BOB BARR

Member of Congress, 1995 – 2003

July 19, 2004

In Re: Upcoming Vote on the Marriage Protection Act, H.R. 3313

Dear Representative:

I would like to take this opportunity to express my concerns with the Marriage Protection Act, H.R. 3313, which I understand may be on the House floor as early as this week. While I understand and appreciate the reason that supporters of this bill are trying to pass this legislation, I respectfully disagree on the need for the bill and see the potential of a bad precedent for future legislation. For these reasons, I urge that members vote against H.R. 3313.

H.R. 3313 would preclude federal courts, including the Supreme Court, from reviewing the constitutionality of the cross-state recognition section of the Defense of Marriage Act ("DOMA"). If H.R. 3313 is enacted, each of the 50 state supreme courts would be a final authority on the constitutionality of DOMA, with no opportunity for either a state (as a defendant) or a plaintiff to appeal a decision to the Supreme Court.

As the principal author and lead sponsor of DOMA, I completely share the views of the supporters of H.R. 3313 who view DOMA as critical to our federalist system of government, and as integral to the proper resolution of the difficult questions raised by any state extending marriage rights to same-sex couples. DOMA is an important law that will help each state in the nation retain its own sovereignty over the fundamental state issue of who is married under its laws.

However, where I differ with the supporters of H.R. 3313 is in my confidence that the Supreme Court will not invalidate DOMA. During the lengthy consideration of DOMA, the House of Representatives heard detailed testimony on the constitutionality of DOMA. A parade of legal experts--including the Justice Department--determined that DOMA is fully constitutional. Although there were a few naysayers and wishful thinkers who opined that DOMA is unconstitutional, the overwhelming weight of authority was clear that DOMA is constitutional. Based on the exhaustive review of these opinions, Congress overwhelmingly passed DOMA and it was signed into law by President Clinton.

DOMA remains good law. It has never been invalidated by any court anywhere in the country. It is a sound and valid exercise of congressional authority, pursuant to the Full Faith and Credit Clause of the Constitution.

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Some supporters of H.R. 3313 point to the Supreme Court's opinion last year in *Lawrence v. Texas*, in which the Court invalidated a state sodomy law, as reason for concern that the Court could invalidate DOMA. However, I believe the Supreme Court justifiably would see a world of difference between a sodomy law that applied only to homosexual relations, and a federal law allowing the enforcement of nearly uniform state policies prohibiting cross-state recognition of marriages of same-sex couples. Moreover, when the Supreme Court correctly invalidated a racially discriminatory marriage law in *Loving v. Virginia*, it applied the highest level of judicial scrutiny to the state's marriage law. The Supreme Court always applies the highest level of scrutiny to race claims, but a minimal level to sexual orientation claims. Serious legal scholars do not see that changing.

Moreover, because H.R. 3313 does not strip state courts of jurisdiction to hear challenges to the cross-state recognition section of DOMA, the result will be that each of the 50 state supreme courts will be the final authority on the constitutionality of a federal law. The chaotic result could be 50 different interpretations reached by state supreme courts, with no possibility of the U.S. Supreme Court reversing any incorrect interpretation of the federal DOMA. The potential for mischief by these courts is obvious. Ironically, I fear an increased likelihood of an adverse decision on DOMA's constitutionality if H.R. 3313 becomes law.

However, the principal problem with H.R. 3313 is not just that it is protecting a wholly constitutional law that needs no additional protection, but that it sets a harmful precedent for the future. Our healthy democracy depends on having three separate and independent branches of government. I have long been concerned about a runaway judiciary, but I am also concerned about having a Congress or President unchecked by the independent judiciary established by the Constitution.

H.R. 3313 will needlessly set a dangerous precedent for future Congresses that might want to protect unconstitutional legislation from judicial review. During my time in Congress, I saw many bills introduced that would violate the Takings Clause, the Second Amendment, the Tenth Amendment, and many other constitutional protections. My main concern with H.R. 3313 is that it will lay the path for the sponsors of such unconstitutional legislation to simply add the language from H.R. 3313 to their bills. The fundamental protections afforded by the Constitution would be rendered meaningless if others follow the path set by H.R. 3313.

For these reasons, I urge you to vote against this well-intentioned, but unnecessary legislation. The Congress should keep in place the separation of powers outlined in the Constitution, rather than act hastily in fear of an outcome on DOMA that is unlikely in the first instance.

Thank you for your attention to this issue, and with warm regards, I remain,

Very truly yours,

BOB BARR
Member of Congress, 1995-2003