AMERICAN CIVIL LIBERTIES UNION

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

915 15th Street, NW Washington, D.C. 20005 (202) 544-1681 Fax (202) 546-0738

September 14, 2004

Re: The Destructive Effects of the "Sleeper Sentence" in the Federal Marriage Amendment

Dear Representative:

As you prepare for possible floor consideration of the Federal Marriage Amendment, the discriminatory proposed constitutional amendment that would deny states the ability to provide important protections to gay and lesbian families, the American Civil Liberties Union urges you to consider the full consequences of the amendment. In particular, the ACLU would like to provide this analysis of the "sleeper sentence" in the amendment, which is the first sentence of the two-sentence amendment.

Much of the analysis of the Federal Marriage Amendment has focused on the second sentence of the amendment. The second sentence deprives same-sex couples of the "legal incidents" of marriage by preempting the application of the U.S. Constitution and state constitutions. But the harmful impact of the first sentence is much broader.

The Congress should focus at least as intensely on the first sentence of the amendment. The first sentence provides, "Marriage in the United States shall consist only of the union of a man and a woman." The proponents of the amendment have highlighted only the first sentence's obvious effect on prohibiting the federal government and states from marrying same-sex couples, but not its potentially destructive effect on a wide range of other state and local laws, as well as on religions recognizing same-sex couples and private businesses providing benefits to partners of their employees.

I. Potential Harm to State and Local Civil Union and Domestic Partnership Statutes

The first sentence of the amendment, defining marriage as "a man and a woman," could jeopardize state and local protections for gay and lesbian families. Similar legal challenges are already taking place under similar state marriage laws. What the supporters of the amendment have never told Congress is that many

of their anti-gay organizations have used similar state definitions of marriage to challenge a wide range of protections provided by state and local governments to same-sex couples and their families. Groups opposing even the most basic protections for gay and lesbian families have repeatedly challenged in court state and local domestic partnership statutes as being preempted by state definitions of marriage that are limited to a man and a woman.

For example, in April of this year, the Pennsylvania Supreme Court heard oral arguments in a challenge to the Philadelphia domestic partnership ordinance, which was duly passed by the Philadelphia city council. The sole basis of the challenge was a claim that the Philadelphia ordinance was preempted by the Pennsylvania state statutory definition of marriage as being limited to a man and a woman. For example, the Family Research Council argued to the Pennsylvania Supreme Court that “[p]ermitting the City of Philadelphia, or any other municipality, to erode the place of the marriage relationship by creating domestic partner benefits is not consistent with the [state]’s clearly articulated policy protecting marriage.”

Basing a challenge to a domestic partnership law on a theory that a state definition of marriage as limited to one man and one woman might seem far-fetched, but these challenges are serious. In fact, the Pennsylvania Supreme Court case was an appeal of a state appellate decision *invalidating* the Philadelphia domestic partnership ordinance based on its holding that a state definition of marriage as one man and one woman “preempted the field of marital relationship between two people in Pennsylvania.” *Devlin v. City of Philadelphia*, 809 A.2d 980, 990-91 (Pa. Cmwlth. 2002).

An almost identical claim is being pursued in the California state courts by the Alliance Defense Fund and the Center for Marriage Law, which are challenging the California domestic partnership statute, AB 205, which former Governor Gray Davis signed and Governor Arnold Schwarzenegger supports. The opponents of the domestic partnership law are arguing in court that a state law providing that “only marriage between a man and a woman is valid” in California means that the court must invalidate the domestic partnership statute passed by the state legislature and signed by the governor.

If the first sentence of the Federal Marriage Amendment is ratified, we fully expect an explosion of litigation by anti-gay groups seeking to invalidate many or all of the hundreds of state or local laws providing civil unions, domestic partnerships and other basic legal protections for gay and lesbian families. These groups presumably will use the marriage definition in the Federal marriage Amendment in the same way that they are using the marriage definitions in state statutes--as the basis for a claim that all legal protections for same--sex couples are void.

If successful, claims under the first sentence of the Federal Marriage Amendment would eliminate all existing legal protections for gay and lesbian families.

II. Potential Harm to Religions Recognizing Same-Sex Relationships

The failure to explicitly limit the application of the first sentence of the amendment to state actors could endanger the religious liberty right of religions to define for themselves who is married--as long as they do not demand governmental ratification of all of their decisions. The first sentence could impose a single definition of marriage, even for purely religious ceremonies.

With the exception of the Thirteenth Amendment’s abolition of slavery and involuntary servitude, the remainder of the amendments to the Constitution, either explicitly or implicitly restrain only governments. Congress has relied on the Thirteenth Amendment’s broad language to enact legislation that binds both private persons and governments.

Unless Congress explicitly limits the first sentence of the Federal Marriage Amendment to government definitions of marriage only, religious ceremonies recognizing same-sex couples exclusively for religious purposes will be in jeopardy. Under the first sentence, any government agency enforcing the amendment could claim that a purely religious ceremony for same-sex couples violates the constitutional definition of marriage. Under the Constitution today, the Free Exercise Clause of the First Amendment protects purely religious ceremonies. But courts would likely find a later-in-time amendment as trumping an earlier-in-time amendment.

It is nothing short of careless and dangerous to pass an amendment without determining whether it will eviscerate rights of houses of worship now protected by the earlier-in-time First Amendment. Congress should not risk federal policing of sacramental decisions due to a sloppily drafted constitutional amendment.

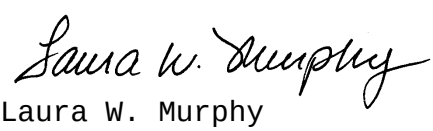
III. Potential Harm to Private Employers

The failure to limit the first sentence of the amendment to government actors, combined with the potentially preemptive effect of a constitutional definition of marriage, could threaten benefits that thousands of private employers--including a majority of the Fortune 500 companies--now offer to the families of their gay and lesbian employees. If successful, these challenges could eliminate health insurance for hundreds of thousands of domestic partners and their children. Congress should expect that the same anti-gay groups using state definitions of marriage to challenge state and local domestic

partnership laws will take aim at private employers under the same theory. The lack of any explicit limitation to government actors will open the door to these challenges.

Instead of the frenzied rush to bring the Federal Marriage Amendment to the House floor, the House should carefully consider the full scope of the harm that the amendment could cause. The ACLU strongly urges you to vote against the Federal Marriage Amendment. Please do not hesitate to call us at 202-675-2308 if you have any questions.

Sincerely,



Laura W. Murphy
Director

Christopher E. Anders
Legislative Counsel