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May 17, 2006

Honorable Arlen Specter, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter:

We understand that the Senate Judiciary Committee is expected this week to mark up S.J.Res. 1, a joint resolution proposing an amendment to the U.S. Constitution relating to marriage and the legal incidents thereof. We are writing to reiterate our opposition and urge you to disapprove this measure.

While the American Bar Association has taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages, the Association staunchly opposes S.J.Res. 1 and any other federal legislative proposal that would restrict the ability of each state to determine the qualifications for civil marriage between two persons within its jurisdiction or dictate how state courts should construe state constitutional provisions regarding civil marriage statutes. S.J.Res. 1 would usurp the traditional authority of each state to establish and interpret its own laws governing civil marriage and forever change the grandeur of our Constitution by invoking the amendment process to permanently restrict individual liberties.

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. This has enabled states to enact diverse marriage laws that respect and reflect the unique needs and views of their residents. 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.

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.

It is impossible to ascertain the degree to which the proposed amendment would preempt state authority because the language of the proposed amendment creates interpretive ambiguities. For example, if challenged in state or federal court, will existing state domestic partnership or civil union laws be construed to be a form of "marriage" and therefore unconstitutional under the proposed amendment or will they be construed to confer only the "incidents of marriage" and therefore still be enforceable?

At a time when millions of children are being raised by same-sex couples, states should retain the flexibility to protect these children by conferring legal recognition on the families in which they are being raised. Without a legal relationship to both of their functional parents, these children may not be entitled to child support from the non-legal parent; they are not entitled to inherit through the non-legal parent in the absence of a will; they may not be entitled to survivor benefits; and they may be prevented from ever seeing this parent, should the parents separate or the biological parent die. The states should be permitted to enact laws and policies they deem appropriate to protect these children.

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.

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. If our Constitution is to continue to embody the spirit of liberty for future generations, we must not allow it to be used to enshrine still-evolving societal views. We urge the Senate Judiciary Committee to reject S.J.Res. 1.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: Members of the Committee on the Judiciary