Testimony of

The Honorable Jon Bruning

March 3, 2004

Jon Bruning
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Testimony before The United States Senate
Subcommittee on the Constitution, Civil Rights, and Property Rights

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Room 226, Senate Dirksen Office Building

Thank you Mr. Chairman and members of the committee.

My name is Jon Bruning - B-R-U-N-I-N-G.

I am the Attorney General of the State of Nebraska.

My office is defending a federal court challenge to the portion of Nebraska's constitution that defines marriage as a union between one man and one woman.

Unfortunately, in spite of efforts in states such as Nebraska to preserve the traditional definition of marriage, recent court rulings have created a legal domino effect that may impose a national policy on gay marriage.

I am not here to debate with you the moral issue of whether same sex marriage is right or wrong. I am here because of the reality that four judges in Massachusetts could eventually invalidate Nebraska's ban on same sex marriages.

In short, I believe the people of the United States would prefer to have policy decided by their elected representatives, and not by appointed judges.

Today, almost 40 states have passed Defense of Marriage Acts. The vast majority of those are by statute, and 4, including Nebraska, are constitutional amendments.

President Clinton signed the federal Defense of Marriage Act into law in 1996, saying, "I have long opposed governmental recognition of same-gender marriages." The federal DOMA attempted to leave the issue of gay marriage to the states and ensure that no state would be required to recognize same-sex unions from other states.

However, recent court decisions indicate neither state attempts to define marriage nor the federal act may be sufficient to protect the ability of states to define marriage.

In 2000, more than 70% of Nebraskans voted to amend the Nebraska Constitution to define marriage as a union between one man and one woman. In 2003, the ACLU and Lambda Legal Foundation together sued Nebraska in federal court, arguing that the Nebraska amendment unconstitutionally denies gay and lesbian persons equal access to the political system. This is the first federal court challenge to a state's DOMA law.

My office moved to dismiss the suit, but last November, the Court denied our motion to dismiss. The language in the Court's order signals that Nebraska will very likely lose the case at trial.

Three recent cases indicate that state and federal attempts to leave this as a states' rights issue may be invalidated by the federal courts.

First, just last year, the U.S. Supreme Court held in Lawrence v. Texas that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause. In his majority opinion, Justice Kennedy listed a number of rights protected by the Constitution, including marriage, and asserted that "...Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

While the majority said the opinion did not speak directly to marriage, Justice Scalia, in dissent, worried that the Court's opinion "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."

In the second case, Romer v. Evans, the Supreme Court held in 1995 that a Colorado Constitutional amendment violated the Equal Protection Clause. The Supreme Court struck down Colorado's amendment, asserting that the amendment imposed "a broad and undifferentiated disability" on homosexuals, singling them out and denying them "protection across the board."

In Nebraska's case, the Plaintiffs have cited both Romer and Lawrence as authority in their attempt to repeal Nebraska's amendment.

In the third case, Massachusetts v. Goodridge, the Massachusetts Supreme Court relied on the reasoning in Lawrence to hold that the everyday meaning of marriage is "arbitrary and capricious."

While no one can predict with certainty what a particular federal court may do, Lawrence, Romer, and Goodridge demonstrate the real possibility of the courts mandating national recognition of same-sex marriages.

Many well-respected legal scholars, including Harvard Law Professor Laurence Tribe, agree that this issue eventually will be resolved by the federal courts.

In short, this country is heading down a path that will allow the judiciary branch to create a national policy for same sex marriages. I am here because I believe such a national policy should be crafted by the states in the first instance, or at a minimum by Congress with the approval of the states.

The ultimate question for you, as members of the United States Senate, is whether you believe this issue should be resolved by judges or by the American people through you, their elected representatives.

Thank you Mr. Chairman, and thank you committee members for your time.