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December 6, 1996

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Re: Legislative and Judicial Options in Response to Trial Court Ruling
Mandating Same-Sex Marriage: Domestic Partnership Is the Only
Way the State May Be Able to "Checkmate" the Trial Court's Decision

Dear Arthur:

Thank you for sending me your paper entitled "Matrimony, Domestic Partnership and Religion: The Compelling Need to Secularize Marriage." This 81 page article is obviously the product of many months of research and deep thinking about these issues. I have taken the liberty of sending a copy of it to Professor Jon Van Dyke.

Your thesis that marriage must be secularized is most valuable. It would appear to offer the only viable solution to the conflict in Hawaii by rendering the current litigation moot. As your article so aptly points out, "civil" marriage has never really been desacralized. As a result, domestic partnership would appear to be the only proposal currently on the table consistent with this approach.

You asked me what I think might happen in Hawaii in reaction to the ruling of the trial court yesterday ordering the state to issue marriage licenses to same-sex couples.

I am reluctant to make predictions of this sort. However, I will share with you the various options that I see are available to the Hawaii Legislature and the Hawaii courts. I would strongly suggest that you ask the same question of three key people in Hawaii whose opinions I value greatly: Professor Jon Van Dyke, Senator Mike McCartney, and Senator Andrew Levin. All three of these men have been very open minded and remarkably objective about the issues of gay marriage and domestic partnership. Professor Van Dyke has his hand on the pulse of the Supreme Court. Senator McCartney has tried to respect the will of the majority as well as the civil rights of individuals. Senator Levin is an experienced legislator highly regarded for his knowledge of legislative practices and often has been able to develop a consensus for constitutionally-sound public policy.

In view of the lack of time to stop same-sex marriage by means of a constitutional convention or even by a specific constitutional amendment before a final Supreme Court decision in *Baehr*, the only legislative action that will stop same-sex marriage is the passage of a domestic partnership act similar to last session's Senate Bill 3113. If such a bill is passed in 1997, the Supreme Court may reverse the trial court's ruling and accept domestic partnership as an alternative method to satisfy the equal protection clause of the state constitution. If the Legislature fails to pass a domestic partnership act, then the legalization of same-sex marriage will come to Hawaii by the end of 1997 or in early 1998. Domestic partnership is the only way the state may be able to "checkmate" the trial court's ruling. Passage of a domestic partnership act would give the

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Attorney General something new to argue to the Supreme Court. The argument would be that the state has a compelling interest to avoid conflict with the federal government and with other states, and that a domestic partnership act is the least restrictive means to satisfy the state's equal protection clause by giving benefits. At the same time it would avoid the ongoing legal, economic, and political battles with the federal government and with other states that the legalization of same-sex marriage would entail. Domestic partnership also avoids the problem of intergovernmental conflict because it is not transportable across state lines such as marriage presumably is.

Judge Chang's ruling itself leaves open the possibility of the Supreme Court's accepting a domestic partnership act as a constitutionally-viable alternative to same-sex marriage, *if*, and only *if* two things happen: (1) the Legislature remedies the denial of benefits through a domestic partnership act before the case reaches the Supreme Court; and (2) the Attorney General brings to the attention of the Supreme Court the text *and legislative history* of the Defense of Marriage Act (DOMA), *the text and legislative history of the laws against gay marriage passed by 16 states* in anticipation of gay marriage being legalized in Hawaii, and *opinions of several Attorneys General* indicating that same-sex marriages performed in Hawaii will not be recognized on the mainland. While no new evidence may be introduced on appeal, the Court can take judicial notice of the materials mentioned above. The Supreme Court can also be asked to take judicial notice of the fact that Hawaii administers millions of dollars of federal funds in various programs that utilize the terms "marriage" and "spouse" as criteria for eligibility. Receipt of these funds by Hawaii may be jeopardized if Hawaii does not limit its definition of marriage to opposite-sex couples as DOMA now requires for federal programs. The court can also be asked to take judicial notice of various *interstate compacts* to which Hawaii is a signatory, some of which utilize the terms "marriage" and "spouse" as these terms have customarily been understood. The refusal of the federal government and of other states to accept same-sex marriage will eventually trigger costly lawsuits in addition to the possibility of Hawaii's having to establish separate administrative and fiscal systems to manage federal programs.

The passage of a domestic partnership act, coupled with judicial notice of these materials, may cause the Supreme Court to remand the case to the trial court for reconsideration of its ruling. If this major change in the law were to occur subsequent to the trial court's ruling, the Supreme Court would be likely to reverse and remand with directions that the trial court conduct a limited factual trial on the fiscal impact on the state of Hawaii caused by intergovernmental conflict over same-sex marriage. Protracted litigation with the federal government and other states who refuse to recognize same-sex marriage could cost Hawaii millions of dollars. The legislative findings in the preamble to a domestic partnership act would be crucial to getting the Supreme Court to remand for another evidentiary hearing to determine if such findings hold up under judicial scrutiny.

Attached to this letter I am enclosing several key paragraphs from Judge Chang's decision which essentially direct the Legislature toward its only option. As an aside, I really wonder whether the Attorney General secretly wants same-sex marriage to be legalized. Professor Van Dyke, Hawaii's constitutional law authority, stated that domestic partnership was the only way out, but the Attorney General never raised this possibility in the trial court and hence the judge had no reason to

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mention it. Had the Attorney General argued that domestic partnership could be an alternative, the judge might have agreed or even hinted in his opinion that it might be sufficient if the Legislature were to adopt such an act. Also, in the law review article which I distributed to the Legislature, I predicted that the only argument that could rise to a compelling interest would be the need to avoid interstate and state-federal conflict. As you can see from the attached excerpts, Judge Chang goes out of his way to mention that no evidence was presented on this issue. This is still the only issue that can work in the Supreme Court, but it will not work unless the issue of discrimination is dealt with by the immediate passage of a domestic partnership act.

Before explaining my reasoning further, let me reiterate that this prediction, namely, that the failure to pass a domestic partnership act will result in same-sex marriage by court mandate, was made by Professor Van Dyke. He told legislators that if a comprehensive domestic partnership bill were not passed, he was virtually 100 percent certain that the courts would order the state to issue marriage licenses to same-sex couples. He also said that if a domestic partnership act were passed, he was 95 percent certain that the Supreme Court would rule that domestic partnership satisfied the state constitution and therefore would not mandate gay marriage.

Senator McCartney accepted this advice. He then merged his desire to end discrimination with his responsiveness to the wishes of the great majority of the public. With Solomon-like wisdom, he introduced a measure that linked passage of a domestic partnership act with a proposed constitutional amendment to limit marriage to opposite-sex couples. The overwhelming majority of Senators supported this proposal. However, leaders in the House of Representatives blocked it.

It is ironic that it is only the stubbornness of a few anti-gay legislators, who refuse to allow domestic partnership to be voted on in the House, that will ultimately cause same-sex marriage to be legalized in Hawaii. Their insistence that same-sex couples receive no legal recognition and no benefits whatsoever, even through a new secular institution like domestic partnership, will bring same-sex marriage to Hawaii. But, who knows, maybe legislators now will see that rigid adherence to the status quo of discrimination will backfire. Unless they pass a domestic partnership act or something like it, the Attorney General will have no credible arguments in the Supreme Court.

The Constitutional Convention will not Stop Same-Sex Marriage. Although a plurality of voters called for a constitutional convention, there are several reasons why this method will not stop the legalization of same-sex marriage.

First, various unions have filed suit to stop the convention. They argue that the constitution only allows a convention if a majority of voters (not a mere plurality) approve it. Although this view is disputed by the Attorney General, the courts may accept the unions' position, or, if the convention process is enjoined pending the outcome of the case, which could take a year or more, this delay alone would make the convention process a useless tool to stop same-sex marriage.

Second, the convention process is too slow, even if the courts dismiss the unions' lawsuit.

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If a special election is not called to select delegates, then delegates would be selected at the general election in November 1998. The Supreme Court will already have ruled on *Baehr* long before then. A Supreme Court ruling could come as soon as December 1997 or as late as March 1998 if the decision-making process takes its usual amount of time. Under this scenario, hundreds of couples will have already gotten married before the convention delegates are even selected.

Third, the convention process will not work, even if lawmakers put the convention on a "fast track." Suppose the Legislature calls a special election for November 1997 to select delegates. The convention probably would not meet until March 1998. Suppose the work of the convention is done in one month, which is overly optimistic. If the convention puts the issue of same-sex marriage on the ballot, it would not be voted on until November 1998. Again, the Supreme Court will have ruled on *Baehr* by March 1998 at the latest, and hundreds of couples will have secured marriage licenses before the election occurs.

A Constitutional Amendment without Domestic Partnership will not Work. Last session, each house took a different approach to the issue. The Senate passed a comprehensive domestic partnership act and the House passed a proposed constitutional amendment. Ultimately, a compromise was suggested by Senator McCartney, which a majority of the Senate Judiciary Committee accepted. Senator McCartney proposed that the two plans be combined so that a constitutional amendment would only be put before the voters if the issue of discrimination were handled by passage of a domestic partnership act. It appeared as if two-thirds of the senators were willing to go along with this compromise. However, representatives Terrance Tom and Joe Souki prevented the compromise measure from ever reaching the floor of the House. As a result, the legislative session ended in a stalemate because the Senate refused to approve a constitutional ballot measure without also taking steps to eliminate unjust discrimination.

Now that the trial court has ruled in favor of same-sex marriage, it is likely that the forces against gay marriage will redouble their efforts to have the Legislature put a constitutional amendment against gay marriage on the ballot. They will ask the Legislature to call a special election for November 1997 and to have this amendment voted on then. Millions of dollars are likely to be poured into Hawaii from anti-marriage forces on the mainland.

Tremendous pressure will be placed on the Legislature to stop the legalization of gay marriage through this amendment and special election. It will be argued that doing this will not cost any extra money because the same special election in November 1997 can be used to select delegates for the convention. The Legislature represents the interests of the majority. It is supposed to be responsive to the people. The people do not want same-sex marriage to be legalized. An exit poll from the most recent election showed that 70 percent of voters were against same-sex marriage. This was not a hypothetical poll, it was a representative sample of people who actually cast ballots. Other polls have shown similar results. Legislators also know that if they had voted to put an amendment on the ballot, this would have reduced the perceived need for a constitutional convention and thus the convention would probably not have been called.

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However, it seems unlikely that two-thirds of the Senate will vote to put a constitutional amendment on the ballot at a special election in November 1997 unless the issue of discrimination is also dealt with by the Legislature. Thus, it is likely that the compromise proposed by Senator McCartney last session will again surface as the only viable way to resolve this impasse. The ultimate test then will be whether speaker Souki and representative Tom will allow such a compromise--domestic partnership together with a proposed constitutional amendment--to be voted on by the full House. If they do, two-thirds of the House probably will accept this compromise. These House members will realize that, if the Senate holds firm and demands a balanced solution, the only way to stop the legalization of same-sex marriage will be for House members to accept this compromise.

The forces against same-sex marriage will be put to a real test that will force them to go beyond the status quo of discrimination. This is exactly what Senator McCartney envisioned when he crafted his proposed compromise measure last session. If anti-marriage forces refuse to provide benefits to domestic partners through a purely secular law, then *they* will be the ones who, by their stubbornness, will actually have caused the legalization of same-sex marriage.

Conservative legislators were able to play "chicken" last session because time had not run out. Now, however, the timetable favors the pro-marriage forces. It would appear that the only way for the state to prevent the legalization of same-sex marriage in Hawaii would be for both houses of the Legislature to pass the amendment/domestic partnership compromise as an early order of business.

There is one further consideration. The law may preclude a constitutional amendment from being voted on at a *special* election. If this be true, then a proposed constitutional amendment would suffer the same flaw as the convention, namely, it would come too late to stop gay marriages from being performed in Hawaii. If an amendment must be voted on at a *general* election, the next general election is not until November 1998. That, of course, is too late because between March 1998 (when the Supreme Court rules) and November 1998 (when the voters ban same-sex marriage), there will have been a hiatus during which hundreds of marriages will have been performed. No one can unring those bells. The federal constitution would preclude a November 1998 ballot measure from voiding, *ex post facto*, marriages lawfully performed prior to that date. Once again, a domestic partnership act is the lesser of two evils that anti-gay legislators will have to face up to.

Legislative Inaction, Reliance on the Supreme Court. Same-sex marriage will be legalized if the Legislature does nothing and simply relies on the Supreme Court to reverse the trial court. Three out of the five justices who are now on the Supreme Court are the same justices who ordered the state to show compelling reasons to deny same-sex marriage. They are not going to engage in "tortured reasoning" or "sophistry" to reverse their previous ruling. Anyone who believes otherwise is dreaming. The state's evidence in the trial court was insufficient to meet the heavy burden imposed by the Supreme Court, with much of the testimony of the state's own witnesses confirming that gay couples can be good parents. No new evidence may be introduced on appeal. Thus, if the Legislature does nothing, same-sex marriage will be legalized because the Supreme Court will be bound by this evidence and by its own previous holding.

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Final Remarks. Last session the Senate Judiciary Committee received testimony from three constitutional law experts: a law professor, a litigator, and a former Supreme Court justice. All three of them agreed that a constitutional amendment against gay marriage, *without passage of a domestic partnership act*, would not render moot the underlying issue of *Baehr*, that is, the denial of benefits. The court could not force the state to issue marriage licenses if the amendment passes, but it *could* order the state to cease and desist from denying benefits to domestic partners.

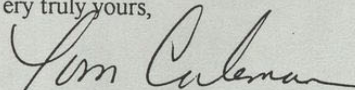
Everything points back to Professor Van Dyke's advice to the Legislature, and Senator McCartney's proposed solution to put an amendment on the ballot only if a comprehensive domestic partnership act is part of the package. If this legislative session ends with the same gridlock as the last session did, I think we can all rest assured that the Supreme Court will uphold the decision of the trial court, and marriage licenses will issue to same-sex couples in Hawaii by early 1998.

I hope this answers your question regarding the alternatives and options of the Legislature and the courts in response to the trial court's decision in *Baehr*. My comments should not be interpreted as being hostile to the legalization of same-sex marriage. My sole concern is the elimination of *unjust discrimination*. Same-sex marriage is one option. Domestic partnership is another option, so long as it provides *comprehensive* benefits under state law. Some legislators now are grudgingly talking about limited humanitarian benefits such as hospital visitation rights. There is no way the Supreme Court will accept a *limited* domestic partnership act. It must be *full benefits under state law* in order for domestic partnership to survive judicial review. Even the exclusion of child custody from last year's domestic partnership act now would be constitutionally suspect in view of Judge Chang's findings on parenting by same-sex partners. I guess that is why they invented severability clauses.

I will support either option the Hawaii Legislature chooses. If it selects a comprehensive domestic partnership act, fine. If it decides to take no action, knowing that as a result the court will legalize gay marriage in Hawaii, that is also fine. At this point, the choice is with the Legislature.

Finally, you also ask whether I plan to go to Hawaii to work with the Legislature this session. The answer is currently no. Last year I provided legislators with information on the domestic partnership option, whether they use it is up to them. Also, I will not be sending any representative to speak on my behalf or on behalf of any organization with which I am affiliated. If a legislative committee were to invite me to testify, then of course I would try to accommodate such a request. Otherwise I expect to remain in Los Angeles as an interested observer.

Very truly yours,



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