court conscientiously applying the relevant legal principles would be amply justified in refusing to give effect to a same-sex ‘marriage’ license from another State.” H.R. Rep. No. 104-199, at 9, 1996 U.S.C.C.A.N. at 2913; but see id. (observing that this “conclusion is far from certain”). Refusing to recognize a same-sex “marriage” or civil union would not be arbitrary or fundamentally unfair, and (after the controversy surrounding the issue of homosexual “marriage”) would not come as an unfair surprise to the litigants. As shown below, refusing to recognize such a “marriage” or civil union would also further a legitimate public policy expressed in the Alabama Marriage Protection Act.

In determining a State’s public policy with respect to marriage, the Restatement first suggests consulting the statutes of the State. See Restatement § 283 cmt. k. The Alabama Marriage Protection Act contains a clear statement of this State’s legitimate public policy: “Marriage is inherently a unique relationship between a man and a woman”; it “is a sacred covenant . . . between a man and a woman . . . .” ALA. CODE § 30-1-19(b), (c) (1998).

Given the strong statement of Alabama public policy contained in the Alabama Marriage Protection Act and the United States Supreme
Court's holdings that "[t]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate," *Baker*, 522 U.S. at 232 (quoting *Pacific Employers*, 306 U.S. at 501), it is the opinion of this Office that Alabama would not be required to substitute the conflicting provisions of Vermont's civil-union legislation for Alabama's Marriage Protection Act. In other words, the Full Faith and Credit Clause would not require the State of Alabama (including its subdivisions, businesses doing business in the State, and citizens of the State) to recognize any form of homosexual "marriage" that might be conducted in the future under the laws of the State of Vermont, whether that relationship were legally styled a "marriage," a "civil union," or a "domestic partnership." 1

The second sentence of the Full Faith and Credit Clause provides: "And Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1. This provision authorizes Congress to prescribe not only the way in which one State's "Acts, Records and Proceedings shall be proved" in another State, but also "the Effect thereof." *Id.*

1It is not controlling, for present purposes, that the legislation approved by the House of Representatives of the State of Vermont calls the proposed legal rite for homosexual couples a "civil union" rather than a "marriage." The Supreme Court of Alabama has held that "[t]he fundamental rule to be applied in construing any statute is that this Court has a duty to ascertain and effectuate the legislative intent as expressed in the statute. This intent may be discerned from the language used, the reason and necessity for the act, and the goal sought to be obtained." *Ex parte State of Ala.*, 620 So. 2d 719, 721 (Ala. 1993). The purpose of the proposed Vermont legislation is "to provide eligible same-sex couples the opportunity to receive the legal benefits and protections and be subject to the legal responsibilities that flow from civil marriage." H. 847, sec. 2(a). This is directly contrary to the purpose of the Alabama Marriage Protection Act, which was intended to conserve the legal status, benefits, and protections of marriage for heterosexual couples "in order to promote, among other goals, the stability and welfare of society and its children." ALA. CODE § 30-1-19(b) (1998). If anything, by not granting homosexual couples the unique status of marriage, the proposed Vermont legislation weakens any claim for recognizing homosexual civil unions under the rule of *lex celebrationis* which applies to marriages.
(emphasis added). At the Constitutional Convention, the “Effects Clause” was amended—over objection—so that Congress could prescribe not only the effect of judgments of one State in another State, but also “the effect of Legislative acts of one State, in another State.” 2 The Records of the Federal Convention of 1787 488 (Max Farrand ed., 1911) (statement of William Samuel Johnson, Sept. 3); see id. at 486 (Journal), 488-89 (Madison’s notes); see also Joseph Story, Commentaries on the Constitution of the United States § 661 (Ronald D. Rotunda & John E. Nowak eds. 1987) (1833) (noting that effects “are expressly subjected to the legislative power”). The Effects Clause is important to your question because Congress has invoked its “express grant of authority . . . to enact legislation to ‘prescribe’ the ‘effect’ that ‘public acts, records, and proceedings’ from one State shall have in sister States” in enacting the Defense of Marriage Act. H.R. Rep. No. 104-664, at 26 (quoting U.S. Const. art. IV, § 1), reprinted in 1996 U.S.C.C.A.N. at 2930.

Congress has provided that “[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . .” 28 U.S.C.A. § 1738C. The effect of this provision is that “even if one state were to recognize same-sex marriages it would not need to be recognized in any other state . . . .” Littleton v. Prange, 9 S.W.3d 223, 226 (Tex. App. 1999) (dictum), review denied, No. 99-1214 (Tex. Mar. 2, 2000). The operation of section 1738C does not depend on the nomenclature used in a State’s laws, such as “civil union” or “marriage,” but instead on the “relationship between persons of the same sex that is treated as a marriage.” Id. (emphasis added). Section 1738C also does not require a state to have a statute such as the Alabama Defense of Marriage Act in order to invoke the provision.

The pending Vermont legislation would treat a homosexual civil-union relationship “as a marriage” in all respects but name. Thus, under the Defense of Marriage Act, Alabama would not be required to give effect to any public act, record, or judicial proceeding of Vermont respecting a homosexual civil union—even without the Alabama Marriage Protection Act being in effect. With the Alabama Marriage Protection Act, however, the Legislature has already elected not to recognize such relationships pursuant to 28 U.S.C.A. § 1738C. See H.R. Rep. No. 104-664, at 27, reprinted in 1996 U.S.C.C.A.N. at 2931 (indicating that section 1738C does not decide the choice-of-law question, but allows each State to decide for itself); ALA. CODE § 30-1-19(e) (1998).
Finally, this Office finds no “other portion of the Constitution” or other law that would require the State of Alabama to recognize homosexual "marriages" or civil unions. As one commentator has stated:

In all the cases so far discovered which have considered the question whether persons of the same sex may marry each other, the view has been taken that since the marriage relationship has always been the union of a man and a woman as husband and wife, there may be no valid marital contract entered into between persons of the same sex.


The Defense of Marriage Act and the Alabama Marriage Protection Act were intended to preserve the traditional moral concept of marriage reflected in these cases, to conserve scarce government resources, and to promote the "stability and welfare of society and its children," among other goals. See H.R. Rep. No. 104-664, at 12-18, reprinted in 1996 U.S.C.C.A.N. at 2916-22; ALA. CODE § 30-1-19(b). They were not acts of bigotry or animus toward homosexuals. Congress has observed that:

[i]t would be incomprehensible for any court to conclude that traditional marriage laws are . . . motivated by animus toward homosexuals. Rather, they have been the unbroken rule and tradition in this (and other) countries primarily
because they are conducive to the objectives of procreation and responsible child-rearing.

H.R. Rep. No. 104-664, at 33, reprinted in 1996 U.S.C.C.A.N. at 2937. Thus, the Supreme Court's reasoning in Romer v. Evans, 517 U.S. 620 (1996), is inapplicable to statutes such as the Defense of Marriage Act and the Alabama Marriage Protection Act. See id. at 632 (characterizing Colorado's Amendment 2 as "inexplicable by anything but animus toward the class it affects"); see also Shahar v. Bowers, 114 F.3d 1097, 1110 & n.25 (11th Cir. 1997) (en banc) (noting limitations on Romer's holding), cert. denied, 522 U.S. 1049 (1998).

**QUESTION 2**

Do the statements concerning the public policy of Alabama in the second sentence of the Code of Alabama 1975, Sec. 30-1-19(b) sufficiently safeguard the State of Alabama from being required to recognize non-marriage "civil unions" whether homosexual or heterosexual as provided in the said Vermont legislation?

**FACTS AND ANALYSIS**

The facts upon which your second question is based are the same as those quoted above in discussing your first question. As our analysis of Question 1 indicates, the statements in the second sentence of section 30-1-19(b) clearly express the State of Alabama's strong public policy regarding marriage. These statements should be sufficient to prevent the State from being required to recognize the proposed civil unions being considered in Vermont. The term "civil union" cannot be used to circumvent the clear legislative intent not to recognize a homosexual "marriage," in the opinion of this Office.

**CONCLUSION**

For the reasons expressed above, the State of Alabama, its subdivisions, businesses doing business in the State, and the citizens of Alabama would not be required to recognize the proposed "civil unions" of
homosexual couples currently under consideration in the General Assembly of the State of Vermont. The Alabama Marriage Protection Act clearly expresses the State’s legitimate public policy not to recognize such “civil unions.”

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Charles B. Campbell of my staff.

Sincerely,

Bill Pryor
Attorney General

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