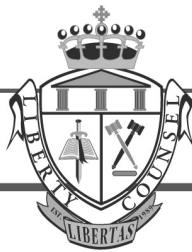


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Reply to: Virginia

July 13, 2009

The Honorable Bonnie Brown, Chair
Joint Standing Committee on the Judiciary -
Subcommittee A
West Virginia House of Delegates
Room 207E, Building 1
State Capitol Complex
Charleston, WV 25305

The Honorable Herb Snyder, Chair
Joint Standing Committee on the Judiciary -
Subcommittee A
West Virginia Senate
Room 217W, Building 1
State Capitol Complex
Charleston, WV 25305

Re: *Need for Marriage Amendment*

Liberty Counsel has been asked to render an opinion concerning the need for a marriage protection amendment to the West Virginia State Constitution. Liberty Counsel is a non-profit litigation, education and policy organization headquartered in Florida with branch offices in Virginia, Texas, and Washington, DC, including hundreds of affiliate attorneys. Liberty Counsel specializes in constitutional litigation, and has been involved in virtually every legal battle to preserve traditional marriage over the past several years.

We strongly recommend the adoption of a marriage protection amendment as the best means for protecting marriage. In a nutshell, because marriage is the bedrock social institution on which all civilization is based, it should receive the greatest possible legal protection available. The greatest protection West Virginia can provide is by adoption of a constitutional amendment defining marriage as only between one man and one woman.

I. Marriage is the fundamental institution on which society is based; as such, it deserves the greatest possible protection in the law.

West Virginia adopted a Defense of Marriage Act (“DOMA”), W. Va. Code § 48-2-101 et seq., in the year 2000. That Act, which defines marriage as “a loving and lifelong union between a woman and a man,” has survived a constitutional challenge and remains in effect. However, the case in which the Act was targeted, *Link v. King*, was dismissed on technical grounds, and a decision on

the merits was never reached.¹ It cannot therefore be relied upon as having definitively established the constitutionality of West Virginia's DOMA statute.

Moreover, the arguments on which *Link* based its attack, namely equal protection and due process, are the very same as those currently being leveled at the federal DOMA statute in a case filed in federal court by the Attorney General of Massachusetts. *See* copy of Complaint at: www.boston.com/news/politics/politicalintelligence/DOMA%20Complaint%20FINAL.pdf. This case and others like it underscore the undeniable fact that marriage is under attack.

Further, even if West Virginia's DOMA statute had been upheld after consideration of the merits of the constitutional challenge in *Link*, we believe a marriage protection amendment would still be necessary for two reasons. First, the Supreme Court of Appeals has recently ruled in favor of expanded rights for same sex couples in family law, thus signaling a willingness to seriously entertain judicial recognition of same sex marriage; and second, a constitutional amendment provides greater protection than a statute, which may be repealed by a subsequent vote of the legislature.

II. The Supreme Court of Appeals has greatly expanded homosexual rights in family law.

In its rulings concerning same sex couples in the area of family law, the Supreme Court of Appeals has exhibited an alarming propensity of extending rights to homosexuals. For example, in the case of *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (W.Va. 2005), a former lesbian partner of the deceased biological mother was awarded custody of a minor child over the objections of the child's grandparents, who also sought custody. In effect, the court created new rights where none had been recognized by the legislature, thereby usurping the authority of the duly elected legislature.

In yet another very recent case, the Supreme Court of Appeals reversed a ruling by a circuit court judge who sought to place a foster child with a traditional family rather than with a same sex couple. In *State ex rel. Kutil v. Blake*, __ S.E.2d __, No. 34618 (W.Va. June 5, 2009), the high court chastised the lower court for questioning the parenting skills of the same sex couple, and noted that under West Virginia law, a single person is permitted to adopt on an equal basis with a married couple, notwithstanding that the single woman is engaged in a lesbian relationship with a live-in partner.

Additionally, the Supreme Court of Appeals has adopted a rule of judicial conduct specifically prohibiting "bias or prejudice" based upon "sexual orientation." *See* Code of Judicial Conduct Canon 3(B)(5).² The court has expounded upon its views of discrimination in a booklet entitled, "Justice for All: Bias-Free Behavior and Language in our Courts." The booklet defines "bias" broadly as "stereotyped thinking that leads to improper disparate treatment in the courtroom" and "devalues" a person "due to prejudice." This vague definition could easily be applied against all

¹ Liberty Counsel and the AFA Center for Law & Policy jointly sought to intervene in that case, but were denied.

² In similar fashion, Rule 3(B)(6) instructs that state court judges must also prohibit lawyers appearing before them from showing bias or prejudice on the basis of sexual orientation.

those who uphold traditional religious teachings to the effect that homosexual conduct is sinful, including Jews, Muslims, and Christians.

These rulings and actions suggest that the West Virginia Supreme Court of Appeals, like courts in California, Massachusetts, and elsewhere, could undertake to redefine marriage judicially. Indeed, the preferred method of those seeking to undermine traditional marriage has been to bring their arguments to the judicial branch rather than the legislature.

Amending the state constitution is the only sure fire means of bridling an activist court. After all, it is the business of courts to strike down unconstitutional statutes. But even the California Supreme Court, after passage of Proposition 8 restoring traditional marriage by means of constitutional amendment, refused to go so far as to declare a constitutional amendment unconstitutional. *See Strauss v. Horton*, __ Cal.4th __ (May 26, 2009).

For all of these reasons, Liberty Counsel respectfully recommends that the legislature act to amend the state constitution to define marriage as between one man and one woman. It may be single most important thing you can do for the State of West Virginia and its people.

LIBERTY COUNSEL