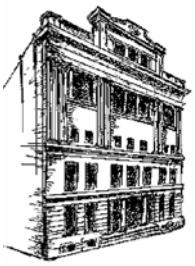

The Association of the Bar of the City of New York

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October 21, 2003

Hon. John Cornyn
517 Hart Senate Office Building
Washington, DC 20510

Hon. Russ Feingold
506 Hart Senate Office Building
Washington, DC 20510

Re: Sub-Committee on the Constitution, Civil Rights and Property Rights: For the record of hearings held by the Subcommittee on Thursday, September 4, 2003, "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996."

Dear Senators:

I write as the President of the Association of the Bar of the City of New York, the oldest bar association in the City of New York and one of the oldest in the United States. On behalf of the Association's Committees on Lesbian, Gay, Bisexual and Transgender Rights and Sex and Law as well as its 23,000 members, I would strongly urge the members of the Sub-Committee, as well as the Senate Committee on the Judiciary, to abandon the further debate on House Joint Resolution 56.

The Association has, for many years, openly supported the rights of lesbian, gay, bisexual and transgendered lawyers, as well as the LGBT community at large in the City of New York. House Joint Resolution 56, is an unwarranted attack on the civil rights of not only the LGBT community, including their children, but citizens as whole.

The Association opposes any constitutional amendment to ban same-sex marriage throughout the United States as an option during your discernment as to "what is needed to defend the bipartisan Defense of Marriage Act of 1996." Using H. J. Res. 56 as an example, that proposed amendment would federalize a traditional state function: defining and interpreting family law. Furthermore, the amendment would not only impair

courts' ability to interpret family law, but could also restrict legislatures' ability to enact statutes benefiting same-sex couples. Finally, civil marriage grants couples and their children access to over 1000 federal rights and benefits and to hundreds of state protections, rights, and responsibilities. Amending the Constitution to exclude families headed by same-sex couples from all of these protections is inconsistent with our Constitution's history and purpose.

> H.J. Res. 56 Provides:
> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

The proposed amendment is not necessary to protect the institution of religious marriage. Religious institutions already have the freedom, under the Establishment Clause, to determine which unions they will solemnize. The civil benefits of marriage, on the other hand, should be granted to couples in committed, long-term relationships without regard to whether they adhere to the strictures of any particular religious sect. Because certain denominations already bless same-sex unions, the proposed amendment actually undermines religious institutions' freedom to define marriage; it would single out same-sex marriages for non-recognition under state and federal law.

The proposed amendment, by enshrining discrimination in the Constitution, does not belong in a document that was designed to promote liberty and equality. Without exception, the Constitution has never been amended to exclude a particular group from the protections of the law. With the exception of prohibition (which was repealed), the Constitution has never been amended to limit basic rights. The proposed amendment is an unprecedented attempt to single out a group of people for lesser legal status. We oppose utilizing the Constitution, the founding document of our Republic, for this purpose.

By creating federal marriage law, the proposed amendment strips states of one of their traditional exclusive powers. Family law has been the province of the states. In fact, state law determines marital status even for the purpose of federal benefits such as Social Security. There was no federal definition of "spouse" until 1996, when Congress passed the so-called "Defense of Marriage Act," which purported to limit "spouses" to married people of the opposite sex. The proposed amendment intrudes even further upon state sovereignty, preventing any state from defining marriage to include same-sex couples, and possibly disabling legislatures from passing *any* relationship-recognition measures.

The proposed amendment would hamper courts in crafting equitable resolutions to the disputes before them. Proponents of the proposed amendment have argued that its purpose is to prevent courts from determining that same-sex couples are entitled to marriage equality or to "civil unions." *See* http://www.allianceformarriage.org/reports/fma/colorchart.cfm. However, in part because it would bar courts from conferring "the incidents" of marriage upon same-sex couples, the proposed amendment could in fact impair courts in resolving cases involving *hundreds* of state protections and responsibilities that are contingent upon marital status. One example of such rights is standing to sue for the wrongful death of a spouse, *see Langan v. St. Vincent's Hosp*., 2003 N.Y. Misc. LEXIS 673 (April 10, 2003) (holding that a surviving partner to a civil union could sue for the wrongful death of his partner under the laws of New York).

The proposed amendment could invalidate popularly-enacted legislation. In recent years, numerous state and local legislatures have granted various rights and protections to same-sex partners that state law traditionally confers upon spouses. For instance, 173 state and local governments extend health benefits to the same-sex partners of their public employees. California passed legislation in 2001 that enables registered domestic partners to: adopt a partner's child through stepparent adoption; be appointed as administrator of the partner's estate, as a spouse would be; take medical leave from work to be with a sick partner (or partner's child); receive unemployment insurance benefits if he or she leaves employment to join his or her domestic partner at a remote location; file a claim for disability benefits for his or her partner; make health care decisions for an incapacitated partner; and recover damages for negligent infliction of emotional distress and wrongful death.

Although the proposed amendment would not prohibit a state from enacting such legislation, it could be interpreted to prevent a court from enforcing such legislation. For example, if a registered domestic partner in California filed a wrongful death claim for his deceased partner, the court might conclude that because standing to sue for wrongful death is an incident of marriage, it could not constitutionally "construe" the domestic partner law to confer such standing to the surviving partner.

The proposed amendment would prohibit states from recognizing otherwise valid marriages from other countries. Belgium, the Netherlands, and Canada have all permitted same-sex couples to enter into civil marriages. Under the principle of comity, marriages that are valid where celebrated remain valid wherever the couple may travel. The proposed amendment would require states to break with this rule and refuse to honor certain otherwise valid marriages from these countries.

The City Bar has consistently defended legislation legalizing and recognizing the rights of same sex couples. I enclose for the sub-committee's review, a copy of the City Bar's Report on Same Sex Marriage for inclusion with this letter as part of the record.

For all of these reasons, we write to oppose any federal marriage amendment to the Constitution of the United States.

Very truly yours,

E. Leo Milonas
President

CC: Hon. John Kyl
Hon. Lindsey Graham
Hon. Larry Craig
Hon. Saxby Chambliss
Hon. Edward Kennedy
Hon. Charles Schumer
Hon. Richard Durbin

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