

July 9, 2004

Dear Senator:

We understand that efforts are underway to bring S.J.Res 30, 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. Our federal system also enables states to look to their own constitutions to define and protect the rights and liberties of all their citizens and to interpret their constitutional provisions to accord greater protection to individual rights than do similar provisions of the U.S. Constitution. Over the years, we not only have successfully tolerated the fact that state laws and judicial interpretations governing marriage are not uniform, we have benefited from it. 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.

Variations among the states laws governing same-sex unions have increased each state's exposure to new ideas, provided the opportunity to examine the effect different laws have on society and provided guidance to other states that seek to modify their laws. Adoption of S.J. Res. 30 would deprive the nation of these benefits by curtailing the ability of states to enact diverse marriage laws that respect and reflect the unique needs and views of their

residents and to interpret their state constitutions to confer legal protections on same-sex couples.

While the proposed amendment is far too vague to ascertain its full meaning with certainty, 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 extending to unmarried couples—heterosexual or gay – legal protections, such as health insurance, that the state provides to married spouses if they are constitutionally required, as it is in Vermont. And, despite the claims of the resolution’s authors, 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. There is little doubt, however, that the joint resolution’s lack of clarity will result in litigation and that its passage and adoption will limit the future ability of states to fashion their own responses to meet the changing needs of their residents.

S. J. Res. 30 also should be opposed 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, succinctly stated before the Senate Judiciary Committee earlier this month, “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.”

We do not understand the motivation for this end-of-Congress rush to pursue the Family Marriage Amendment since no national consensus has emerged over this emotionally volatile issue and a constitutional amendment is neither a necessary nor appropriate vehicle for changing our civil marriage laws. Congress, through enactment of the Defense of Marriage Act in 1996, already has denied same-sex couples the more than 1,000 federal benefits that extend to heterosexual married couples. That Act also statutorily relieved states of their obligation to accord full faith and credit to same-sex marriages that are lawfully entered into in other jurisdictions. Therefore, this proposed amendment would only affect laws governing marriage and same-sex unions and attending judicial interpretations within each of the 50 states. During your deliberations over the next week, we hope you will not lose sight of the fact that at present 49 states grant civil marriage licenses exclusively to heterosexual couples. Clearly, this nation is not facing a crisis of constitutional proportion that requires a drastic and immediate solution.

We hope the enclosed white paper, *An Analysis Of The Law Regarding Same-Sex Marriage, Civil Unions And Domestic Partnerships*, will help you in your review of this

issue. The study, prepared by the ABA Section of Family Law, amply demonstrates that courts and legislatures already have enacted or issued hundreds of statutes, local ordinances and court opinions to address the myriad complex issues and ramifications arising from this relatively new public policy debate and are continuing to address the issue vigorously.

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.

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. 30.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dennis W. Archer". The signature is written in dark ink on a white background.

Dennis W. Archer