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June 1, 2006

RE: S.J.Res. 1, the Proposed Federal Marriage Amendment

Dear Senator:

We understand that efforts are underway to bring S.J.Res 1, the Federal Marriage Amendment, to the Senate floor for a vote next week. While we have taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages, the American Bar Association is staunchly opposed to this proposed amendment. Regardless of your personal views on same-sex marriage, we urge you to reject this attempt to use the constitutional amendment process to impose on the states a particular moral viewpoint about a controversial subject of great importance and to vote against the proposed amendment, which tramples on the traditional authority of each state to establish its own laws governing civil marriage.

The authority to regulate marriage and other family-related matters has resided with the states since the founding of our country and is rooted in principles of federalism. Over the years, the variations in state laws and judicial interpretations governing social and economic institutions have benefited our citizens and strengthened our nation by reinforcing its diversity. As the late Justice Louis Brandeis famously explained many years ago:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may... serve as a laboratory; and try novel social experiments without risk to the rest of the country.

This proposed amendment also would abridge the authority granted by our federal system to each state to interpret and amend its own state constitution. As the late Chief Justice William H. Rehnquist stated in his majority opinion in *Arizona v. Evans*, 514 U.S. 1, 8 (1995), “[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.” Absent compelling circumstances, which are not evident here, the constitutional amendment process should not be used to undermine and limit the authority of states to define and protect the rights and liberties of their own residents.

While the proposed amendment’s language creates interpretive ambiguities that make it impossible to ascertain the degree to which the amendment would preempt state authority, it is indisputable that its adoption would have sweeping consequences for the states that extend well beyond invalidating or prohibiting same-sex civil marriages. For instance, it would forever prohibit a state from adopting its own constitutional amendment to establish civil unions or extend to unmarried couples—heterosexual or gay – legal protections, such as health insurance, that the state provides to married spouses if they are constitutionally required. And, despite some claims to the contrary, it is unclear whether a state would be prohibited from passing laws permitting civil unions or domestic partnerships and providing state-conferred benefits to the couples involved: if challenged in court, would such laws be construed to be a form of “marriage” and therefore unconstitutional under the proposed amendment or would they be construed to confer only the “incidents of marriage” and therefore still be enforceable?

Ironically, the joint resolution’s lack of clarity will need to be resolved through litigation that will require federal and state courts to make the very kind of interpretive decisions regarding sensitive social matters that supporters of the proposed amendment intend to prevent through its passage, and its adoption will most certainly curtail the future ability of states to fashion their own responses to meet the changing needs of their residents.

The ABA also urges you to oppose S. J. Res. 1 because the Constitution should not be amended absent urgent and compelling circumstances. It certainly should not be amended to call a halt to democratic debate within the states or to promote a particular ideology. In the more than two centuries since the Constitution was adopted, the freedoms it guarantees have only been expanded and reinforced. We must not, as a nation, write into our cherished national charter, for the very first time, a provision denying rights to one group of Americans. As Bob Barr, former U.S. Representative from Georgia, has succinctly stated before Congress, “We meddle with the Constitution to our own peril. If we begin to treat the Constitution as our personal sandbox, in which to build and destroy castles as we please, we risk diluting the grandeur of having a Constitution in the first place.”

Despite employing the rhetoric of dire consequences, marriage amendment supporters have failed to demonstrate that there is an urgent need for this proposed drastic action.

At present, 49 states grant civil marriage licenses exclusively to heterosexual couples, and 18 states have adopted state constitutional amendments banning same-sex marriages.

This year, Alabama, South Carolina, South Dakota, Tennessee, Virginia and Wisconsin will hold statewide referendums on constitutional amendments to ban same-sex marriages, and similar amendments have been proposed and are making their way through the legislative process in multiple other states. No one can assert that the states are shirking their responsibilities or waiting for Congress to intervene; indeed, state legislatures are vigorously engaged in this socially charged debate and are responding to the needs and wishes of their residents.

Allowing the states to craft their own solutions in this area requires both confidence and humility: confidence in the wisdom of the people and their representatives, and the humility best expressed by Judge Learned Hand, who said, "The spirit of liberty is the spirit that is not too sure that it is right." If the Constitution is to continue to embody the spirit of liberty for future generations, we must not seek to use it to enshrine still-evolving societal views.

Congress should not rush to judgment and use the constitutional amendment process to impose on the states a rigid viewpoint regarding a controversial issue of great consequence to this nation. Despite the fact that more than 11,000 proposed constitutional amendments have been introduced in Congress since 1789, the Constitution has been amended only 27 times in 215 years -- a testament to its vitality and to Congressional restraint. We urge you to exercise the same restraint today and oppose S.J. Res. 1.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans". The signature is written in dark ink and is positioned below the word "Sincerely,".

Robert D. Evans