SUBJECT: Prohibiting recognition of same-sex marriages from other states

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 6 ayes — Brimer, Corte, Elkins, Janek, Solomons, Woolley

0 nays

3 absent — Rhodes, Dukes, Giddings

WITNESSES: For — Pat Carlson, Texas Eagle Forum; Wyatt Roberts

Against — Dianne Hardy Garcia, Terence O'Neill

BACKGROUND: Same-sex marriages are prohibited in Texas. Section 2.001 of the Family Code specifically refers to a man and a woman obtaining a marriage license and states that a license may not be issued for the marriage of persons of the same sex. Texas attorney general opinions have stated that county clerks are not authorized to issue marriage licenses to same-sex couples and that two persons of the same sex cannot marry in Texas.

However, a 1991 Hawaii case, *Baehr v. Lewin*, raised the issue of whether Texas would be required to recognize the marriage of a same-sex couple that legally married in another state and then moved to Texas. In that case, three same-sex couples sued to be allowed to be married in Hawaii on the ground that refusal to issue same-sex marriage licenses violated the state's constitutional bars against discrimination based on sex. In 1993, the Hawaii Supreme Court held that the state's refusal to permit same-sex marriages could violate the equal protection clause of the state constitution absent a compelling reason why such marriages should not be allowed. The court did not hold that same-sex couples had a constitutional right to marry, but instead sent the case back to the lower court to conduct further hearings about whether the state had the compelling interest necessary to prohibit same-sex marriages. The lower court found no compelling interest, but a final disposition of the case is still pending on appeal. Meanwhile, the Hawaii Legislature has approved a state constitutional amendment to bar same-sex marriages, which will be voted on in a special election.

At this time, same-sex marriages are not legal in any state. However, if same-sex marriages were legal in another state, Texas conceivably could be required to recognize those marriages under the "full faith and credit" clause of the U.S. Constitution, Art. 4, sec. 1, which states that "full faith and credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The U.S. Supreme Court has not broadly construed this clause. Prior rulings suggest that the court would look to which state had the most significant contacts with a same-sex couple before determining whether a same-sex marriage valid in one state would have to be recognized in another state. A marriage valid in the state where it was contracted might have to be recognized by other jurisdictions unless a state with more significant contacts with the couple had a strong public policy against such marriages. That public policy could be found in state statutes or case law.

Several states have reacted to *Baehr* and the possibility that same-sex marriages could be legal in another state by seeking to prohibit recognizing same-sex marriages, thereby clearly establishing a strong public policy against them. These states have used several strategies, e.g., defining marriage as the union of a man and a woman, barring same-sex marriages within the state, and refusing to recognize same-sex marriages contracted in other states. The Texas Family Code, as noted, contains two such provisions.

The U.S. Congress also reacted to *Baehr* and the question of whether other states would have to recognize a same-sex marriage legally entered into in another state. In September 1996, the Defense of Marriage Act became law. The act amended the Federal Judicial Code to provide that no state, territory or possession of the United States or Indian tribe can be required to give effect to any marriage between persons of the same sex under the laws of any other such jurisdiction or to any right or claim arising from such relationship. In addition, the act established federal definitions of "marriage" as limited to a legal union between one man and one woman as husband and wife and "spouse" as limited to a person of the opposite sex acting as husband or wife. However, the Defense of Marriage Act has been

questioned on the grounds that the act is an unconstitutional attempt by Congress to limit the full faith and credit clause and that Congress possesses no power to legislate any such categorical exemption from the clause.

DIGEST:

CSHB 3464 would prohibit Texas from giving effect to a public act, record or judicial proceeding that recognized or validated a marriage between persons of the same sex or a right or claim asserted as a result of the marriage.

The bill would take immediate effect if finally approved by a two-thirds record vote of the membership in each house.

SUPPORTERS SAY:

Given the constitutional questions regarding the effectiveness of the federal Defense of Marriage Act, it is vital for Texas law to be as specific and as strong as possible to ensure the courts understand that the established public policy and desires of the people of Texas are that marriage is an institution existing solely between one man and one woman. If the Hawaii Supreme Court rules that same-sex marriages must be allowed in that state before the voters get a chance to approve the constitutional referendum to ban same-sex marriages, there will be a window of opportunity for persons of the same sex to marry in Hawaii and then move to Texas. Texas would have to show a clear strong public policy against same-sex marriages in order to avoid having to recognize those marriages under the full faith and credit clause of the U.S. Constitution. CSHB 3464 would provide that clear strong policy. Several other states have already enacted legislation similar to this bill in order to guard against that possibility, and Texas should join them now.

Making a preemptive move is necessary because advocates of recognizing same-sex marriage plan to challenge state laws by marrying in Hawaii and then filing for benefits in other states. In addition, those activists are shopping for a sympathetic judge to declare the Defense of Marriage Act unconstitutional. One activist has reportedly stated that the goal is to use same-sex marriage as the final tool with which to dismantle all sodomy statutes, insert education about homosexuality and AIDS into public schools, and, in short, usher in a sea change in how society views and treats homosexuals.

As early as 1885, the U.S. Supreme Court defined marriage as the union between one woman and one man. State and federal courts have held to that definition consistently. The courts have understood this to be the fundamental nature of the concept of marriage, which has been articulated to be "the sure foundation of all that is stable and noble in our civilization." The discussion about same-sex "marriage" is not a discussion about marriage. It is a discussion about the fundamental nature of Western civilization and culture.

Since same-sex marriage falls outside the fundamental understanding of the very concept of marriage, denying marriage licenses to same-sex couples is not a regulation of marriage itself. If a court did decide that this fundamental understanding of marriage was no longer valid, then the entire legal argument used to outlaw polygamy or polyandry would also be removed.

In addition, the legal concept of equal protection has always applied only to immutable characteristics. While there is an increasing tendency to recognize homosexuality as a minority class akin to race, it must be noted that even if a genetic link is established, homosexuality can only be identified by a particular set of behaviors. It is false to equate a benign nonbehavioral characteristic such as skin color with an orientation based on behavior. The legal case against equating a particular kind of sexual conduct with a fundamental right is well established — laws banning or regulating a wide variety of sexual conduct have been upheld at every court level.

OPPONENTS SAY:

CSHB 3464 is unnecessary. At this time, no state or locality sanctions same-sex marriages, and there is no urgent "threat" of gay marriage. In addition, the federal Defense of Marriage Act already authorizes states to refuse to give effect to any same-sex marriages entered into under the laws of another state.

The bill reflects very bad public policy. The U.S. is a nation governed by one Constitution, not a collection of small nations with contiguous borders. It does not make sense for Texas to say to other Americans that the existence of their marriages depends on which states they travel through on vacation or to which states their employer transfers them. Americans have a right to

go from one state to another, including Texas, without having to surrender their marriage as a price of traveling or relocating. In addition, the bill would create a complex set of legal and logistical problems that have not been fully examined. For example, what would happen to marital property of a marriage that is not recognized in Texas?

Clearly, this bill is designed to be a preemptive strike to nullify the rights that may be conferred by Hawaii and other states to same-sex couples. This bill would not be offered if our society did not have a deep bias against gay and lesbian people, so the debate is really about the civil rights of persons with different sexual orientations. If two adults of the same sex have legally married each other in another state, Texas should not be able to disregard that marriage. This view does not advocate *special* rights for lesbians and gay men, just *equal* rights under the law.

CSHB 3464 would not by itself deny lesbians and gay men the right to marry because that prohibition is already in Texas law; however, it would deny recognition to licensed marriages from other states. The Supreme Court has held that marriage is a fundamental right. Civil marriage is the way our society defines the most intimate, committed relationships; it is the only vehicle our society has for recognizing the existence of primary relationships not defined by blood. That has both powerful emotional consequences and powerful practical consequences. Marital status is used to identify our partners for everything from retirement programs to critical medical decisions to the simple right to be together in crisis situations, like hospital emergency rooms. In addition, without marriage, a partner could not inherit through intestacy.

The current ban on same-sex marriages in Texas violates the equal protection rights of lesbians and gay men because it discriminates on the basis of sex and makes the ability to marry dependent on gender. Extending the ban to same-sex marriages from other states would only exacerbate the constitutional problems. Classifications that discriminate on the basis of gender must be substantially related to some important government purpose. The only justification for the classification in CSHB 3464 is that the bill would preserve what some regard as the “traditional” understanding of marriage. If tradition were an important government purpose, then sex discrimination would be quite permissible because discrimination against

women has a pedigree in tradition at least as long and time-honored as that of discrimination against same-sex couples in marriage. Laws against miscegenation once had a long tradition, which was insufficient justification to uphold barring marriage by persons of different races.

Recognizing out-of-state same-sex marriages would not corrupt or tarnish heterosexual marriages. Marriage between men and women is a social and religious institution that has thrived for thousands of years. Marriage is not so fragile that it would be undermined by extending the franchise to the small percentage of the population that is homosexual.

State recognition of same-sex marriages would not undermine the rights of religious institutions to refuse to recognize such unions. In contrast, allowing states to refuse to recognize same-sex marriages from other states would infringe on the rights of religious institutions that allow same-sex marriages to practice their religion.

OTHER OPPONENTS SAY:

The federal Defense of Marriage Act violates the full faith and credit clause of the U.S. Constitution, and CSHB 3464 would also. The U.S. Supreme Court has ruled many times that sister-state judgments are to be afforded the greatest protection obligated by the full faith and credit clause. There is no "policy" exception; states that disagree with the policy behind a law on which a judgment is based still must enforce the judgment. Congress does not have the power to nullify the clause, and Texas could not just declare that it was not going to give full faith and credit to marriages from other states without a rational basis, something that is clearly absent in this case.

NOTES:

The original version of the bill related to enforcement and validity of certain out-of-state transactions and associations. The committee substitute deleted these provisions and added the section addressing recognition of same-sex marriages.

An identical bill, HB 11 by Chisum, was referred to the House State Affairs committee, and its companion, SB 575 by Nelson, was referred to the Senate State Affairs Committee; no action has been taken on either bill.