# RELIGIOUS LIBERTY AND H.R. 2802, THE FIRST AMENDMENT DEFENSE ACT (FADA)

## HEARING

BEFORE THE

## COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

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# RELIGIOUS LIBERTY AND H.R. 2802, THE FIRST AMENDMENT DEFENSE ACT (FADA)

**Tuesday, July 12, 2016**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
WASHINGTON, D.C.

The committee met, pursuant to call, at 10:04 a.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Duncan, Jordan, Walberg, Amash, Gosar, DesJarlais, Farenthold, Lummis, Massie, Meadows, Mulvaney, Buck, Walker, Blum, Hice, Russell, Carter, Grothman, Hurd, Palmer, Cummings, Maloney, Norton, Lynch, Connolly, Cartwright, Duckworth, Kelly, Lawrence, Lieu, Watson Coleman, Plaskett, and Lujan Grisham.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come to order. And without objection, the chair is authorized to declare a recess at any time.

I thank you all for being here. This is an important topic. It is an important subject. I know we don't necessarily all agree and see it the same way. But that is why we have vibrant discussion. That is what we do in this country is we talk about it in a professional way, in a civil way, and we have this discussion.

And so I want to thank the witnesses. We have done something that is unprecedented, and a number of witnesses that the Democrats have asked for are all here. We have a rather large and distinguished panel. We are going to have a good and vibrant discussion.

I did notice when we came in that there were a number of—at least a few signs and whatnot. We are responsible to keep the rules and decorum. If you want to show off those signs and wave them and do all you want, you can do that right now, but as we get going during the hearing, I would ask that you please refrain from doing so. It is part of the way we have a good, fair discussion on these issues. So if you have those signs, you are free to show them right now, wave them all you want, but to do so during the hearing while somebody is speaking is not the level of respect that we would ask from everybody on both sides of this important issue.

So protecting the sacred right to freely exercise your religion is the First Amendment to the Constitution for a reason. It has been and still is a fundamental part of the foundation of our nation.

The First Amendment Defense Act, or FADA, has some very important goals. Legislation is intended to ensure the tax-exempt status of religious institutions is not unfairly threatened. This was an

issue acknowledged by the solicitor general during arguments before the Supreme Court. When asked by Justice Alito whether a religious institution could lose its tax-exempt status if it opposed same-sex marriage, the solicitor general responded, "I don't think I can answer that question without knowing more specifics, but it is certainly going to be an issue. I don't deny that, Justice Alito, it is going to be an issue."

And I do believe that this is an issue that needs to be addressed. FADA attempts to ensure that no one is discriminated against based on how they view marriage. I am an original cosponsor of this piece of legislation. There have been some updates to this legislation. So if you are looking at the older piece of legislation, I would highly encourage you as swiftly as you can to go online at Raul Labrador, who is testifying who is the House sponsor of this bill has posted this online. And I would encourage anybody who is in the listening audience to look at that most recent version of this important bill.

I recognize the sensitive nature of this, the emotion that is attached to it, but I hope that today doesn't divide into too much of a politically charged discussion about what divides us. But it is important for me and my vantage point, just because you are for one thing doesn't mean you are against another thing, and that is an important distinction.

It is also important to me that we have the right to freely exercise religion. Religion is part of the foundation of this nation. Religion is part of what so many Americans believe in. But it is their choice to believe in it. It does not mean I want to hurt or strip somebody else of their rights, their pursuit of happiness.

As Members of Congress, we have a responsibility to engage in a way that is consistent with what the First Amendment teaches us, to be open-minded and respectful of all Americans' experiences and beliefs, especially when they disagree. And today we have that opportunity to have this vibrant discussion and lead by example.

Chairman CHAFFETZ. We are fortunate to have the two sponsors of FADA that are here. Senator Lee is the Senate sponsor, a colleague of mine from the great State of Utah. We also have Representative Raul Labrador, who is the House sponsor, who is here to share some things.

It is consistent with House practice we typically in the past have allowed House and Senate Members to come present on a separate panel and then, given the pressures and the few days that we have remaining before the recess period here, we typically will excuse them so that they can continue on with their duties and responsibilities. Given the second day here, we have a lot of hearings and a lot of other business happening, so we are going to ask them that they give their opening statements. Then we will excuse them, but we will continue with the rest of the panel for their opening statements and their questions along the way.

It is an important discussion. I am glad we are having it. I appreciate them introducing this bill. I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Mr. Chairman, today is a terribly sad day for the LGBT community and for all of America. Today is the 1-month anniversary of

the deadly shooting spree at the Pulse nightclub in Orlando, Florida, that killed 49 people and injured dozens of others, 1 month ago.

Throughout the day today there will be commemorations across the country. In fact, Members of Congress are holding a vigil this evening on the steps of the United States Capitol. With everything going on in this country right now, these horrific shootings of gay people, black people, police officers, what we should be doing is coming together as a nation, not tearing each other apart, which is exactly what this bill does.

As I sit here now, it is difficult to imagine a more inappropriate, a more inappropriate day to hold this hearing. Even if you truly believe that being gay is morally wrong or that people should be allowed to discriminate against gay people, why in the world would you choose today of all days to hold a hearing on this discriminatory legislation?

To say that this hearing is politically tone-deaf is the understatement of the year. And I do not believe that the chairman did this intentionally. He may not have even realized before the week that today is the 1-month anniversary. But we asked repeatedly to cancel today's hearing or at least postpone it. And dozens of groups and other stakeholders made the same request in letter after letter after letter to the committee, all without success.

Mr. Chairman, I ask unanimous consent to place into the record the letters and statements from 77 groups and organizations relating to today's hearing.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CUMMINGS. It is actually 80, Mr. Chairman. We got three more.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CUMMINGS. Thank you. I also ask unanimous consent to place into the record a letter opposing this legislation signed by more than 3,000 faith and clergy from across the country.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CUMMINGS. At any rate, we are here now. For the record, I do want to thank the chairman for agreeing to our request to have three minority witnesses on the panel. I truly appreciate it. It is much more balanced, and I commend the chairman for agreeing to our request.

We are honored to have with us today our former colleague and distinguished friend in the House of Representatives, Congressman Barney Frank.

We are also very honored to have Jim Obergefell, the lead plaintiff in the Supreme Court's recent case legalizing same-sex marriage. He has a very important and poignant story, and we thank him for being here today.

Finally, our third witness is Katherine Franke, a nationally renowned legal expert and director of the Center for Gender and Sexuality Law at Columbia Law School. And I thank you as well.

I would like to address my remaining comments to Senator Lee and Representative Labrador, the two Members of Congress who are here today sponsoring this legislation in the Senate and the House. I had hoped that we would have had the opportunity to ask you questions about why you believe your bill is a good idea, but

now I understand that you will not be taking any questions from members of the committee. So I would like to ask just one question now so that you might address it in your opening statement.

I am the son of two Pentecostal ministers, and I strongly believe that people have the right to freely express their religious beliefs. Senator Lee and Congressman Labrador, my question for you is simply this: What is the difference between discriminating against someone who is black and someone who is gay? For centuries in our nation a black person could not marry a white person. Those in power justified this doctrine on religious grounds, and they codified it in our laws. But in 1967 the Supreme Court changed all that in the case of Loving v. Virginia. The Court held that this discrimination is unconstitutional.

Now, we have a similar situation with same-sex couples. For centuries, gay people could not marry. This discrimination was also justified on religious grounds, and it was also codified in our statutes. But last year, nearly 50 years after the decision in Loving v. Virginia, the Supreme Court ruled that this discrimination is also unconstitutional. I acknowledge that this change is a major change, and this change is very difficult. But the paramount lesson we have learned over our nation's history is that if we are separate, we will never be equal. That is the lesson we should be reinforcing across our great country every single hour of every single day, especially now. And that is the lesson I hope our committee takes to heart today. And with that, Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentleman. I will hold the record open for 5 legislative days for any members who would like to submit a written statement.

Let us now recognize our panel of witnesses. We are pleased to welcome the Honorable Mike Lee. He is a United States Senator from the State of Utah and author of the First Amendment Defense Act in the United States Senate.

We also have the Honorable Raul Labrador. He is a United States Congressman from the First Congressional District of Idaho and the author of the First Amendment Defense Act in the House of Representatives.

We are pleased to have the Honorable Barney Frank, former United States Congressman from the Fourth Congressional District of Massachusetts. I had the pleasure of serving with Mr. Frank while he was here. I overlapped a little bit, and pleased, sir, that you would join us here for this important discussion.

We are going to go out of order here a little bit because we are going to have Mr. Hice—actually, why don't we recognize Mr. Hice to introduce Mr. Cochran at this point.

Mr. HICE. Thank you, Mr. Chairman. It is a great honor that I have to introduce and welcome former fire chief of Atlanta Kelvin Cochran. Thank you for joining us today, sir, on this hearing on religious liberties.

Chief Cochran served for roughly 34 years, an extremely decorated career. He was, for example, brought to New Orleans right after the Hurricane Katrina and the devastating effects there and did an outstanding job. He also held positions with the International Association of Fire Chiefs and was appointed by President Obama as a U.S. fire administrator between 2008 and 2010. And,

Chief Cochran, we have had the opportunity to serve and do different things for the last couple of years, and I just want to say, first of all, thank you for your service to our country. Thank you for your willingness to be here today, and it is a great honor to introduce former Atlanta Fire Chief Kelvin Cochran. Thank you.

Chairman CHAFFETZ. I thank the gentleman. We thank Mr. Cochran for being here as well.

We have Mr. John Obergefell, who is appearing in his personal capacity. He is a plaintiff in the landmark Supreme Court marriage equality case Obergefell v. Hodges and the coauthor of Love Wins. We thank you, sir, for being here as well.

Ms. Kristen Waggoner, who is senior counsel and senior vice president of the United States Legal Advocacy at the Alliance Defending Freedom. In this role Ms. Waggoner oversees a team specializing in civil liberties legislation and education. And we appreciate you being here.

Ms. Katherine Franke is the Isidor and Seville Sulzbacher professor of law and director of the Center of Gender and Sexuality Law at the Columbia School of Law and the faculty director of the Public Rights/Public Conscience Project. I hope I pronounced all of that properly. I was trying. But thank you, Ms. Franke, for being here with us as well.

And we have Mr. Matthew Franck, a lot of Franks on the panel, but Mr. Matthew Franck, a Ph.D. who is appearing in his personal capacity. In his professional capacity, Mr. Franck is the director of the William E. and Carol G. Simon Center on Religion and the Constitution at the Witherspoon Institute at Princeton University. And so we thank you for being here as well.

Pursuant to committee rules, all non-Members are to rise and raise their right hand. It is optional for Members of Congress in this portion of it, but we would ask that everybody on the panel please rise and raise your right hand.

[Witnesses sworn.]

Chairman CHAFFETZ. Thank you. You may be seated. Let the record reflect that the witnesses answered in the affirmative.

We are now going to recognize each person for 5 minutes, again, with Senator Lee and Congressman Labrador, we thank you for being here. We will recognize you and then, please, you are excused to deal with the business of Congress. But we will start first with Senator Mike Lee.

## STATEMENT OF HON. MIKE LEE, A UNITED STATES SENATOR FROM THE STATE OF UTAH

Senator LEE. Chairman Chaffetz, Ranking Member Cummings, and members of the Judiciary Committee, thank you for holding this hearing and thank you for giving me the opportunity to come and testify before this hearing in support of the First Amendment Defense Act. It's an honor to be here and to participate with my fellow witnesses on this important discussion.

I'd like to preface my remarks today by issuing a challenge to all of those who were involved in this debate here on Capitol Hill and, for that matter, across the country, myself included. As we engage in dialogue with one another about this topic, this topic which happens to be highly charged, let's commit to treating one another

with respect, with kindness, and with decency, as fellow citizens rather than as adversaries. Let's insist on hashing out our honest differences honestly. It's too easy to assume the worst in those with whom you disagree, to impugn their motives so you don't have to listen to their arguments. Let's be better than that today. We all came here to talk, but let's not forget to listen just because we're here to talk.

And with that, I'm going to spend a few more minutes talking now.

The most important feature of this legislation, which I was proud to introduce in the Senate, the First Amendment Defense Act, is its exceptionally narrow scope. If enacted, the bill would do one thing. It would do one thing only, just one thing. That is, it would prevent the Federal Government from discriminating against particular disfavored religious beliefs.

There are other forms of discrimination in the world, for instance, the discrimination that may occur between two private parties, two people who are not the government. But these are entirely different issues, and those types of actions are completely unrelated to and unaffected by the First Amendment Defense Act. This bill deals exclusively with a particular but a rather pernicious form of discrimination, one in which the Federal Government could single out certain religious beliefs for disfavored treatment.

The bill is so narrowly focused because it is a targeted response to particular legal developments that have taken place just in the last year or so. In the wake of last year's decision by the Supreme Court in the same-sex marriage case, Obergefell v. Hodges, many millions of Americans were left wondering: What does this mean for me? What does this mean for me personally and for my family, for how I live my life? There were many who wondered what the Court's decision might mean for countless institutions that play a significant role in our civil society, including churches and synagogues; charities and adoption agencies; counseling services and religiously affiliated schools, colleges, and universities that are made up of American citizens who believe marriage is the union between one man and one woman. For instance, now that the Supreme Court had discovered a constitutional right to same-sex marriage, would a school that holds the belief that marriage is the union of one man and one woman be in danger of losing its tax-exempt status? Would it be deemed no longer performing a charitable function simply because it had that religious belief?

More than one year after the Supreme Court's ruling in the Obergefell case, these questions remain unanswered. On the one hand, the Court's majority opinion in the Obergefell case reiterated the meaning of religious liberty that has always been understood in America when it stated, "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."

But on the other hand, there was the ominous exchange referred to by Chairman Chaffetz a few moments ago between Supreme Court Justice Samuel Alito and Solicitor General Donald Verrilli during oral arguments in that case that seemed to suggest that the Obama administration would be comfortable with the notion that

the IRS could revoke the tax-exempt status of religious institutions, including schools, colleges, and universities, that maintain the traditional definition of marriage.

The First Amendment Defense Act is a very narrow and very targeted legislative response to these questions, these still-unanswered but nonetheless very important questions. The bill reaffirms the letter of the First Amendment. It also strengthens the spirit of the First Amendment. And it does so by stating unequivocally that the Federal Government may not revoke or deny the Federal tax exemption or any grant or contract, accreditation, license, or certification to any individual or to any institution based on a religious belief about marriage.

The First Amendment protects each of us from punishment or reprisal from the Federal Government for living in accordance with our deeply held religious and moral convictions. Adhering to these convictions should never disqualify an individual from receiving Federal grants, contracts, or tax status. What an individual or an organization believes about marriage is not and never should be any of the government's business, and it certainly should never be part of the government's eligibility rubric in distributing licenses, awarding accreditations, or issuing grants.

And the First Amendment Defense Act simply ensures that this will always be true in America, that Federal bureaucrats will never have the authority, the discretion to require those who believe in the traditional definition of marriage to choose between living in accordance with those beliefs on the one hand and on the other hand maintaining their occupation, their tax status, or their eligibility to receive and obtain grants, licenses, or contracts.

The First Amendment Defense Act is absolutely critical to the many charitable and service organizations in this country whose convictions about marriage are fundamental to their work and to their mission. Guaranteeing the full protection of these organizations' First Amendment rights will ensure that faith-based adoption agencies are not forced to discontinue their foster care and adoption services on account of their belief that every child needs a married mother and father. It will protect religiously affiliated schools, colleges, and universities from losing their accreditation or being compelled to eliminate housing options for students. And it will protect individuals, regardless of their beliefs about marriage, from being deprived of eligibility for Federal grants, licenses, and employment simply because of their deeply held convictions.

Now, you may hear tall tales and in some cases perhaps outright falsehoods about this bill, about this legislation we're discussing today. Some may suggest that the First Amendment Defense Act, or FADA as we sometimes call it, would give private businesses a license to violate the antidiscrimination laws with impunity. This is just not so. It isn't true. The bill does not preempt, negate, or alter any antidiscrimination measures or civil rights laws, State or Federal. To be clear, this bill does not take anything away from any individual or any group because it does not modify any of our existing civil rights protections.

The First Amendment Defense Act does not allow Federal workers or contractors to deny services or benefits to same-sex couples,

and it does not allow hospitals to refuse medically necessary treatment or visitation rights to individuals in same-sex relationships.

I invite everyone within the sound of my voice to read the bill so you can see in plain English, in black and white that the First Amendment Defense Act does not do any of these things. It simply affirms all Americans' God-given, constitutionally protected right to live according to their religious or moral convictions without fear of punishment by the government, especially when it comes to operating churches, schools, charities, or businesses.

It recognizes that religious liberty in America has always meant that the government's job is not and can never be to tell people what to believe or how exactly to discharge their religious duties, but rather to protect the space for all people of all faiths and people of no faith at all to seek religious truth and to order their lives accordingly.

Questions surrounding marriage today are difficult, and reasonable people of good faith will reach different judgments about how best we can protect religious liberty. But the First Amendment must remain our lodestar. And I believe any differences of opinion can be constructively worked out, even and especially as to particular provisions of this bill if our shared concern remains preserving the American tradition of religious liberty. I hope it is.

Thank you.

Chairman CHAFFETZ. I thank the gentleman.

I will now recognize the Representative from Idaho, Mr. Labrador, for 5 minutes.

**STATEMENT OF HON. RAUL LABRADOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO**

Mr. LABRADOR. Good morning, Chairman Chaffetz and Ranking Member Cummings. Thank you for holding this hearing today and allowing me to testify on my bill, the First Amendment Defense Act.

From its very beginning, our nation has been home, harbor, and refuge to a wide range of religious beliefs. No other country has been as tolerant and as accommodating of religion and religious people as America.

American tolerance has been a vital source of our strength for our people and for the Nation. Religious pluralism is a hallmark of our nation's promise. It is what continues to make the land of the free so attractive to religious refugees and earnest seekers from around the world whose humble wish is the free exercise of religion.

It is unsurprising then that when it came time for our Founding Fathers to list those rights most fundamental to a free and fulfilled people, the freedom of religion was prominently placed before the rest. I am grateful for the opportunity to testify before you today because I fear that this fundamental freedom is threatened.

Over the past several years, we have seen a shift away from our nation's long-held beliefs in the value of religious freedom, particularly where an individual's religious belief or moral conviction that marriage is the union of one man and one woman is concerned. This growing intolerance has spawned a climate of intimidation in the public sphere.

I have worked with Senator Lee for the past 3 years on the First Amendment Defense Act to protect individuals, churches, and other religious institutions, including institutions of higher education, from government discrimination simply because they exercise what, until recently, we as Americans believed to be unalienable, self-evident right. No American should be threatened or intimidated because of their belief in traditional marriage.

Critics of the bill have falsely claimed that the First Amendment Defense Act would give license to discriminate against the LGBT community. It has never been our intention to give anyone a so-called license to discriminate. In fact, Senator Lee and I have spent countless hours listening to both supporters and opponents of the bill in order to draft the legislation in a way that religious liberty is protected without taking anything away from anyone. Our bill does not take away anybody's rights, to answer Mr. Cummings' question. It just attempts to enshrine in religious liberties—to enshrine in law religious liberties long-believed to be protected.

Today, the OGR Committee is considering a revised version of the First Amendment Defense Act, which protects those who stand for traditional marriage and same-sex marriage alike, and we have made these amendments after speaking to countless people who have both opposed and supported this bill.

All Americans should be free to believe and act in the public square based on their beliefs about marriage without fear of government penalty. The First Amendment Defense Act simply ensures the fundamental right to exercise one's religion by prohibiting the Federal Government from denying or excluding a person from receiving a Federal grant, contract, loan, license, certification, accreditation, employment, or other similar position or status based on the exercise of that religious or moral conviction.

Detractors will have you believe that the First Amendment Defense Act would allow hospitals to refuse care to a same-sex couple or turn away a single pregnant mother. This claim is completely false. The First Amendment Defense Act expressly excludes hospitals, clinics, hospices, nursing homes, or other medical or residential custodial facilities with respect to visitation, recognition of a designated representative for health care decision-making, or refusal to provide medical treatment necessary to cure an illness or injury.

It has also been hypothesized that this bill would authorize Federal Government employees to refuse to process tax returns, visa applications, Social Security checks, or passport applications of same-sex married couples. The bill specifically excludes Federal employees acting within the scope of their employment, and thus does not permit government employees to refuse services or benefits in any circumstance.

However, the pendulum of tolerance must swing both ways. An employee like former Fire Chief Kelvin Cochran acting outside the scope of their employment should not lose their job because of their beliefs they hold and because of their practices.

Finally, the claim that FADA would allow homeless shelters or landlords to turn away same-sex married couples is again false. This bill does not alter or modify any civil rights protections or negate any Federal antidiscrimination laws already in existence. And

I repeat because I think this needs to be heard, the bill does not alter or modify any civil rights legislation.

In addition, the bill specifically excludes Federal for-profit contractors, which are usually the contractors that are building these buildings, acting within the scope of their Federal contract from refusing any services or benefits.

As I have had conversations with people and read the many comments about this bill in preparation for this hearing, one thing has become obvious to me, that there is a gross misunderstanding as to the intent and purpose of this bill. I have met with several opponents of the bill to understand their concerns, and I have read the testimony of many of the witnesses testifying today, and it has become painfully clear that they haven't even read the bill.

I say to all detractors of this very measured piece of legislation just read it, please. Please read the bill that this committee is considering today before you make statements about the legislation. And to the media that's here today, I ask the same. Please read the bill. We have gone through painstaking time and effort to make sure that this bill takes nothing away from any individual, but in a measured way we protect the rights enshrined in the Constitution.

Many people claim that this law is unnecessary. Well, I disagree, and you will see why it's necessary because of the testimony and many of the statements made here by the opposition. While Americans are free to structure their personal relationships as law permits, the Federal Government should not and must not use its muscle or might to threaten or target individuals and organizations who hold traditional religious views.

The need for religious liberty hits close to home for me. I come from a religious tradition that in the no—not-too-distant past experienced intolerance, suffered discrimination, and fortunately, survived an official extermination order at the hands of the government. Freedom of religion is not only the right to worship in private, but it is also the right to publicly exercise our religion without fear of government interference.

In the words of James Madison, "The religion then of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." This right, this freedom is in jeopardy today.

We live in a time where some strident voices call for tolerance but only for those with whom they agree. Intolerant tolerance really isn't tolerance at all. The First Amendment Defense Act is a reasonable, rational, and important step forward in the protection of religious beliefs and moral convictions regarding marriage. You will hear today various examples of how religious freedom is currently under attack. My bill is designed to protect the First Amendment's guarantee of the exercise of these freedoms.

Thank you, Mr. Chairman. Thank you, Mr. Cummings. And thank you, Committee, for listening to these words.

Chairman CHAFFETZ. We thank the gentleman.

We will now recognize Congressman Frank. You are now recognized for 5 minutes.

## WITNESS STATEMENTS

### STATEMENT OF BARNEY FRANK

Mr. FRANK. Thank you. Mr. Chairman and members of the committee, let me say as he's leaving room that I was glad to hear Mr. Labrador stress the importance of the American tradition of welcoming people, non-Americans to come to our shores to exercise religious freedom, and I was particularly pleased that, unlike some others, he did not exclude Muslims from that tradition. I think that is an important principle of which we, I hope, will continue to be proud.

I'm sorry, was that a gavel? I ——

Chairman CHAFFETZ. No, no, no.

Mr. FRANK. Oh, I ——

Chairman CHAFFETZ. They were adjusting the mic, and it pulled out the cord and it made a sound. Sorry.

Mr. FRANK. I am still gavel-conscious when I'm here.

[Laughter.]

Mr. FRANK. The next thing I want to say is that I appreciate this telling us that we should all be nice, and I would reciprocate by saying, yes, okay, how about being nice to me? I was here for 32 years. We used to say that we don't take things personally, and most of the time we don't, but, Mr. Chairman, this is very personal. This is a legislative enactment that essentially says that the fact that I live in a loving committed marriage with another man is somehow a threat to other people's freedom. And the Congress has to single that out to act against it.

And let me make this point. You're talking about mischaracterization. This is not a bill to protect religious liberty in general. It singles out one particular religious tenet, the notion that same-sex marriage is morally wrong, oh, and also thrown in that non-marital sex is wrong. There are a whole lot of religious tenets that are under attack, so this one singles it out.

And when the Senator said, well, let's be kind and respectful, I don't feel respected. I don't feel that this is kind to single out what I do. And I've got to say, Mr. Chairman, I got married when I was still here. I don't think any of the people with whom I served, some of whom are still here, were in any way inconvenienced or compromised or that their religious freedom was impinged. And I don't understand why you have to single out my marriage as something against which people have to be protected. And single out is what you do.

And as far as tolerance is concerned, I want to be very clear. I think people who are here shared with me I have never been overly sensitive to people's opinions. Maybe the opposite is the case.

[Laughter.]

Mr. FRANK. But when there was a bill to outlaw the practices of one of the outstanding homophobic bigots of our time, that nut from Kansas who used to go and picket cemeteries because he said that's the gay people's fault, I was one of three Members of the House who voted against that. Three of us, Ron Paul, Dave Wu, and I voted to allow this bigot to continue to demonstrate his bigotry. The Supreme Court sided with us. Any of you were here, you probably voted for that bill who had been there at the time.

This is not a case of people's right to think what they think or feel what they feel. This bill—and I will differ specifically with Mr. Labrador on this—empowers people to take my tax money and use it to do things and then exclude me and Jim from its benefit and a lot of other people as well because Mr. Labrador said with regard to housing, he specifically wanted to object to that. I spent a lot of my time here working on affordable housing. We created the Low-Income Housing Trust Fund. I was glad to do it. Mr. Jordan is not here but his predecessor Mike Oxley and I worked together on that.

And it says that you can build housing with Federal funds for low-income renters. A very large number of these, contrary to Mr. Labrador's view, and I say this because I specialize in this area, are nonprofits. Nonprofit developers are major stanchions of housing, and this bill explicitly says that the Federal Government may not say to a nonprofit developer if you intend to exclude same-sex married couples, we're not going to let you use the money to do that so that they can take the money I pay—I pay taxes, and as some of you will discover, I pay a lot more taxes now than when I was here ——

[Laughter.]

Mr. FRANK.—and you're going to take the tax money I pay and build housing and say people like me can't live there because we somehow would be offensive, regardless of our behavior, and telling us that it won't impinge on any other existing civil right is meaningless because in much of the country there is no such rights.

The Supreme Court says we have a right to be married. There is no Federal legislation and in many States no other legislation that protects us against discrimination. So the argument that, oh, you don't have to worry because existing statutes aren't preempted is irrelevant to many, many Americans who live in places where there is no such statute.

Also, I was struck—I think it was Senator Lee who said, well, what about people who administer programs involving care for children? And they believe that the child is best served by a marriage with two parents, a mother and a father. Well, if you believe that and if you believe the child has been disadvantaged by not having it, how do you morally justify further disadvantaging that child by denying him or her benefits? Because that's what this bill allows. It says that if you are—we can say, hey, the child of a same-sex couple or an unmarried parent, no, we don't approve of that and we're going to exclude that, so you punish the child. Nothing in here says that you cannot do that.

And finally, it would allow State employees—now Federal employees you exclude from this but State employees are not covered in the exemptions. A lot of Federal programs are administered by State employees. So this now leaves it very much open to the interpretation that State and Federal programs, unemployment compensation, disability, you can disapprove of and exclude people like that.

So, Mr. Chairman, I can't say I'm glad that we're having this hearing. I really resent the fact that you're having this hearing. You're singling me and a lot of other people out who don't deserve this from you. We don't deserve the unkindness and the disrespect that we get.

If you were talking about people generally being protected because their religious views might be under assault, then bring out a general bill, but to say that same-sex marriage is somehow the issue and that people should be allowed to take Federal money and discriminate against those of us who are in same-sex marriages, which this bill clearly does in some ways for nonprofit contractors, for example, it violates a great principle.

And I'll close with this when people say I'm somehow assaulting them. I'm not talking about private citizens. I'm talking about people who decide voluntarily to go after Federal money. And a great former Member of this body Gus Hawkins said when he presided over a bill that said you can't take Federal money and discriminate, if you're going to dip your fingers in the Federal till, don't complain if a little democracy rubs off on them. I hope that principle will win out.

[Prepared statement of Mr. Frank follows:]

STATEMENT OF BARNEY FRANK ON H.R. 2802

TO THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM.

Mr. Chairman and Members of the Committee,

I do not understand why people think I should pay taxes that fund a variety of Federal contracts and then be excluded from receiving any benefits from them for which I am otherwise eligible because the contractor who has voluntarily sought these funds doesn't think I should have married the man I love. That contractor is of course fully entitled to be unhappy that Jim and I have been happily married for four years, even though it has so obviously had no effect on him or her that he or she either never knew it or has long since forgotten it.

If, when it is brought to his or her attention, he or she decides not to socialize with me, that is a loss I will bear without complaint. If, on meeting me in a social setting, he or she identifies himself or herself as someone offended by my marriage, I will not only have no objection to him or her avoiding me for the duration of the event, I would find that preferable to a reiteration of arguments I heard years ago, the falsity of which has been long since demonstrated, that Jim and I have in some indefinable way damaged the social fabric by sharing our lives.

But if the contractor in question has successfully pursued a contract by which Federal taxpayers, of whom I am a larger one than I was when I served in this body, pay him or her to provide specified services to class of people that includes me, I object strenuously to being denied them because of an aspect of my life that does him or her absolutely no harm and is wholly irrelevant to the purposes for which he or she is being paid.

My objection in no way means that I do not recognize his or her right to any opinion whatsoever. But neither does it mean my acquiescence in his opinion diminishing my ability to participate in an activity which he has not only volunteered to perform, but has almost certainly worked hard for the right to do so and be financially rewarded for it.

The objection to being forced to set aside your personal impulse to refuse to associate with law-abiding people who behave civilly because of your prejudice against some aspect of their personality was best answered by one of the great former members of this House, Gus Hawkins of California, Chairman of what when Democrats were in power was called the Committee on Education and Labor, when he replied that "when you dip your fingers in the Federal till, you shouldn't be surprised if some democracy rubs off on them."

What you are considering today is whether one's religious beliefs justify an exception to the Hawkins principle. And when his point is properly understood, the answer is no. The question here is not whether people should be free in their personal and individual capacities to follow their religion. It is in the case of this legislative proposal whether the particular religious views of one acting in an official capacity, i.e. as an agent of our democratically elected, publicly funded government, can supersede public policy to the disadvantage of individuals whose legally guaranteed rights conflict with those doctrines.

It is of course the case that this particular proposal is motivated solely by an animus against lesbian, gay, bisexual and transgender people, and is in fact worded in the form I have seen to authorize denial of publicly funded services to anyone in these categories who engages in any physical intimacy with another. That it is an expression of anti GLBT prejudice is beyond

debate. There are a variety of religions with a variety of precepts that differ with Federal policies. This bill singles out one such objection and empowers those who hold this belief—and only them—with a legal right no other religious believer will enjoy.

And no one should be misled that it is simply a protection against an individual being forced into personal activity he or she believes is sacrilegious. Federal funds for the construction of rental housing for people of limited income was one of the issues on which I focused in my tenure here. I am deeply troubled by the possibility that this bill becomes law and allows developers to receive some of the money I fought to make available, and then use it to construct rental units which people like me would be prevented from inhabiting. How in the world does requiring that developer to rent to same-sex couples in any way impinge on his religious freedom?

Finally having noted that this bill is motivated by, and intended to implement dislike of people like me, I do want to disclaim any notion that it would be better if it were more broadly assaultive of people's right to live their own lives free from the prejudices of others. But the warning of Pastor Niemoller is relevant here. This bill, in the unlikely event in is enacted, signed and found to be Constitutional will be a powerful precedent, attracting others who have religious objections to the entirely lawful activities -or personal characteristics—of some of their fellow citizens to subject them to similar penalties.

BIOGRAPHY

Barney Frank was a U.S. Representative in Congress from 1981 to 2013. He is a resident of Massachusetts who spends much of his time in Maine with his husband, Jim Ready, whom he

married in 2012 while he was a Member of the House. He does not know if any other Member or employee felt compelled to violate any religious belief in working with him.

Chairman CHAFFETZ. I thank the gentleman.

Mr. Cochran, you are now recognized. Make sure your microphone is on there. There we go. Thank you.

**STATEMENT OF KELVIN COCHRAN**

Mr. COCHRAN. Chairman Chaffetz, Ranking Member Cummings, members of the committee, it's great to be back before Congress. The last time I was here was when President Barack Obama nominated me to be the United States fire administrator. Thankfully, I was unanimously confirmed by the Senate Homeland Security Committee.

As I sit before you today, as an African-American male with 34 years in public safety, I, like many Americans, have been heartbroken by the loss of life in the recent events in our nation. So before my remarks, I'd be remiss not to acknowledge the sensitivities of the loss of lives felt by the African-American community, also the sensitivity of the loss of lives felt in the public safety community and as a result of this being the 1-month anniversary of the loss of lives in the city of Orlando, Florida. And I would ask that we all continue to pray for our nation.

To begin my remarks on this issue today, I was born in Shreveport, Louisiana, in 1960 at Confederate Memorial Hospital. I was one of six kids. My father left my mother and raised all six of us by herself. At 5 years old I heard sirens outside of our front door of the shotgun house we lived in, and to my surprise, we opened the door and there was a big red Shreveport Fire Department fire truck in front of our house fighting the fire in Ms. Mattie's house across the alley that we lived in. On that day I was smitten, and I wanted to be a firefighter when I grew up.

The grownups told us in our neighborhood that in the United States of America all of our dreams would come true if we believed in and had faith in God, if we go to school and got a good education. If we respected grownups and treat the other children like we wanted to be treated, all of our dreams would come true.

And in my case they were right. In 1981 I became a Shreveport firefighter, one of the first African-Americans in the history of the city of Shreveport to do so. However, I faced significant discrimination because of my race. There were designated plates, spoons, and forks for the black firefighters. At one fire station I had to wash the dishes in scalding hot water, and captain stood by to make sure that the water was hot enough to get rid of the germs. There was a designated black bed for the black firefighters so that the white firefighters on the other shifts could have the assurance that they were not sleeping on a bed that was shared by a black man. And I was constantly faced with a barrage of racial slurs.

However, I believe that in our country if I practiced the values that I was raised upon that made my dream come true, I had a chance to overcome those racial barriers, and that through compassion for people, passion for the work that we were all called to do, and competence in the work that we all performed that I would win over my brother and sister firefighters and would one day be recognized as an equal member of the Shreveport Fire Department.

In 1999 I became the first African-American for the city of Shreveport in its history. In 2008 I was honored and humbled to

be appointed as fire chief of the city of Atlanta under the Honorable Mayor Shirley Franklin. Twenty months later, I was honored to be appointed to the United States Fire Administration by the Honorable President Barack Obama.

I was here less than a year and the Honorable Mayor Kasim Reed came to Washington, D.C., and recruited me back to the city of Atlanta where I resumed my duties as a fire chief under his leadership. In 2012, my professional association, the International Association of Fire Chiefs and Fire Chief magazine recognized me as the fire chief of the year.

But in 2014, the week of Thanksgiving, my childhood-dream-come-true fairytale career came to an abrupt end when I was suspended for 30 days without pay after Atlanta city officials who disagreed with the Judeo-Christian beliefs about marriage learned that I mentioned my beliefs in such in a book that I had written for a Christian men's bible study.

During that suspension, the city launched an investigation to determine if my religious beliefs caused me to discriminate against anyone in the LGBT community. That really was a shock to me. My faith does not teach me to discriminate against anyone but rather it instructs me to love everyone without condition and to recognize their inherent human dignity and worth as being created in the image of God and to lay down my life if necessary in the service of my community as a firefighter.

And I would even do it today if it was necessary even in this very room. In fact, it was because of the discrimination that I myself suffered that I made a promise that under my watch if I were ever in charge no one would ever have to go through the horrors of discrimination that I endured because I was different from the majority, which is why I created in Atlanta the Atlanta Fire Rescue Doctrine based upon a collaborative effort from all the men and women from every people group within our organization. It was a doctrine that established a system to provide justice and equity for every member of the department and every member of the community that we had served.

Consequently, after concluding its investigation, the city determined that I had never discriminated against anyone, including members of the LGBT community. Nevertheless, ladies and gentlemen, on January the 6th, 2015, I was terminated from employment from the city of Atlanta. It's unthinkable to me today as an American that the very faith and patriotism that caused my childhood dreams to come true and my professional achievements is what the government ultimately used to bring my childhood dream come true to an end.

I wrote a book to encourage men, inspire them to fulfill their God-called purpose as husbands, fathers, and community leaders. Only a few paragraphs of the 162-page book addressed teachings, Biblical teachings on marriage and sexuality, versus taken directly from the Holy Scripture, yet the city of Atlanta's officials, including Mayor Reed, made it clear that it was those beliefs that resulted in my suspension, the investigation, and my termination.

Following my termination, an Atlanta City Council member made this statement, "When you're a city employee and your thoughts and beliefs and opinions are different from that of the

city's, you have to check them at the door." The city's actions do not reflect true tolerance and diversity that has always been a part of America's history and set us apart from other nations. Equal rights and true tolerance means that regardless of your position on marriage you should not—you should be able to peaceably live out your beliefs and not suffer discrimination at the hands of the government.

The First Amendment Defense Act would ensure that no Federal employee who expressed their beliefs about marriage on their own time face discrimination by the government and face punishment that it have endured. Please pass this law to ensure our country remains diverse and truly tolerant. No one deserves to be marginalized or driven out of their profession simply because of their beliefs about marriage.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Cochran follows:]

**TESTIMONY**

**BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**

**ON**

**RELIGIOUS FREEDOM & THE FIRST AMENDMENT DEFENSE ACT**

**BY**

**KELVIN J. COCHRAN**

**JULY 12, 2016**

Mr. Chairman and Members of the Committee:

After being born and raised in poverty, I rose to become the first African American Fire Chief in the City of Shreveport, Louisiana and ultimately held the highest fire office in the nation. Despite these achievements, government officials used the very religious convictions that fueled my professional success to bring an end to my career in public service.

There is an ever increasing attack on religious liberty and expressive freedom in our beloved United States of America. Our government, formed to be freedom's greatest protector, increasingly is becoming its greatest threat. My story is just one of many where the government has imposed adverse consequences on an individual for publicly expressing the belief that marriage is the union of one man and one woman or for seeking to live and work consistent with that belief. Because of this government discrimination, the First Amendment Defense Act is necessary to preserve the freedom and dignity of people who hold beliefs about marriage that have been embraced throughout the world for most of human history and who seek to peacefully live consistent with those beliefs without fear of unjust government punishment.

The story of my dedicated public service became publicized during the week of Thanksgiving 2014 in a way that I never thought possible. That was when my government employer—the City of Atlanta—suspended me without pay and subsequently terminated me because of beliefs I expressed about marriage in a religious devotional book that I wrote on my own time. This brought my 34 years in the fire and emergency services industry to an abrupt end.

The very faith that inspired my professional achievements is what the government ultimately used to bring my childhood-dream-come-true career to an end.

I was born in poverty in Shreveport, Louisiana in the early 1960s, and I was one of six kids. We were living in a government project. After my dad left, my mother raised all six of us by herself. At that point, we were too poor to stay in the government project, so we moved to an alley shotgun house. When I was five years old, one Sunday after church, we heard a siren outside of our house. We sprang to our feet and opened the front door, and there was a big red Shreveport fire truck in front of our house. Ms. Mattie's house across the alley from us was on fire. I saw the firefighters, and I was smitten on that day: I knew that I wanted to be a firefighter when I grew up.

There were three things that I thought about as a little kid – I wanted to be a firefighter, I didn't want to be poor, and I wanted a family because I realized how awful it was not to have a dad at home. The grown-ups told us that in America all of our dreams would come true if we had faith in God, went to school and got a good education, respected grown-ups, and treated others like we wanted to be treated. Following those principles and trying to serve God faithfully led to success in my career.

In 1981, my childhood dream came true when I became a firefighter for the City of Shreveport. I was one of the first African Americans hired by the Shreveport Fire Department. I faced numerous obstacles and difficulties at work because of my race. But I believed that if I practiced the values that I had been taught as a child and demonstrated passion and dedication to the department and my colleagues, I could overcome any racial barrier.

Eventually, that proved to be true. In 1999, after years of dedicated service and many promotions within the department, I became the Chief of the Shreveport Fire Department.

In 2008, Mayor Shirley Franklin appointed me as the Fire Chief of the City of Atlanta.

In 2009, I was appointed by President Barak Obama and confirmed by the United States Senate as U.S. Fire Administrator for the United States Fire Administration, which is a component of the U.S. Department of Homeland Security's Federal Emergency Management Agency. Serving as the nation's highest ranking fire official, I oversaw, coordinated, and directed national efforts to prevent fires and improve fire response. I also led fire prevention and safety education programs and professional development opportunities for emergency responders.

Less than one year later, Mayor Kasim Reed recruited me back to Atlanta. I resumed my duties as Fire Chief of Atlanta in 2010, and I continued to serve there until my termination. While I was in Atlanta, I was nationally recognized as Fire Chief of the Year in 2012. Subsequently, in July 2014, under my leadership, the City of Atlanta received the best Public Protection Classification rating available from the Insurance Services Office for its fire services, a rating shared by only 60 cities nationwide.

Just weeks after that success, I was suspended for 30 days without pay after passages of a book that I wrote about my faith were brought to the attention of the mayor and a member of the City Council. Then on January 6, 2015, I was terminated from my employment with the City of Atlanta, ending my career. All of this happened simply because I expressed my religious beliefs about marriage and biblical morality—beliefs that have been held by Christians for nearly two thousand years.

Among the most important Christian values is to love without condition all humankind. I believe that every person—without exception—possesses the image of the Creator, and as such has inherent dignity and worth.

In the fire service, I had the privilege to live out this virtue every day for 34 years. I would have laid down my life for anyone in the community. And I would gladly do so today if necessary, even though I no longer serve in a profession that often requires this ultimate sacrifice.

Having overcome discrimination myself, I believed that I had an obligation as Fire Chief to run inclusive fire departments that respected the diverse traits, characteristics, and beliefs of all my employees. I sought to ensure that every member of my departments was treated with dignity and respect, regardless of any personal characteristic.

So the investigation that the City of Atlanta launched during my suspension was particularly hard to understand and even more difficult to endure. For years, I had worked so hard to ensure that everyone in my departments was respected and valued. And now, the City was insinuating that because of my faith, I discriminated against others.

After my suspension but before my termination, the City determined that I had never discriminated against anyone. Its investigation concluded that "[n]o interviewed witness could point to a specific instance in which any member of the organization has been treated unfairly" by me. Yet the City terminated me anyway.

It is still unthinkable to me that writing a book about my faith to help other men pursue God's calling on their lives brought about the end of my career in public service. I was prompted to write the book while I was leading a men's Bible Study. I became fascinated with God's interaction with Adam in the Garden of Eden. After much research and prayer, I became convinced that there were too many Christian men who were failing to live up to all that God is calling them to be. So I wrote the book to encourage and inspire men to fulfill their purposes as husbands, fathers, and community leaders. A few pages in the book addressed biblical morality, sexual challenges that Christian men face, and the Bible's teaching on marriage, but those issues are not the book's primary topic. Yet statements from City of Atlanta officials have made it clear that those religious beliefs resulted in my suspension, investigation, and ultimate termination.

On the day I was suspended, Mayor Reed issued the following statement on social media:

> Late last week, Mayor Reed learned about material published in a book by Atlanta Fire and Rescue Chief Kelvin Cochran. The contents of the book do not reflect the views of Mayor Reed or the Administration. Mayor Reed's full statement is below:
>
> I was surprised and disappointed to learn of this book on Friday. I profoundly disagree with and am deeply disturbed by the sentiments expressed in the paperback regarding the LGBT community. I will not tolerate discrimination of any kind within my administration.
>
> We are conducting a thorough review of the facts surrounding the book and its distribution. In the interim, I have directed that the following steps be taken:
>
> • Chief Cochran will be suspended for one month without pay;
>
> • Chief Cochran will be required to complete sensitivity training;
>
> • Chief Cochran will be prohibited from distributing the book on city property; and
>
> • Deputy Chief Joel G. Baker will serve as Acting Fire Chief in Chief Cochran's absence.
>
> I want to be clear that the material in Chief Cochran's book is not representative of my personal beliefs, and is inconsistent with the Administration's work to make Atlanta a more welcoming city for all of her citizens - regardless of their sexual orientation, gender, race and religious beliefs.

Atlanta City Council Member Alex Wan similarly made the following statement to the *Atlanta Journal Constitution*:

> I respect each individual's right to have their own thoughts, beliefs and opinions, but when you're a city employee, and those thoughts, beliefs and opinions are different from the city's, you have to check them at the door.

Councilmember Wan also said that my termination sent a strong message. I could not agree more. It publicly declared that there are grave consequences for expressing the belief that marriage is the

union of a man and a woman. If government employees hold beliefs like mine, they better remain silent, even in their personal lives, or they will be fired.

But the actions by the City of Atlanta do not reflect American values. The real test of liberty is what happens when citizens disagree on important issues. By terminating me because of my beliefs, the City failed to reflect the true tolerance and diversity that has always set America apart. Instead, the City labeled as outcasts the many diverse people—from Christians to Jews to Muslims—who express their faith's longstanding teachings on marriage.

The First Amendment Defense Act would protect federal employees who express their religious belief or moral conviction that marriage is the union of one man and one woman. As I previously mentioned, I was the Fire Administrator for the United States Fire Administration in 2009. Had I been in that position when I wrote my book, the federal government could have terminated me just as the City of Atlanta had done, simply because it did not like the beliefs that I expressed. There are many men and women who daily risk their lives for others like I did, yet they live in fear of their government discriminating against them because of their belief about marriage. The First Amendment Defense Act would ensure that no federal employee will face the same sort of unjust government punishment that I endured.

We live in a pluralistic society in which people of good will hold more than one view of marriage. We have a rich history in America of balancing important government interests with a wide diversity of beliefs, including disfavored beliefs, on controversial issues like war, healthcare, education, and abortion. I'm here today to ask that you preserve these cherished freedoms in a world where they are increasingly eroding. When our government takes steps to safeguard its citizens' freedom to peacefully live and work according to their beliefs, we as a nation live up to the best of our ideals.

Although I was born in poverty, I have been blessed to succeed in America, a land where all are equal regardless of their religious creed. Please pass the First Amendment Defense Act and send the message that there is a place for me, and others like me, in the public square. In a truly diverse society, no one deserves to be ostracized, marginalized, or driven out of their profession because of their beliefs about marriage.

Mr. MEADOWS. [Presiding] Thank you, Chief Cochran.
Mr. Obergefell, you are recognized for 5 minutes.

**STATEMENT OF JIM OBERGEFELL**

Mr. OBERGEFELL. Chairman Chaffetz and the Ranking Member Cummings, thank you for inviting me to testify today. My name is Jim Obergefell, and I was the lead plaintiff in the Supreme Court's historic marriage equality ruling in Obergefell v. Hodges. June 2015 was a joyous time for me and LGBT people across the country. The Supreme Court decision extending the freedom to marry to all loving couples was a landmark achievement in the long and ongoing struggle for equality under the law. I was deeply honored to have played a role in helping same-sex couples win this victory.

June of this year was a time of heartbreak for millions around the world, including myself. The murder of 49 people and wounding of 53 others at a gay nightclub in Orlando, Florida, on June 12 was a devastating tragedy and the worst attack on the LGBT community in our nation's history.

Today, exactly 1 month after this horrifying event, I am appearing before this congressional committee to discuss a bill that would authorize sweeping, taxpayer-funded discrimination against LGBT people, single mothers, and unmarried couples. I think that is profoundly sad.

With all due respect to you and the members of this committee, this hearing is deeply hurtful to a still-grieving LGBTQ and ally community. It is my opinion that a hearing like we're having today would have been much better spent in looking at how best to ensure that no one in this country is subjected to violence or discrimination based on who they are or whom they love. Sadly, that is not the focus of today's hearing.

I will explain why I am so strongly opposed to the so-called First Amendment Defense Act, but I first would like to share a bit more about myself. I was in a loving, committed relationship with my partner and eventual husband John Arthur for almost 21 years. I wish more than anything that John were still with me today, but he passed away on October 22, 2013, after a years-long battle with amyotrophic lateral sclerosis, known as ALS. I was with John, caring for him, at every difficult stage of his illness.

Losing the most important person in your life is never an easy experience or one that is free of heartbreak. However, losing John was made much more difficult by the State of Ohio because it refused to recognize our marriage. We learned that I would not be listed on John's death certificate as his surviving spouse when he died because the State refused to recognize our marriage for any purpose.

It is difficult to express just how devastating it is to be told by the State in which you reside and where you were born that you will not be recognized as the surviving spouse to the man you loved more than anything and built a life together with for more than two decades.

We decided to fight back against this injustice. Together with partners like the ACLU, we began a legal journey that, sadly, John did not get to see to conclusion. It culminated in a momentous victory for loving and committed couples across our country. I know

John would have been proud to have a played a role in this historic legal victory for equality.

As important as it is that same-sex couples like John and I have the ability to obtain a civil marriage license in any State of the country, it is also critically important that this constitutional right is not undermined by proposals, like this legislation, that would subject loving couples like me and John and other LGBT people to discrimination.

I understand that the proponents of this legislation argue that it is necessary to protect churches, clergy, and others who oppose marriage equality for religious reasons. But the First Amendment is already clear on this point. Since the founding of this country, no church and no member of the clergy has been forced to marry any couple if doing so would violate their religious teachings. That has not changed since same-sex couples won the freedom to marry.

Religious liberty is a core American value. Everyone in this country is free to believe or not and to live out their faith as they see fit, provided that they do not do so in a way that harms other people. As I see it, this legislation turns this value on its head by permitting discrimination and harm under the guise of religious liberty.

Among this legislation's many potential harms, it could allow any privately owned business to refuse to let a gay or lesbian employee take time off to care for a sick spouse even though that otherwise would violate Federal Family and Medical Leave laws. This is not the kind of dignity and respect that the Supreme Court spoke so eloquently in the decision granting the freedom to marry nationwide last June. What could ever justify such a discriminatory and harmful action?

Earlier in this hearing, it was stated that the purpose of the First Amendment Defense Act is to ensure no one is discriminated against because of how they view marriage. I would like you to read the bill again and understand that is exactly what this bill does. It allows discrimination against me and couples like me and John across this country who believe in marriage equality, who believe in our constitutional right to marry the person we love. I believe that the United States Congress must be better than this.

Thank you again for the opportunity to provide these remarks.

[Prepared statement of Mr. Obergefell follows:]

**Written Statement of James Obergefell for July 12, 2016 Hearing in the Committee on Oversight and Government Reform on "Religious Liberty and H.R. 2802, the First Amendment Defense Act (FADA)"**

Chairman Chaffetz and Ranking Member Cummings:

Thank you for inviting me to testify today. My name is Jim Obergefell, and I was the lead plaintiff in the Supreme Court's historic marriage equality ruling in Obergefell v. Hodges.

June 2015 was a joyous time for me and LGBT people across the country. The Supreme Court decision extending the freedom to marry to all loving couples was a landmark achievement in the long and ongoing struggle for equality under the law. I was deeply honored to have played a role in helping same-sex couples win this victory.

June 2016 was a time of heartbreak for millions around the world, including myself. The murder of 49 people and wounding of 53 others at a gay nightclub in Orlando, Florida on June 12 was a devastating tragedy and the worst attack on the LGBT community in our nation's history.

Today, exactly one month after this horrifying event, I am appearing before this congressional committee to discuss a bill that would authorize sweeping, taxpayer-funded discrimination against LGBT people. I think that is profoundly sad. With all due respect to you, Chairman Chaffetz, and the members of this committee, this hearing is deeply hurtful to a still-grieving LGBT community.

It is my opinion that a hearing like we're having today would have been much better spent in looking at how best to ensure that no one in this country is subjected to violence or discrimination based on who they are or whom they love.

Sadly, that is not the focus of today's hearing. I will explain why I am so strongly opposed to the so-called "First Amendment Defense Act," but I first would like to share a bit more about myself.

I was in a loving, committed relationship with my partner and eventual husband John Arthur for almost 21years. I wish more than anything that John were still with me today, but he passed away on October 22, 2013 after a years-long battle with amyotrophic lateral sclerosis (known as ALS). I was with John, caring for him, at every difficult stage of his illness.

Losing the most important person in your life is never an easy experience or one that is free of heartbreak. However, losing John was made much more difficult by the state of Ohio because it refused to recognize our marriage.

Following the Supreme Court's decision in 2013 to strike down the heart of the so-called "Defense of Marriage Act," which prohibited federal recognition of marriages between individuals of the same sex, John and I decided to marry. Our home state, Ohio, did not allow same-sex couples to marry. At the time, John was confined to his bed and we knew that he did not have much time left. His physical condition made it extremely difficult to travel to a state where we would have the freedom to marry. Thanks to tremendously generous support from family and friends, on July 11, 2013, we boarded a medically equipped plane and traveled to Maryland. John's health was so fragile at that time that we could not even leave the plane. We were married inside of it on the airport tarmac.

When we returned to Ohio, we learned that I would not be listed on John's death certificate as his surviving spouse when he died because the state refused to recognize our marriage for any purpose. It is difficult to express just how devastating it is to be told by the state in which you reside that you will not be recognized as the surviving spouse to the man you loved more than anything and built a life together with for more than two decades.

We decided to fight back in court against this injustice. Together with partners like the ACLU, we began a legal journey that, sadly, John did not get to see to conclusion. It culminated in a momentous victory for loving and committed couples across the country. I know John would have been proud to have a played a role in this historic legal victory for equality.

As important as it is that same-sex couples like John and I have the ability to obtain a civil marriage license in any state in the country, it is also critically important that this constitutional right is not undermined by proposals, like this legislation, that would subject loving couples like me and John, and other LGBT people to discrimination.

Among this legislation's many potential harms, it could allow any privately owned business to refuse to let a gay or lesbian employee take time off to care for a sick spouse, even though that otherwise would violate federal family and medical leave laws. This is not the kind of dignity and respect that the Supreme Court spoke so eloquently of in the decision granting the freedom to marry nationwide last June. What could ever justify such a discriminatory and harmful action?

I understand that the proponents of this legislation argue that it is necessary to protect churches, clergy and others who oppose marriage equality for religious reasons. But the First Amendment is already clear on this point. Since the founding of this country, no church or member of the clergy has been forced to marry any couple if doing so would violate their religious teachings. That has not changed since same-sex couples won the freedom to marry.

Religious liberty is a core American value. Everyone in this country is free to believe (or not) and to live out their faith as they see fit, provided that they do not do so in a way that harms other people. As I see it, this legislation turns this value on its head by permitting discrimination and harm under the guise of religious liberty.

Given the way that this legislation is drafted – particularly the phrase "...or that sexual relations are properly reserved to such a [heterosexual] marriage" – its harms are not limited to LGBT people or same-sex couples. Indeed, women, particularly single mothers, and unmarried couples could also find themselves on the receiving end of discriminatory treatment if this proposal were ever to be signed into law. For example, the legislation could allow certain social service programs that receive federal funding, including homeless shelters, to turn away a single mother and her child. In addition, it could permit any non-profit university to continue to receive federal funding even when it fires an unmarried teacher simply for becoming pregnant.

It is difficult for me to imagine why anyone would think such discrimination should be permitted in the year 2016. I believe that the United States Congress must be better than this.

We have seen similar discriminatory bills to this proposal introduced in state legislatures across the country this year – the vast majority of them were defeated after facing significant, bipartisan backlash, including in deep red states like Georgia, Oklahoma and Wyoming. In addition, just

last month, a federal judge in Mississippi blocked a state law similar to this proposal from taking effect saying that it violated both the 1st and 14th Amendments in the U.S. Constitution. The "First Amendment Defense Act" is an attempt to shift this divisive and failed strategy from the states to Congress. I urge all of you to stand on the right side of history by steadfastly rejecting this mean-spirited, discriminatory and unconstitutional proposal.

I would like to conclude by saying that it is my sincere hope that Congress will move away from elevating proposals like this that only serve to harm a vulnerable community. I hope that this committee will look at ways to protect LGBT people and others in America from harm. Everyone deserves the freedom to live their life without fearing discrimination or worse simply because of who they are or whom they love.

Thank you again for the opportunity to provide these remarks. I look forward to your questions.

Mr. MEADOWS. Thank you.
Ms. Waggoner, you are recognized for 5 minutes.

**STATEMENT OF KRISTEN WAGGONER**

Ms. WAGGONER. Mr. Chairman and members of the committee, America enjoys a rich heritage of protecting fundamental human rights and civil liberties. The lifeblood of our nation has been our ability to speak freely and civilly and to act consistent with our beliefs even when those beliefs are politically unpopular.

Indeed, same-sex marriage advocates would never have gained traction if the government had used the power of law to suppress their speech and banish them from the public square. We failed to preserve justice and true equality if our constitutional freedoms hinge on the whims of those who have political power.

Religious freedom is a pre-political right that rests securely in our dignity as human beings. It belongs to all of us. It is inalienable. And we must never forget that protecting religious freedom protects freedom for the religious and the nonreligious alike. It allows all of us to engage and explore the meaning and purpose of life and then to order our lives consistent with the answers we find.

Regardless of what one thinks about religion, we also know that civil liberties travel together. Countries that protect religious freedom are linked to vibrant democracy, gender empowerment, robust freedom of the press, and economic freedom. And countries without robust religious freedom are generally linked to more poverty, more war, extremism, and suppression of minorities. Religious freedom serves as a lynchpin to our other civil liberties and our human rights. And its loss signals the loss of other freedoms sure to follow.

The First Amendment Defense Act preserves the core of the American experiment and safeguards the values that we all hold dear: diversity, human dignity, equality, and freedom for all people. It ensures that Americans do not face discrimination at the hands of the Federal Government simply because they seek to stay true to the very principles that guide and inspire their commitment to social justice and to their communities.

Consider what our country would look like without these institutions from the Catholic-run homeless shelters and adoption agencies to the Baptist food banks and the Islamic hunger-relief programs or to the religious institutions of higher learning. These charities and institutions should not have to choose between abandoning the beliefs that motivate their service and being denied fair and equal treatment by their government.

Using the Federal Government to drive out these institutions will harm our most disadvantaged members of society. Private charities should not have to live in fear of being shut down while they are offering a hand up.

Are we really willing to censor and even force individuals, organizations, and churches to close simply because they adhere to the long-held belief that lies at the very core of each of the Abrahamic faiths?

Members of the committee, the real test of liberty is what happens when we disagree, and laws that protect views on marriage promote tolerance, and they contribute to our society and make it

a more respectful and peaceful place in which to live. And FADA does just that.

Now, today, we've already heard mischaracterizations about what this bill does. And like others that have gone before, please, I urge you, read the language in the bill.

I'd like to briefly address three of those mischaracterizations. First, any attempt to demonize those who adhere to the belief that marriage is between a man and a woman is wrong. Since when have we assumed that anyone who holds a different view is motivated by hatred or animus?

Second, comparing those who believe in man-woman marriage to racists is intellectually dishonest. Racists of Jim Crow America subjected African-Americans to fire hoses and lynch mobs. They burned their businesses, they bombed their churches, and they destroyed their communities. In contrast, those who believe in man-woman marriage seek only to peacefully live and work consistent with this truth, one that is universally recognized by all major religious faiths, by all cultures, by all civilizations, and by all races throughout human history, which is why the Supreme Court affirmed that it is an honorable belief held by reasonable people.

Finally, we've already heard today tall tales to suggest that Americans will lose rights under FADA if it is adopted. Let us be clear. That is not true. FADA is very limited in scope, and it does not take away civil rights protections. Any suggestion to the contrary is not supported by the bill's text.

In a pluralistic society, a multitude of convictions, ideas, and beliefs will always exist. The First Amendment Defense Act helps to ensure that citizens are not marginalized based on their belief in marriage, whichever belief that is. And it preserves those freedoms that are integral to our human dignity.

It is a time for choosing. People throughout world history under every sort of regime have had the freedom to believe. But what has made America great, what makes it unique is our freedom and commitment to be able to peacefully live out those beliefs. The First Amendment Defense Act ensures that tolerance remains a two-way street. Please, please do not allow marriage to become a litmus test for participation in our civil society.

Thank you for your time.

[Prepared statement of Ms. Waggoner follows:]

**TESTIMONY**

**BEFORE THE HOUSE COMMITTEE ON OVERSIGHT & GOVERNMENT REFORM**

**ON**

**RELIGIOUS FREEDOM & THE FIRST AMENDMENT DEFENSE ACT**

**BY**

**KRISTEN K. WAGGONER**

**JULY 12, 2016**

Mr. Chairman and Members of the Committee:

Just over a year ago, five members of the United States Supreme Court declared that the federal constitution includes a fundamental right to marry a person of the same sex. Dissenting in the *Obergefell* decision, Justice Samuel A. Alito, Jr., explained the threat it presented to people of faith:

> [This decision] will be used to vilify Americans who are unwilling to assent to the new orthodoxy . . . . I assume that those who cling to old beliefs will be able to *whisper* their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.[1]

UCLA law professor Eugene Volokh similarly commented:

> If I were a conservative Christian (which I most certainly am not), I would be very reasonably fearful, not just as to tax exemptions, but as to a wide range of other programs—fearful that within a generation or so, my religious beliefs would be treated the same way as racist religious beliefs are.[2]

Opponents of religious freedom are committed to making Justice Alito and Professor Volokh's statements a reality. And, bolstered by *Obergefell*, governments across the United States feel emboldened to force individuals and organizations to forego their convictions on marriage and human sexuality in order to remain in the public square.

We are witnessing nothing less than the beginning of an ideological cleansing of public life in America. Congress must act to stop the marginalization of many Americans by passing the First Amendment Defense Act ("FADA").

Consider the case of Alliance Defending Freedom client and Wyoming Judge Ruth Neely. For over 14 years, Judge Neely has served in two judicial positions in Pinedale, Wyoming, population 2,030, winning the respect and admiration of her community. Like many tens of millions of her fellow Americans, Judge Neely's religious faith teaches her that marriage is the union of one man and one woman for life. When same-sex marriage was legalized by a federal court in Wyoming, a local reporter, who appears to have known that Judge Neely was religious, telephoned her at home and asked her whether she was "excited" to perform same-sex marriages. Judge Neely told him

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1 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting) (emphasis added).

2 Laurie Goodstein and Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, New York Times (June 24, 2015), http://www nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html (last visited July 6, 2016).

the truth: due to her sincerely held religious beliefs about marriage, she could not solemnize same-sex unions.

After the local Pinedale paper ran a story on Judge Neely's statement of her beliefs about marriage, the Wyoming Commission on Judicial Conduct and Ethics launched an inquiry and brought a complaint against her for publicly disclosing her beliefs. Following a summary investigation and hearing process wherein the Commission played the roles of investigator, prosecutor, judge, and jury, the Commission concluded that Judge Neely should be removed from office. The matter now sits with the Wyoming Supreme Court, which has the power to affirm or reject the Commission's recommendation.

Notably, nothing about the law of Wyoming *requires* Judge Neely to solemnize marriages—the law gives her authority in one of her judicial positions to perform weddings *if she chooses*. The other position she holds does not include the authority to solemnize weddings. But, according to the Wyoming Commission, that does not matter. In the Commission's view, the fact that Judge Neely stated her religious beliefs about marriage when questioned by a reporter renders her unfit to serve as a judge in both of her positions. The government has set up a religious litmus test for public office: those who believe that marriage is the union of a man and a woman need not apply (unless, of course, they hide their personal convictions).

Consider also the case of Alliance Defending Freedom client Kelvin Cochran, former fire chief for the City of Atlanta. Mr. Cochran, a devout man of faith, wrote a book to inspire men to fulfill their purpose as husbands, fathers, and community leaders. A few pages of the book address biblical morality and the Bible's teaching on marriage. When the book was brought to the attention of the Mayor of Atlanta and a member of the City Council, Mr. Cochran's employment was first suspended and then terminated—all because he expressed beliefs about marriage that he shares with millions of people of faith around the globe.

And then there is Dr. Eric Walsh, a California physician and former director of public health who accepted a job in Georgia as a district health director.[3] When Georgia health department officials learned that Dr. Walsh had delivered a number of sermons on his own time in which he spelled out orthodox Seventh-day Adventist positions on topics including human sexuality and marriage, they split the sermons between health department employees, scrutinized his religious views, and took notes.[4] Two days later, Dr. Walsh was informed that a termination letter was on its way.[5]

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[3] David French, *Georgia Bureaucrats Listed to a Doctor's Sermons, and Then Fired Him*, National Review Online (April 20, 2016), http://www nationalreview.com/article/434297/eric-walsh-georgia-public-health-doctor-fired-christian-beliefs (last visited July 7, 2016).

[4] *Id.*

[5] *Id.*

The cases of Judge Neely, Mr. Cochran, and Dr. Walsh demonstrate the stakes of the present battle over religious liberty. The ever-increasing push to slander as "bigots" the countless Americans who adhere to the reasonable and honorable view that marriage is the union of one man and one woman threatens not just religious liberty and our expressive freedoms, but all of our treasured civil liberties.

When we find ourselves deprived of our ability to participate meaningfully in public life for holding views at odds with the prevailing government orthodoxy, freedom itself is a chimera.

Religious freedom is not the gift of the state or the product of social compromise. It is an inalienable, pre-political right that rests securely in our dignity as humans. It ensures we can all search for the meaning of life and then peacefully live consistent with the answers we find. Religious liberty benefits all Americans, the religious and non-religious alike.[6]

Research shows that the extent to which a country protects religious freedom is linked to vibrant democracy, freedom of the press, and rising economic and social well-being.[7] This same research reveals that other civil liberties find themselves tightly bound with religious freedom.[8] The loss of religious freedom signals the loss of other freedoms too.

Years ago, what Judge Neely, Chief Cochran, and Dr. Walsh have had to endure would have been unthinkable. But now, the unthinkable is reality.

It is a time for choosing. Will *this* Congress safeguard religious and expressive freedoms, or will it facilitate discrimination toward Americans who simply seek to peacefully live their lives according to their belief about marriage? Will Congress ensure that the government continues to be freedom's greatest protector, or will it stand aside as opponents of religious freedom expand their liberty-thwarting efforts from the states to the federal government and into all areas of public life?

In a country as diverse as America, there will always be a multitude of convictions, ideas, and beliefs. And the test of liberty is what happens when we disagree about important topics. Members of Congress can and should preserve Americans' first freedoms and our ability to engage in the marketplace of ideas consistent with our core religious beliefs or moral convictions about marriage. Congress can do this by enacting FADA.

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[6] Robert P. George and Katrina Lantos Swett, *Religious Freedom Is About More Than Religion*, The Wall Street Journal (July 25, 2013), http://www.wsj.com/articles/SB10001424127887324783204578624510558738282 (last visited July 8, 2016).

[7] *See* Brian Grim and Roger Fink, The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century (2011) at 61-88.

[8] *See id.*

In the wake of *Obergefell*, FADA is also necessary to protect against imminent threats to nonprofit religious educational institutions, churches, and social-welfare organizations. These institutions tirelessly educate and serve America's families including the poor and vulnerable.

The story of Gordon College on the outskirts of Boston provides a good example. Gordon College is an evangelical Christian institution. It, like most orthodox Christian schools, has a policy that defines marriage as the union of one man and one woman, and requires students and employees to limit sexual activity to marriage.

Prior to President Obama's issuance of Executive Order 13672 banning sexual-orientation discrimination by federal contractors, Gordon's president, Michael Lindsay, together with a number of other Christian leaders, signed a letter dated July 1, 2014, asking the President to include a religious exemption. The letter stated:

> We have great appreciation for your commitment to human dignity and justice and we share those values with you. With respect to the proposed executive order, we agree that banning discrimination is a good thing. We believe that all persons are created in the divine image of the creator, and are worthy of respect and love, without exception. Even so, it still may not be possible for all sides to reach a consensus on every issue.[9]

This exercise of President Lindsay and Gordon College's right to petition the government prompted activist groups to target the school and its religious views. In September, the New England Association of Schools and Colleges—Gordon College's accreditor—announced that it was giving Gordon College one year to ensure that its policy was "nondiscriminatory."[10]

The revocation of its accreditation would severely harm an institution like Gordon College. Indeed, the Department of Education requires that schools participating in federal student loan programs be accredited.[11] Loss of accreditation would thus mean that Gordon students could not obtain federally subsidized student loans.

After convening a working group and engaging in several months of self-study and internal discussion, Gordon College reaffirmed its core principles and its criticized policies. In late April 2015, the New England Association of Schools and Colleges decided not to revoke Gordon's accreditation, but not without setting off months of turmoil and anguish as Gordon was left to question what the future might hold given this newfound antagonism towards its beliefs.[12] Its threats represent the ominous arc of the current political and cultural trajectory.

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[9] Letter to President Obama (July 1, 2014), quoted in David French, *The Persecution of Gordon College*, National Review Online (Feb. 2, 2015), http://www nationalreview.com/node/413119/print (last visited June 30, 2016).

[10] *See* David French, *Gordon College Keeps Its Faith and Its Accreditation*, National Review Online (May 1, 2015), http://www nationalreview.com/node/417788/print (last visited June 30, 2016).

[11] Federal Student Aid Webpage, Department of Education, Accreditation, https://studentaid.ed.gov/sa/prepare-for-college/choosing-schools/consider#accreditation (last visited July 5, 2016).

[12] *See id.*

In addition to protecting religious schools' accreditation and the ability of their students to receive federal financial aid, FADA would also ensure that the federal government cannot subject students to discrimination or otherwise treat them unequally in an educational program because of their belief that marriage is the union of one man and one woman.[13] This protection is necessary because universities throughout the country have already begun taking adverse actions against students for operating consistent with their belief that marriage is between one man and one woman.

For example, in the fall of 2008, Alliance Defending Freedom client Jonathan Lopez attended Los Angeles City College and was enrolled in a speech class. That fall, California voters passed Proposition 8, which amended the state's constitution to define marriage as a legal union between one man and one woman. The day after the vote, Jonathan's speech professor came to class, slammed his papers on his desk, announced to the class that anyone who voted for Proposition 8 was a "fascist bastard," and then dismissed the class.

In Jonathan's next assignment, a short informative speech about the topic of his choice, Jonathan shared his faith story and addressed important elements of his religious beliefs, including his beliefs about marriage. Jonathan's professor erupted again, declared the speech over, and dismissed the class. In the days that followed, the professor continued to harass Jonathan and told him that he was going to make it his mission to expel him from the school, forcing Jonathan to take legal action. Jonathan's case vividly illustrates the hostility that those in public schools have displayed toward the belief that marriage is the union of husband and wife.

The case of Alliance Defending Freedom client Emily Booker is disturbingly similar. During Emily's time at Missouri State University, she received an assignment to write a paper expressing her support for same-sex families. When she explained that she could not perform the assignment due to her sincere religious beliefs, her professor filed a grievance against her which led to a faculty hearing where Emily was interrogated about her faith. As a condition of graduation, she was forced to sign a contract vowing to "close the gap" between her faith and the views of her social work program. Again, Emily's story shows that the government has begun engaging in a pattern of hostility toward students who want to live consistent with their religious convictions on marriage.

The California legislature's recent attempts to enact Senate Bill 1146 demonstrate the very real assault against faith-based colleges, universities, and their students. If enacted, this law would strip religious colleges that receive public funding of an exemption that allows them to require faculty

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[13] *See* First Amendment Defense Act at Section 3(b)(4) (forbidding the federal government from taking action to "withhold, reduce, exclude, terminate, or otherwise make unavailable or deny any entitlement or benefit under a Federal benefit program, including admission to, equal treatment in, or eligibility for a degree from an educational program"). The United States Supreme Court recently construed the language "otherwise make unavailable or deny" in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* to support the existence of disparate-impact liability under the Fair Housing Act. 135 S. Ct. 2507, 2519 (2015). Similarly here, FADA's use of the phrase "otherwise make unavailable or deny" in Sections 3(b) (3), (4), and (5) ensures that the bill's prohibition of discriminatory action "on the basis" of a religious belief or moral conviction about marriage extends to situations where government action disparately impacts a person or persons who hold such beliefs regardless of the government's purported nondiscriminatory motives.

and students to comply with various religious-based ethical standards.[14] The proposed law would also limit the ability of faith-based colleges and universities to require students and staff to sign statements of faith, honor codes, or otherwise pledge to abide by biblical standards of conduct.[15] If the law passes, any college with policies affirming the belief that marriage is between one man and one woman will risk losing state funding, particularly jeopardizing poor and minority students.

But students and schools should not be marginalized or closed simply because their beliefs do not accord with the current government orthodoxy. The government should ensure true tolerance by safeguarding a diversity of beliefs and not punishing those who disagree. FADA will prevent the federal government from similarly discriminating against students who believe in one-man-one-woman marriage in educational programs that receive federal funding.

Beyond colleges and universities, FADA is important to protect the conscience rights and religious liberty of social-welfare organizations, including private foster-care and adoption providers.

There are more than 1,000 private, licensed foster-care and adoption providers in the United States, many of which are faith-based organizations whose religious beliefs call them to care for vulnerable children.[16] These critical social-welfare organizations are supported in part with federal funds provided through programs including the Stephanie Tubbs Jones Child Welfare Services Program,[17] the Federal Foster Care Maintenance Payments Program,[18] and the Adoption and Guardianship Assistance Program.[19]

In the wake of the *Obergefell* decision, there is a real danger that faith-based adoption and foster-care organizations with sincere convictions about marriage could find their federal funding cut off through executive action. The impact of such a move would be devastating to the welfare of many of the most vulnerable children in our society because faith-based adoption and foster-care providers currently help thousands of children find permanent homes every year. In 2007, more than 20,000 of the approximately 76,000 unrelated domestic adoptions that took place in the United States were handled by private providers, and many of those were arranged by faith-based groups. Furthermore, excluding these agencies from the marketplace would deprive birth mothers of real choices when they are deciding the type of family with whom they would like to place their child.[20]

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[14] *See* California Senate Bill 1146 (2016), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1146 (last visited July 7, 2016).

[15] *See id.*

[16] Sarah Torre and Ryan T. Anderson, *Adoption, Foster Care, and Conscience Protection*, Heritage Foundation (Jan.15, 2015), http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection (last visited July 5, 2016).

[17] 42 U.S.C. § 621, *et seq.*

[18] 42 U.S.C. § 672.

[19] 42 U.S.C. § 673.

[20] Sarah Torre and Ryan T. Anderson, *Adoption, Foster Care, and Conscience Protection*, Heritage Foundation (Jan.15, 2015), http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection (last visited July 5, 2016).

The reality of the threat to these groups' federal funding is borne out by evidence at the state level. For example, when the District of Columbia redefined marriage to include same-sex couples, government officials informed Catholic Charities that it no longer would be allowed to provide publicly funded foster-care and adoption programs in the District of Columbia as a result of the agency's inability to place children with same-sex couples.[21] Thus, Catholic Charities was forced to close its foster-care and adoption programs.[22] FADA would have prevented that and would have helped the many children served by Catholic Charities. The demise of Catholic Charities in the District of Columbia is no isolated incident. Unfortunately, the same thing happened in Massachusetts when that state's high court redefined marriage,[23] and in Illinois when civil unions for same-sex couples were legalized.[24]

At present, the federal government might take similar action in the wake of *Obergefell*. In order to protect the ability of faith-based adoption and foster-care providers to continue serving vulnerable children and families, Congress should pass FADA. Faith-based social-welfare organizations must not be subjected to government discrimination when they seek federal funds to carry out their important work. The welfare of vulnerable children hangs in the balance.

Finally, FADA is necessary to shield churches and religious schools from the government's coercive power to tax. In the wake of *Obergefell*, churches and religious schools are a vulnerable target for those who seek to expand the size and scope of the federal government. But we must never forget that the power to tax is the power to destroy.

This threat is particularly imminent. Arguing before the Supreme Court in the *Obergefell* case, the Solicitor General of the United States was asked whether a religious school that opposes same-sex marriage might lose its tax-exempt status should the Supreme Court redefine civil marriage to include same-sex couples. The Solicitor General responded that "[i]t's certainly going to be an issue."[25]

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[21] *See Same-sex 'marriage' law forces D.C. Catholic Charities to close adoption program*, Catholic News Agency (Feb. 17, 2010), http://www.catholicnewsagency.com/news/same-sex_marriage_law_forces_d.c._catholic_charities_to_close_adoption_program/ (last visited July 5, 2016) ("Although Catholic Charities has an 80-year legacy of high quality service to the vulnerable in our nation's capital, the D.C. Government informed Catholic Charities that the agency would be ineligible to serve as a foster care provider due to the impending D.C. same-sex marriage law.").

[22] *See id.*; Julia Duin, *Catholics end D.C. foster-care program*, Washington Times (Feb. 18, 2010), http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/ (last visited July 5, 2016) ("The Archdiocese of Washington's decision to drop its foster care program is the first casualty of the District of Columbia's pending same-sex marriage law").

[23] *See* Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 Children's Legal Rights Journal 1 (2007).

[24] *See* Waymon Hudson, *Illinois Catholic Charities Ends Adoption Lawsuit*, Huffington Post, (Nov. 15, 2011), http://www huffingtonpost.com/waymon-hudson/illinois-catholic-charities-adoption_b_1094723.html (last visited July 5, 2016).

[25] Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

This admission by the Solicitor General is more than a little troubling because it confirmed that, absent legislative action by Congress, the Internal Revenue Service ("IRS") may move to revoke the tax-exempt status of religious schools and churches.

To understand just how serious and real the threat to religious institutions' tax-exempt status truly is, one must understand precisely why the IRS would feel justified in taking action. In *Bob Jones University v. United States*, the United States Supreme Court concluded that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[26] The Court then looked to its decision in *Brown v. Board of Education*,[27] as well as "myriad Acts of Congress and Executive Orders," to find a "firm national policy" against racial segregation and discrimination in education.[28] The Court held that a religious educational institution "engaging in practices affirmatively at odds with" a firm national policy—in that case, the school's racially discriminatory admissions policy—is not "charitable" within the meaning of Section 501(c)(3) and therefore is not entitled to tax-exempt status.[29]

In the wake of the *Obergefell* decision, there is a real and growing danger that the IRS will attempt to wrongly extend the holding of *Bob Jones University* to revoke the tax-exempt status of religious institutions, including churches and schools that adhere, as a matter of religious principle, to the definition of marriage as between one man and one woman. The IRS would do this by purporting to discover a so-called "firm national policy" against organizations operating consistent with that reasonable and widely held religious and moral belief.

But unlike the racially discriminatory policies at issue in *Bob Jones University*, the view that marriage is between a man and a woman is a respectable, long-held belief that lies at the very core of each of the Abrahamic religions. Indeed, there can be no legitimate comparison whatsoever between that decent view and the moral repugnancy of racial discrimination. The civil-rights movement fought a true and dangerous evil, and did so at great consequence to those brave enough to stand for the principle that all men are created equal and endowed by their Creator with inherent rights to life, liberty, and the pursuit of happiness. The victims of racism suffered terrible violence and degradation for hundreds of years in America, first on slave plantations and then, following a bloody civil war to end that dreadful and immoral institution, found themselves subject to further degradation in the form of segregation, Jim Crow laws, and violence at the ends of the ropes of lynch mobs and the fire hoses of racist government officials. Comparing the evils of racism to the grievances of those who wish to silence individuals and institutions who believe in gender-diverse marriage slanders millions of good and respectable Americans who seek only to peacefully live consistent with their religious beliefs or moral convictions.

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[26] 461 U.S. 574, 586 (1983).
[27] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[28] *Bob Jones University*, 461 U.S. at 593.
[29] *Id.* at 598-99.

Contrary to what the illegitimate comparison to racism suggests, the belief that marriage is the union of one man and one woman for life is a decent and honorable one that has been held by people of diverse cultures, races, and faiths for virtually all of human history. People on both sides of the aisle agree that those who hold this belief are good and honest people. Indeed, it's a belief that President Obama publicly expressed as recently as 2008 when, during an interview with Pastor Rick Warren, the President stated, "I believe that marriage is the union between a man and a woman. For me as a Christian, it's also a sacred union. God's in the mix."[30] Congress should thus take action to protect the rights of the myriad people and institutions that hold this respectable belief.

The danger to the tax-exempt status, accreditation, and federal funding of nonprofit religious institutions is clear, present, and growing. Together with those specific threats, the free exercise and expression rights of Americans are under assault. The opponents of religious freedom seek to relegate those who believe in one-man-one-woman marriage to an undeserved ignominy, and they have shown that they are more than willing—and, in fact, eager—to use the power of government to do it.

A free people in a representative democracy must never countenance the censorship of public life by public officials in any part of government, no matter how well-intentioned they may claim to be. If we do not vigorously oppose those who seek to censor the public square now, we will soon find all of our freedoms and our nation's diversity in great jeopardy. By passing FADA, Congress will not only enact important protections for institutions and individuals, but also delegitimize the actions of those who seek to suppress religious freedom. And it will confirm that the view of marriage held by many tens of millions of Americans is and continues to be decent, honorable, and worthy of respect in the public square.

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[30] Robin Phillips, *DOMA and the Definition of* Marriage, Examiner.com (March 26, 2011), http://www.examiner.com/article/doma-and-the-definition-of-marriage (last visited July 7, 2016).

Mr. MEADOWS. Thank you.

Ms. Franke, you are recognized for 5 minutes.

**STATEMENT OF KATHERINE FRANKE**

Ms. FRANKE. I'm the only one with a different kind of mic, but it seems to be on.

Mr. Chairman, Ranking Member Cummings, the rest of the committee, thank you so much for inviting me to testify today on the important issues of religious liberty and civil rights that are before the committee.

I'm a professor of law at Columbia Law School, as you heard earlier, and I'm also the faculty director of the Public Rights/Private Conscience Project at Columbia. It's a project I founded a few years ago where we bring academic—legal academic expertise to bear on the multiple contexts in which religious liberty rights are in tension with other fundamental rights to equality and liberty. And clearly, the bill before you today is one of such contexts.

My testimony today is delivered on behalf of 20 other prominent legal academics who have joined me in providing an in-depth analysis of the meaning and the likely effects of FADA, the First Amendment Defense Act, were it to become law. We particularly feel compelled to testify today because the first legislative finding contained in FADA declares that "leading scholars concur that conflicts between same-sex marriage and religious liberty are real and should be addressed through legislation."

So as leading scholars, we must correct this statement. We do not concur that conflicts between same-sex marriage and religious liberty are real, and we do not hold the view that any such conflict should be resolved through or addressed through legislation.

On the contrary, we maintain that religious liberty rights are already well protected in the United States Constitution, in Federal and State law, rendering in our view FADA both unnecessary, and as I hope I can convince you, harmful.

I would ask that the more thorough written testimony that my colleagues and I have prepared would be entered into the record.

Mr. MEADOWS. Without objection.

[Prepared statement of Ms. Franke follows:]

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**House Of Representatives**
**Committee On Oversight And Government Reform**
**Hearing on H.R. 2802, the First Amendment Defense Act (FADA)**

**Testimony of Professor Katherine Franke[1]**
**July 12, 2016**

Mr. Chairman, Ranking Member Cummings, and Members of the Committee, thank you for inviting me to testify on these important questions of religious freedom law.

I am the Sulzbacher Professor of Law at Columbia Law School in New York City, where I am also the Faculty Director of the Public Rights/Private Conscience Project, a think tank in which we bring legal academic expertise to bear on the multiple contexts in which religious liberty rights are in tension with other fundamental rights to equality and liberty.

**Introduction:**

My testimony today is delivered on behalf of twenty leading legal scholars who have joined me in providing an in depth analysis of the meaning and likely effects of the First Amendment Defense Act (FADA),[2] were it to become law. We feel particularly compelled to provide testimony to this Committee because the first legislative finding set out in FADA declares that: "Leading legal scholars concur that conflicts between same-sex marriage and religious liberty are real and should be addressed through legislation."[3] As leading legal scholars we must correct this statement: we do not concur that conflicts between same-sex marriage and religious liberty are real, nor do we hold the view that any such conflict should be addressed through legislation. On the contrary, we maintain that religious liberty rights are already well protected in the U.S. Constitution and in existing federal and state legislation, rendering FADA both unnecessary and harmful.[4]

Rather, FADA establishes vague and overly broad religious accommodations that would seriously harm other Americans' legal rights and protections. Instead of protecting the First Amendment, the First Amendment Defense Act likely violates the First Amendment's

[1] Sulzbacher Professor of Law, Director, Center for Gender & Sexuality Law, Faculty Director, Public
[2] The version currently before the committee, *AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2802*, was introduced by Rep. Raúl Labrador (H.R. 2802) on July 7, 2016. References in this testimony will be to the July 7, 2016 version of the legislation.
[3] FADA, Sec 2 (1).
[4] *See, e.g.*, U.S. CONST. amend. I; 42 U.S.C. § 2000bb–1; 42 U.S.C. § 2000cc; 42 U.S.C. § 2000cc–1.

Establishment Clause. The Act purports to protect free exercise of religion and prevent discrimination, yet in fact it risks unsettling a well-considered constitutional balance between religious liberty, the prohibition on government endorsement of or entanglement with religion, and other equally fundamental rights.[5]

As legal scholars with expertise in matters of religious freedom, civil rights, and constitutional law, we offer this legal analysis to call attention to provisions of the bill that we believe raise serious conflicts with the First Amendment of the U.S. Constitution.

The proposed FADA aims to immunize a wide range of "persons" from federal penalties and law enforcement when they engage in speech or conduct that would otherwise violate constitutional or statutory law, so long as that speech or conduct is in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of two individuals of the opposite sex; or two individuals of the same sex; or extramarital relations are improper.[6] A broad reading of this bill would create a safe harbor from penalties associated with an enormous range of behavior that is otherwise illegal or prohibited by federal law and regulation. For example, in contexts where a person holds such a religious belief or moral conviction, FADA would:

- Prevent the government from taking enforcement action against an employer that refuses to provide mandated health insurance coverage to the dependents of same-sex or unmarried parents;
- Prevent the government from taking enforcement action against a retirement plan that refuses to provide annuity benefits to same-sex spouses of plan beneficiaries;
- Eliminate the federal government's ability to prohibit discrimination by recipients of federal grants and contracts. For instance, a clinic could refuse to provide contraceptives to unmarried women or men yet remain eligible for a Title X grant to provide family planning services;
- Prevent the federal government's ability to enforce the Patient Protection and Affordable Care Act (ACA) in cases where a health care provider denied coverage for mandated preventative services—such as counseling for sexually transmitted infections, contraception, or domestic violence screening and counseling— to

[5] While not the focus of this memo, we also note that we have significant concerns about FADA's constitutionality under other provisions of the U.S. Constitution, including the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. FADA singles out for special protection only a person who believes, speaks, or acts in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of two individuals of the opposite sex; or two individuals of the same sex; or extramarital relations are improper. *See* FADA § 3(a)(1). By providing special rights and benefits for a narrow type of speech, the bill violates the Free Speech Clause requirement that government regulations of private speech be viewpoint-neutral. *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."). As a law that substantially involves the state in public and private discrimination, we believe FADA conflicts with Supreme Court precedent including *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *Hunter v. Erickson*, 393 U.S. 385 (1969).

[6] FADA, § 3(a)(1).

employees who are married to a same-sex partner or who have extramarital relations/sex.

- Prevent the Secretary of Housing and Urban Development and/or the U.S. Attorney General from enforcing the Fair Housing Act against a landlord that advertises that it will not rent to unmarried parents.[7]
- Prevent the federal government from denying Title X funding to a health clinic that provides family planning care only to those patients that provide a marriage license in order to qualify for such services.
- Prevent the federal government from denying a Violence Against Women Act grant to a domestic violence shelter that required all residents to attest their opposition to marriage equality and/or extramarital relations/sex before securing housing.
- Require that the federal government provide preferred tax status to nonprofits that discriminate or otherwise violate the tax code. For instance, charitable hospitals could refuse to apply a mandated financial assistance policy to patients who are married to someone of the same sex and still maintain their tax-exempt status.
- Interfere with same-sex couples' newly secured right to civil marriage by preventing the federal government from enforcing the Supreme Court's ruling in *Obergefell v. Hodges*[8] on state actors. For instance, the Department of Justice would be unable to sue state officials who deny same-sex couples their constitutional right to marry;
- Deny some federal courts the capacity to adjudicate lawsuits between private parties, since a court could be interpreted as "imposing a penalty" within the meaning of the bill.[9]

These are merely a few salient examples of the kinds of safe harbors that FADA would create, thus imposing significant harms on third parties otherwise protected by federal laws. A longer, more detailed list is discussed below.[10]

In essence, FADA would incapacitate the federal government from enforcing a wide range of laws, policies, and regulations that secure and further fundamental rights to equality and liberty. For this reason, FADA does not defend the First Amendment; rather it creates and then defends a new right for non-governmental actors to discriminate in the name of religion. Even worse, FADA's language may conscript the federal government as a partner in those very acts of discrimination.

## I. By Implying An Absolute Right to Religious Liberty, FADA Does Not "Defend" First Amendment Principles But Rather Violates Them

As a preliminary matter, we note that the First Amendment Defense Act's title is a misnomer. The purpose and effect of the bill is to exempt all persons—defined very broadly—

[7] 42 U.S. Code § 3604 (a)-(c).
[8] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[9] At first glance, FADA appears to apply only to suits against the federal government or initiated by the federal government rather than between private parties. However the Religious Freedom Restoration Act, which contains similar language, has been interpreted by some courts to be applicable as a defense even in private civil suits. *See infra*, fn. 54-59 and accompanying text.
[10] See *infra* pp. 7-18.

from otherwise neutral laws of general applicability that conflict with their religious beliefs. This absolute right to disobey the law because of one's personal religious preferences or moral convictions, regardless of the consequence on others, is emphatically not required or sanctioned by First Amendment doctrine.

For well over a century, the Supreme Court has held that religious freedom does not provide an unconditional right to act in accordance with one's beliefs, religious, moral, or otherwise. In 1990 in *Employment Division v. Smith*, Justice Scalia, writing for the Court, summed up this longstanding principle, stating that the Supreme Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[11] The Court first clearly articulated this principle in 1878 in *Reynolds v. U.S.*, when it upheld a criminal charge of polygamy against a Mormon man, a practice that he considered a religious duty. The Court held that while laws "cannot interfere with mere religious belief and opinions, they may with practices,"[12] and further noted that allowing a religious exemption from the law in such circumstances "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[13] To be sure, the Constitution requires the provision of religious exemptions in some circumstances, but that right is not absolute. Even in the pre-*Smith* case *most* favorable to religious exemptions, *Wisconsin v. Yoder*, the Court clearly stated that the "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."[14] Thus, rather than "defending" the First Amendment, FADA in fact contradicts a basic tenet of the First Amendment's Free Exercise Clause: while religious *belief* is absolutely protected, religiously-motivated *actions* are not, as any claim to exemption under the Free Exercise clause must be weighed against other important interests.

In fact, the Supreme Court has twice considered and rejected the right of an institution to discriminate in the name of religious liberty. In *Newman* v. *Piggie Park*, a restaurant argued that enforcement of the 1964 Civil Rights Act constituted an "interference with the 'free exercise of the Defendant's religion'"—a claim the Supreme Court dismissed and deemed "patently frivolous."[15] In *Bob Jones University v. U.S.*, the Court took a religious university's Free Exercise claim far more seriously, but ultimately concluded that the federal government could withhold tax-exempt status from schools that engage in racial discrimination. The Court explained that the government had a "fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[16] Thus

[11] *Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990).
[12] *Reynolds v. U.S.*, 98 U.S. 145, 166 (1878).
[13] *Id.* at 167.
[14] *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).
[15] *Newman v. Piggie Park*, 390 U.S. 400, 402 fn 5 (1968).
[16] *Bob Jones University v. U.S.*, 461 U.S. 574, 604 (1983).

FADA's premise, that the First Amendment entails an absolute right to discriminate, runs contrary to well-established Free Exercise principles.[17]

## II. The Establishment Clause of the First Amendment Prohibits Religious Accommodations That Seriously Harm Third Parties

### a. The General Legal Principle of Third Party Harms Creating A Violation Of The Establishment Clause

The religion clauses of the First Amendment state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[18] Read together, these two clauses are understood to protect individual religious belief and practice through the Free Exercise Clause, while through the Establishment Clause, constraining the state from expressing favor or disfavor towards any particular religion or religion in general.[19] In interpreting the bounds of the First Amendment, the Supreme Court has consistently held that religious accommodations that cause a meaningful harm to other private citizens violate the Establishment Clause.[20] In *Estate of Thorton v. Caldor*, the Court held that a Connecticut statute giving workers the right to a Sabbath day of rest impermissibly advanced religion by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee."[21] Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court found that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to "become indirect and vicarious donors" to religious entities.[22] While the Court upheld a religious exemption law in *Cutter v. Wilkinson*, it nevertheless noted that accommodations need not be granted where they "impose unjustified burdens" on third parties or the State.[23] Two years ago, when the Supreme Court upheld a religious accommodation under the Religious Freedom Restoration Act in *Burwell v.*

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[17] The Supreme Court has read a "ministerial exception" into the First Amendment, thus preventing "government interference with an internal church decision that affects the faith and mission of the church itself." *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 707 (2012). *See also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (*cert. denied*, 409 U.S. 896 (1972)). As a corollary, the Court has also held that Congress may choose to exempt religious institutions from some antidiscrimination laws without violating the Establishment Clause. *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). *Amos*, however, merely held that the Establishment Clause *permitted* Congress to exclude religious corporations from a provision of Title VII banning religious discrimination, not that the Free Exercise Clause *compelled* it to do so.

[18] U.S. CONST. amend. I.

[19] *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion…favoring neither one religion over others nor religious adherents collectively over nonadherents") (internal quotation marks omitted).

[20] *See Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985). *See also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion,* 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 725 ("There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment.") (Kennedy, J., concurring).

[21] *Caldor*, 472 U.S. at 709.

[22] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (internal quotations omitted).

[23] *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005).

*Hobby Lobby*, Justice Alito repeatedly emphasized the fact that the accommodation requested under RFRA would have "exactly zero" negative impact on others' rights and interests.[24] And most compellingly, a federal court recently found that language very similar to the federal FADA, Mississippi's HB 1523, improperly harms the rights of others in violation of the Establishment Clause. In a decision ordering that a state law be enjoined, the court found that the law "violates the First Amendment because its broad religious exemption comes at the expense of other citizens."[25]

FADA conflicts with the above constitutional principles in violation of the Establishment Clause. It provides accommodations that require private citizens to bear the cost of others' religious faith.

**b. FADA Will Impose Material And Identifiable Third Party Harms**

FADA, in the name of religious diversity, disrupts the careful balance set forth in the U.S. Constitution between private religious practice, non-endorsement of religion by the state, and other fundamental rights such as rights to equality and liberty. It substantially oversteps the limits of the Establishment Clause by immunizing religious believers from compliance with laws that are generally applicable to all other American citizens. These laws include not only federal antidiscrimination protections, but a remarkably broad set of federal laws and regulations that provide important rights, benefits, or protections to all private citizens regardless of their marital status or sexual identity. In exempting religious believers from an obligation to respect the equality and liberty rights of all Americans, FADA sacrifices the rights of many in order to accommodate the religious preferences of a few.

***i. FADA Strips Americans of Numerous Legal Rights and Protections In Order to Satisfy Certain Religious and Moral Preferences***

Under FADA, the federal government may not take any negative action (termed "discriminatory action" in the bill) against a person because they act in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of two individuals of the opposite sex, or two individuals of the same sex, or that extramarital relations are improper. "Discriminatory action" is defined broadly to include enforcement of neutral laws and regulations of general applicability, such as those that prohibit discrimination by recipients of government grants or provide protections and benefits to employees, patients, students, and other private citizens. "Person" is defined to mean both individuals[26] and corporations, including secular, for-profit companies.[27] Organizations that choose to discriminate against same-sex couples, different-sex couples, unmarried parents, or others on the basis of their beliefs are given

[24] *See Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

[25] *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 55 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction).

[26] Excepting federal employees acting within the scope of their employment. FADA § 6(3)(A).

[27] Unless a federal contractor acting within the scope of a federal contract FADA § 6(3)(B).

blanket immunity under FADA from administrative, and perhaps even judicial, enforcement of the law.

In exempting religious and moral objectors from federal laws and regulations, FADA would harm third parties in numerous ways. The bill defines "discriminatory action" by the government to include, among other things, "any action" taken by the federal government to "alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against" a person.[28] Currently, numerous federal laws create tax benefits and penalties in order to advance important public interests. FADA would substantially interfere with these laws, eliminating or reducing protections for many Americans, especially, but not only, lesbian and gay married couples and people who have "extramarital relations" – a particularly imprecise term that is most likely constitutionally infirm on account of its vagueness. The rights and interests of single parents and pregnant women will likely be most negatively effected by the immunity the law proposes to grant to those who regard "extramarital relations" as improper.

Specifically, FADA would allow discrimination in the provision of the following mandated health and financial benefits:

- **Health Care:** Under FADA, group health plans, employers, and healthcare providers would receive protection from federal enforcement actions when they discriminate based on their religious or moral beliefs.
    - Group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) would be immune from federal enforcement actions if they violate numerous requirements imposed on them under 26 U.S.C. Chapter 100. Such violations would normally result in tax penalties under 26 U.S.C. § 4980D. For example, plans could restrict benefits for hospital stays following childbirth for unmarried, LGBTQ, or some surrogate mothers;[29] deny coverage based on any preexisting conditions that are the "result" of same-sex relationships or non-marital sex, such as sexually transmitted infections or pregnancy;[30] or deny coverage for mandated preventative services—such as counseling for sexually transmitted infections, contraception, or domestic violence screening and counseling— to employees who are married to a same-sex partner or who have extramarital relations/sex.[31] Covered health plans could also violate provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA) without being

[28] FADA § 3(b)(1).

[29] This would violate provisions of the Newborns' and Mothers' Health Protection Act. *See* 26 U.S.C. § 2811. Note that this provision only applies to plans that have elected to cover childbirth.

[30] This would violate provisions of the tax code that prohibit health plans from excluding coverage for pre-existing conditions. *See* 26 U.S.C. § 9815.1; 45 U.S.C. § 300gg-3. Note, however, that while covered plans could not impose a pre-existing condition exclusion, they could decide not to provide coverage for a particular benefit for all enrollees, regardless of whether the condition is pre-existing.

[31] This would violate provisions of the Patient Protection and Affordable Care Act (ACA), as incorporated into the tax code. 26 U.S.C. § 9815.1. Under the ACA, health plans must provide preventive health services without cost sharing. *See* 42 U.S.C. § 300gg–13. Preventive health services includes coverage for testing and counseling for certain sexually transmitted infections, contraception, and domestic and interpersonal violence screening and counseling for women. *See* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *Preventive Services Covered Under the Affordable Care Act* (last rev'd Sept. 27, 2012) http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/preventive-services-covered-under-aca/index.html.

subject to a tax— for example by refusing to consider a divorce a "qualifying event" for same-sex couples.[32]

- FADA states that health care institutions would not be protected if they refused "to provide medical treatment necessary to cure an illness or injury" because of their religious or moral beliefs.[33] However hospitals would still be protected if they discriminated by refusing to provide financial assistance for such care, or by refusing to provide preventative care that is not "necessary to cure an illness or injury."
- FADA could also protect applicable large employers from tax penalties that they would normally incur under 26 U.S.C. § 4980H if they denied adequate health coverage to full-time employees or their dependents because of the employer's religious or moral beliefs about same-sex marriage and extramarital relations/sex. Employers would be protected if they, for example, denied health coverage to dependents that are the "result" of same-sex marriages or extramarital relations/sex, such as children born to LGBTQ or unmarried parents, or with surrogates.[34]
- Nonprofit religious hospitals could violate provisions of the Patient Protection and Affordable Care Act (ACA) that impose certain obligations on charitable hospitals yet maintain their tax-exempt status.[35] For example, hospitals could potentially refuse to apply a mandated financial assistance policy to patients who are married to someone of the same sex or who have extramarital relations/sex.[36]

- **Retirement Benefits:** A tax qualified retirement plan that denies same-sex spouses the right to receive benefits in the form of a qualified joint and survivor annuity (QJSA) and/or qualified preretirement survivor annuity (QPSA), as is required under 26 U.S.C. § 401(a)(11), would not risk losing tax-qualified status. Under 26 U.S.C. § 417, the right to a QJSA or QPSA may be waived by a plan beneficiary only with spousal consent. Under FADA, a plan could discriminate against same-sex spouses by denying them this protection as well as other protections and privileges under other provisions of 26 U.S.C. §401— such as the right to withhold consent for a participant's loan— without losing the plan's qualified status.[37]

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[32] 26 U.S.C. § 4980B.

[33] FADA § 6(3)(C).

[34] 26 U.S.C. § 4980H (imposing penalties for any applicable large employer that "fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan.").

[35] *See* 26 U.S.C. § 501(r); 26 U.S.C. § 4959.

[36] Under the revised FADA, health care institutions would not be protected if they refused "to provide medical treatment necessary to cure an illness or injury" because of their religious or moral beliefs. FADA § 6(3)(D). However hospitals would still be protected if they discriminated by refusing to provide financial assistance for such care, or by refusing to provide preventative care that is not "necessary to cure an illness or injury." Further, the introduced FADA contains no exemption whatsoever related to the provision of medical care. H.R. 2802, 114th Cong. (2015).

[37] For more detailed information on spousal rights related to qualified retirement plans, *see* INTERNAL REVENUE SERVICE, *Application of the Windsor Decision and Rev. Rul. 2013-17 to Qualified Retirement Plans Notice 2014-19* (2014) *available at* https://www.irs.gov/pub/irs-drop/n-14-19.pdf. While FADA would limit federal enforcement of these provisions, they are also incorporated in ERISA; therefore a plan participant or beneficiary could enforce the requirements under ERISA section 502, 29 USC § 1132. Nevertheless, federal enforcement is an important protection for those who are unable to access or afford an attorney. Further, an increase in the adoption of class action prohibitions within benefit plan documents will make federal enforcement even more essential to employees.

Other important rights and benefits that are not enforced through tax penalties would also be thwarted by FADA. The bill does not merely restrict the regulation of tax benefits and fees, but bans "any action" taken by the federal government to cause any "penalty, or payment to be assessed against" a person. While it's possible that this language was *intended* to refer only to tax penalties, such a narrow interpretation of the bill is belied the text and by the fact that the bill has gone through several revisions and this language has not been corrected.[38] If discriminatory action is therefore interpreted to include the imposition of any government penalty, this language would severely limit administrative enforcement of a wide range of laws enforced through fines and litigation by government agencies such as the Attorney General (AG), the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), the Department of Health and Human Services (HHS), the Department of Housing and Urban Development (HUD), the Federal Trade Commission (FTC), and the Department of Justice (DOJ). For example, under this clause, religious or moral beliefs about marriage and sexuality could immunize a person from any enforcement action brought by the federal government in connection with otherwise illegal conduct in the following circumstances:

- The Civil Rights Act,[39] Pregnancy Discrimination Act,[40] Americans with Disabilities Act,[41] Fair Housing Act,[42] and Equal Credit Opportunity Act[43] all prohibit some forms of discrimination against customers, employees, renters, or creditors who are in same-sex relationships,[44] are unmarried and pregnant or parenting,[45] or who have a disability (such

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*See* James P. Baker, *A Sea Change for ERISA Litigation: Using Contractual Bars to Avoid Class Action Claims* Feb. 2014) *available at* http://www.bakermckenzie.com/ALNAASeaChangeDec13/.

[38] Similar language also appears in the federal FADA's state corollaries. See, eg: Georgia HB 757, Mississippi HB 1523, Iowa Assembly Bill 2207, Wyoming HB 0098.

[39] 42 U.S.C. §§2000a *et seq*; §§2000e *et seq*.

[40] 42 U.S.C. § 2000e(k).

[41] 42 U.S.C. § 12101 *et seq*.

[42] 42 U.S.C. §§ 3601, *et seq*.

[43] 15 U.S.C. § 1691.

[44] The Civil Rights Act's ban on employment discrimination on the basis of sex has been interpreted to protect employees who are LGBT or challenge gender norms and expectations. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (""[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Los Angeles Dept. of Water & Power v. Manhart*, 435 U. S. 702, 435 U. S. 707, n. 13 (1978), *quoting Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971)"). *See also E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013) (holding prohibition of sexual harassment in Title VII protected a male employee whose male co-workers called him "kind of gay" and a "faggot."); *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (finding that Title VII of the Civil Rights Act prohibits discrimination based on gender identity); *Fabian v. Hosp. of Centr. Conn.*, 2016 WL 1089178 (D. Conn. 2016); *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015) (finding that Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation); U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, http://www.eeoc.gov/eeoc/newsroom/wysk/lgbtexamplesdecisions.cfm (last visited Mar. 16, 2016). LGBT persons and families also have some protections under the sex and familial status discrimination provisions of the Fair Housing Act. *See* HUD.GOV, *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families: Enriching and Strengthening Our Nation*, http://portal.hud.gov/hudportal/HUD?src=/programoffices/fairhousingequalopp/LGBTHousingDiscrimination (last visited Mar. 16, 2016) ("a lesbian, gay, bisexual, or transgender (LGBT) person's experience with sexual orientation or gender identity housing discrimination may still be covered by the Fair Housing Act"); *Thomas v. Osegueda et al*,

as HIV/AIDS) that may be linked to non-marital sex.[46] The EEOC, HUD, and the FTC would be unable to investigate or prosecute these claims against a business, employer, landlord, or lender, or even provide a "right to sue" letter, as this could be considered an action that could cause or threaten a penalty to be assessed against a person because of their religious beliefs.

- The Family and Medical Leave Act (FMLA)[47] guarantees leave to employees to care for certain family members, including a same-sex spouse or a child born to an unmarried parent. FADA would prevent the DOL Wage and Hour division from enforcing FMLA claims against an employer whose actions are based on religious or moral beliefs about marriage and sexuality.[48]
- Title I of ERISA[49] and its amendments, including the ACA, Newborns' and Mothers' Health Protection Act, Mental Health Parity and Addiction Equity Act, and other health laws guarantee important health benefits to workers and their families. Under FADA, the DOL Employee Benefits Security Administration would be unable to take any

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No. 2:2015cv00042 - Document 11 (N.D. Ala. 2015) *available at* http://law.justia.com/cases/federal/district-courts/alabama/alndce/2:2015cv00042/154020/11/. In addition, a lawsuit recently filed by Lambda Legal has the potential to expand LGBT protections under the Fair Housing Act. *See* Chris Johnson, *New Lawsuit Asserts Anti-LGBT Bias Illegal in Housing*, WASHINGTON BLADE (Jan 16, 2016), http://www.washingtonblade.com/2016/01/16/new-lawsuit-could-extend-lgbt-success-to-housing-discrimination/. Note, however, that there are no protections from sex discrimination—and therefore sex stereotyping, sexual orientation, or gender identity discrimination—within federal public accommodations law. *See* 42 U.S.C. § 2000a.

[45] Title VII's sex and pregnancy discrimination provisions in some cases protect workers from discrimination on the basis of marital status, including discrimination against unmarried pregnant or parenting workers. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Pre-Employment Inquiries and Marital Status or Number of Children* (last visited May 17, 2016) https://www.eeoc.gov/laws/practices/inquiriesmaritalstatus.cfm; *Hamilton v. Southland Christian School*, 680 F.3d 1316 (11th Cir. 2012) (reversing a trial court's grant of summary judgement to a religious school that fired a teacher who conceived while unmarried, and finding that "Title VII does not protect any right to engage in premarital sex, but as amended by the Pregnancy Discrimination Act of 1978, Title VII does protect the right to get pregnant."); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2001) ("[t]he central question in this case, therefore, is whether [a religious school's] nonrenewal of Cline's contract constituted discrimination based on her pregnancy as opposed to a gender-neutral enforcement of the school's premarital sex policy. While the former violates Title VII, the latter does not."; *Ganzy v. Allen Christian School*, 995 F.Supp. 340 (E.D.N.Y. 1998) (holding that the First Amendment does not exempt religious schools from compliance with the Pregnancy Discrimination Act, and therefore firing a pregnant teacher could violate the law unless the school demonstrated she was fired because of violation of a moral code applied equally to male and female employees); *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) ([t]he fact that defendants' dislike of pregnancy outside of marriage stems from a religious belief... does not automatically exempt the termination decision from Title VII scrutiny"); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980). The Fair Housing Act prohibits discrimination in housing based on "familial status," which covers persons who are pregnant or live with a child under 18, regardless of their marital status. *See* 42 U.S.C. §§ 3601, *et seq.* The Equal Credit Opportunity Act forbids discrimination on the basis of marital status in lending, and applies regardless of sexual orientation or whether someone is an unmarried parent. 15 U.S.C. § 1691. Similar provisions are imposed on foreign banks and cooperative banks. *See* 12 U.S.C.A. § 3106a; 12 U.S.C. § 3015(a)(4).

[46] HIV/AIDS meets the definition of "disability" under the ADA. *See* ADA.GOV, *Fighting Discrimination Against People with HIV/AIDS* (last visited May 18, 2016) http://www.ada.gov/aids/.

[47] 29 U.S.C. §§2601 *et seq.*

[48] An employee who is wrongfully denied leave could attempt to bring a civil suit to enforce FMLA rights. 29 U.S.C. § 2617. However as will be discussed below, FADA may in some cases be used as a defense within a private suit. *See infra*, fn. 54-59 and accompanying text. Further, federal enforcement is an important protection for employees who face other barriers to filing a private suit.

[49] 29 U.S.C. §§1001 *et. seq.*

enforcement action against employers who refused to provide mandated health benefits to LGBTQ and unmarried pregnant or parenting employees and their families.[50]

- Title I of the ACA imposes regulatory requirements on issuers of qualified health plans on health insurance exchanges as well as issuers of health insurance coverage in the non-exchange individual and group markets. These regulations include provisions added to Title XXVII of the Public Health Service Act.[51] Among other things, the rules require insurers, agents, brokers, and insurance navigators to offer services on a nondiscriminatory basis. These requirements, including the requirements for health insurance issuers to offer coverage to anyone who applies, are enforced by HHS.[52] FADA would restrict HHS's ability to enforce Title I.
- FADA is written so broadly that it could even be interpreted to prevent the DOJ from investigating or enforcing the Shepard Byrd Hate Crimes Prevention Act,[53] a federal hate crime law, if the perpetrator of a hate crime could show that his or her actions were motivated by religious or moral beliefs about marriage and/or extramarital relations/sex.

There are certainly additional otherwise-illegal acts that would be protected by FADA; the list above is merely illustrative of the bill's reach. This overly broad bill threatens federal enforcement of nearly any law, regulation, or policy that protects American citizens without regard to their marital status or sexual practices. Americans who fail to conform to "traditional," religiously-based sex and gender norms will of course face the greatest harm. They may find themselves suddenly vulnerable to a range of health, housing, labor, and other violations of their rights and liberties, and cut off from any federal assistance in mitigating these harms. While couching itself as a narrow religious freedom bill, FADA in fact creates sweeping protections for religious and moral objectors to violate a broad range of federal laws.

### *ii. FADA Threatens Federal Judicial Enforcement of Civil Laws*

FADA may not only limit the ability of federal agencies to enforce the law; it may also prevent the judiciary from enforcing federal law in suits between private parties. At first glance,

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[50] ERISA also creates a private right of action, and under FADA it may remain possible for plan participants and beneficiaries to sue the employers or unions that sponsor those group health plans if they violate these protections. *See* 29 U.S.C § 1132. As with the FMLA, however, FADA is still significant in that it may be used as a defense even in private suits, and because federal enforcement provides important additional protections against ERISA violations. Additionally, it's worth noting that church plans are not subject to ERISA, but only to IRS enforcement. Thus under FADA, they would have even greater leeway to discriminate without consequence.

[51] *See, e.g.*, 42 U.S.C. §§ 300gg *et seq.*; 18031(c).

[52] In most states, the state insurance exchange or state insurance regulator also has enforcement authority; state insurance regulators are the principal enforcers of these requirements against health insurance issuers. The introduction of FADA-like bills in many states, however, may create opportunities for states to decline to take action against noncompliant health insurance issuers. *See, e.g.*, H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016) (signed into law by Governor Phil Bryant). *See also* H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 284, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 2181, 28th Leg., Reg. Sess. (Haw. 2016); H.B. 2532, 28th Leg., Reg. Sess. (Haw. 2016); S.B. 2164, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); H.B. 2207, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.B. 2211, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.J.R. 96, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.J.R. 97, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.B. 1107, 91st Gen. Assemb., Reg. Sess. (S.D. 2016); H.B. 773, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); S.B. 41, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.B. 2631, 64th Gen. Assemb., Reg. Sess. (Wash. 2016); H.B. 2752, 64th Gen. Assemb., Reg. Sess. (Wash. 2016).

[53] 18 U.S.C. § 249.

such a reading seems overbroad. FADA defines "discriminatory action" as actions taken "by the Federal Government."[54] Further, the bill states that a religious or moral believer "may assert an actual or threatened violation of [FADA] as a claim or defense in a judicial or administrative proceeding ... *against the Federal Government*" (emphasis added).[55] However four circuit courts have held that a federal law with very similar language to FADA may be used as a claim or defense in suits between private parties. Like FADA, the Religious Freedom Restoration Act (RFRA) appears to constrain only governmental actions. The law states that the "Government shall not substantially burden a person's exercise of religion."[56] Under a provision titled "Judicial Relief," it states that a person "whose religious exercise has been burdened in violation of [RFRA] may assert that violation as a claim or defense in a judicial proceeding ... *against a government*" (emphasis added).[57] While RFRA is most commonly used in suits where the federal government is a party, several courts have held that RFRA may be used as a claim or defense in some suits between private parties.[58] The Supreme Court has not addressed this issue.[59]

Considering the similarity between the basic structure and the "judicial relief" provisions of FADA and RFRA, it seems likely that at least some federal courts will apply FADA to limit judicial enforcement of federal laws even in private lawsuits. If this were the case, not only would federal agencies be unable to enforce the laws discussed in the previous section, but private citizens would also be unable to enforce their rights through civil litigation. To give just one of many possible examples, it would mean that if an employer violated the FMLA by refusing to provide leave to an employee to care for his same-sex spouse or an unmarried mother to care for her newborn child, not only would the DOL be unable to bring a claim to enforce these employees' unambiguous FMLA rights—the employer could also claim FADA as a defense in a civil suit brought directly by the employee against their employer. Such an interpretation of FADA would even further restrict the rights and liberties of American citizens, especially LGBTQ persons and single parents, and would impose serious harms on many rights-holders in the name of respecting religious or moral diversity.

#### *iii. FADA Prohibits the Government From Denying Taxpayer Funds and Contracts to Organizations That Discriminate*

[54] FADA § 3(a).
[55] FADA § 4(a).
[56] 42 U.S.C. § 2000bb–1.
[57] *Id.*
[58] *See* Sara Lunsford Kohen, *Relgious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43 (2011); *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006) (holding that, at a minimum, RFRA should apply in suits brought by private parties where a government agency also could have sued). The *Hankins* court found that "permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party [] involves a convoluted drawing of a hardly inevitable negative implication." *Hankins*, 441 F.3d at 103. *See also In re Young*, 141 F.3d 854 (8th Cir. 1998) (allowing RFRA to be used as a defense within a private suit involving bankruptcy law); *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (applying RFRA equally to Title VII claims brought by EEOC *and* by a private plaintiff). The Ninth Circuit has taken a middle-of-the-road approach, holding that RFRA applies to private parties acting "under color of law" as that term is defined in 42 U.S.C. § 1983. *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999).
[59] *See McGill v. General Conference Corporation of Seventh-day Adventists*, 563 U.S. 936, (2011) (denying writ of certiorari to a 6th Circuit case that held RFRA could not be used as a defense between private parties); *Christians v. Crystal Evangelical Free Church*, 525 U.S. 811 (1998) (denying writ of certiorari to an 8th Circuit case that upheld the use of RFRA in a suit involving private parties).

FADA would additionally prevent the federal government from taking any steps to "withhold, reduce, exclude, terminate, or otherwise make unavailable or deny any Federal grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, license, certification, accreditation, employment, or other similar position or status" from a person or organization based on their religiously or morally-motivated speech or acts regarding marriage and/or extramarital relations/sex.[60] In other words, the federal government may not disqualify a person or entity from receiving taxpayer money, or administering an important state-created or -funded program, because they discriminate based on their religious beliefs or moral convictions.[61]

Numerous provisions of federal law and policy currently impose nondiscrimination requirements on non-profit[62] recipients of federal grants and contracts including social service providers, hospitals, and universities.[63] Many of these laws prohibit sex (and pregnancy) discrimination, which, as noted previously, have been interpreted by administrative agencies and courts to include discrimination based on sexual orientation or marital status.[64] Other laws explicitly prohibit sexual orientation discrimination by grantees.[65] At least one law explicitly discourages marital status discrimination.[66]

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[60] *See* FADA § 3(b)(3).

[61] Similar provisions of FADA additionally ban the federal government from withholding any "entitlement or benefit under a Federal benefit program, including admission to, equal treatment in, or eligibility for a degree from an educational program" or from withholding or denying access to "Federal property, facilities, educational institutions, speech fora (including traditional, limited, and nonpublic fora), or charitable fundraising campaigns from or to such person" based on the person's religiously-motivated acts. *See* FADA §§ 3(b)(4) - (b)(6). These provisions, along with FADA's prohibition on withholding a scholarship based on a person's religious speech and/or acts, may override two important Supreme Court opinions that allow the government to exercise discretion over the use of state resources. *See Locke v. Davey*, 540 U.S. 712 (2004) (holding that a state scholarship program that did not permit students to use the scholarship at an institution where they are pursuing a degree in devotional theology did not violate the Free Exercise Clause); *Christian Legal Soc. v. Martinez*, 561 U.S. 661 (2010) (holding that a nondiscrimination requirement that student groups at a public university adopt open membership policies in order to receive official recognition did not violate the right to free exercise or speech.).

[62] For-profit contractors acting within the scope of a federal contract are not deemed "persons" in FADA. See § 6(3)(B).

[63] *See, e.g.* 42 U.S.C. § 18116 ("[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance…"); 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"); 42 U.S.C. § 5672 (applying antidiscrimination requirements to grants funded by the Office of Justice Programs).

[64] *See supra* fns. 44-45 and accompanying text.

[65] 42 U.S.C. § 13925(b)(13) ("No person in the United States shall, on the basis of actual or perceived … sex, gender identity (as defined in paragraph 249(c)(4) of title 18), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994"); 42 U.S.C. § 294e-1 ("To be eligible for a grant under this section [Mental and behavioral health education and training grants], an institution shall demonstrate—(1) participation in the institutions' programs of individuals and groups from … genders and sexual orientations."). Sexual orientation discrimination by federal contractors is also prohibited by executive order. *See* Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014). FADA would additionally weaken an executive order that requires some government contractors, as a condition of eligibility, to disclose their

FADA would prevent the federal government, including the DOL's Office of Federal Contract Compliance Programs, from enforcing these antidiscrimination provisions against non-profit organizations that hold religious beliefs or moral convictions that marriage is or should be recognized as the union of two individuals of the opposite sex; or two individuals of the same sex; or extramarital relations are improper. It would also take away federal agencies' discretionary power to deny taxpayer money to non-profit organizations that discriminate on the basis of sexual orientation, even where not mandated by federal law or policy. In practice, this would allow organizations to apply for a grant or contract to provide particular services, and then refuse to perform those same services on the basis of a religious or moral belief regarding sex or marriage. For example, a health clinic could receive a Title X grant to provide family planning care, and then require that patients provide a marriage license in order to qualify for such services. Another health clinic could receive a Ryan White grant to provide services to people with HIV/AIDS and then decline to work with same-sex married couples. A domestic violence shelter funded by a Violence Against Women Act grant could require all residents to attest their opposition to marriage equality before securing housing. Placing these types of religious and/or moral conditions and restrictions on the use of public monies would clearly harm the intended beneficiaries of those funds.

This provision of FADA would have especially significant effects in the context of government contracts to provide essential services such as healthcare. For example, the federal government contracts with private companies to provide Medicare Advantage Plans to seniors and people with disabilities.[67] Even if a company had already signed a contract with the federal government to provide particular services to Medicare enrollees, these companies might argue that FADA entitles them to stop providing certain services based on their religious beliefs or moral convictions—such as STI testing or treatment to patients who are unmarried, or LGBTQ-affirming mental and reproductive health services.

FADA may also limit the ability of the federal government to prevent discrimination by state employees. While FADA does exempt federal employees acting "within the scope of their employment"[68] from the bill's protections, it does not exempt state employees. Thus the DOJ and other federal agencies would be unable to take any action to ensure that state actors comply with federal law, including the Supreme Court's decision in *Obergefell v. Hodges*. This limitation is especially significant since several states have passed or attempted to pass laws that provide religious exemptions to state workers who are opposed to marriage equality.[69] If FADA were

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compliance with labor laws, including antidiscrimination laws. Fair Pay and Safe Workplaces Exec. Order No. 13, 673, 79 FR 45,309 (Aug. 5, 2014).

[66] *See* 42 U.S.C, § 12639 (providing that programs that receive federal financial assistance under the National Service Trust Program are evaluated to determine their effectiveness in "recruiting and enrolling diverse participants in such programs… based on …marital status.").

[67] *See* Social Security Act § 1857, 42 U.S.C. § 1395w-27.

[68] FADA § 6(3)(A).

[69] *See* H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016) (vetoed by Governor Nathan Deal); S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016) (voted down in committee); H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016). Mississippi's extremely broad religious exemption law was signed into law by Governor Phil Bryant. For an analysis of the law, *see* Memorandum from the Public Rights/Private Conscience Project to Interested Parties, Mississippi H.B. 1523 & the Establishment Clause (Apr. 5, 2015) *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/memoregardingmshb1523.pdf. *See*

enacted, government workers in Mississippi or Kentucky, for example, would be allowed to refuse to issue marriage licenses to, or to marry, same-sex couples under both state and federal law. This would make same-sex couples' constitutional right to marry contingent on their finding a willing government employee, and subject these couples to discrimination and stigma by state actors.

### *iv. FADA Imposes Dignitary Harms on LGBTQ and Other Citizens*

Finally, by specifically singling out for special protections only religiously-motivated discrimination based on sexual orientation and non-marital relations/sex, FADA will produce significant third party harms by increasing the likelihood that LGBTQ people and single parents will face bias and pejorative treatment, including by government-funded actors. In *Obergefell*, Justice Kennedy explained,

> "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises... But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[70]

Like bans on same-sex marriage, FADA would lend the color of law to discrimination, and therefore would demean and stigmatize a class of persons whose relationships have only recently been formally recognized by the state.[71] This stigma is even more acute when it occurs in programs regulated and funded by the state, or by state actors.

The fact that the most recent version of the bill has added an immunity for sincerely held religious belief or moral conviction that marriage is or should be recognized as "two individuals of the same sex" does not mitigate the likelihood that the bill's overall effect will be to induce stigma against same-sex couples. As a matter of fact, the bill's central purpose (as indicated, *inter alia*, in the Committee's Memo noticing the hearing on FADA), is to address the interests of "organizations and individuals that maintain a traditional view of marriage [and] have raised concerns that the government will use the Supreme Court decision in *Obergefell v. Hodges* as a legal basis to discriminate against them for holding such a view of marriage, potentially

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*also* H.B. 130, 2016 Leg., Reg. Sess. (Ala. 2016); H.B. 236/ S.B. 120, 29th Leg., Reg. Sess., (Alaska 2016); H.B. 401, 2016 Leg., Reg. Sess. (Fla. 2015); H.B. 14, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 17, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 31, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 28, 2016 Leg., Reg. Sess. (Ky. 2016); S.F. 2158, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 2462, 89th Leg., Reg. Sess. (Minn. 2016); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 478, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 1328, 55th Leg., Reg. Sess. (Okla. 2016); S.B. 116, 2016 Gen. Assemb., 121st Sess. (S.C. 2015); H.B. 3150, 2016 Gen. Assemb., 121st Sess. (S.C. 2015); S.B. 40, 2016 Gen. Assemb., Reg. Sess. (Va. 2016). Two states even introduced bills to *punish* government workers who recognize same-sex marriage, ban the use of funds to enforce court orders requiring recognition of same-sex marriage, and instruct state courts to dismiss any legal challenges to the bills. *See* H.B. 1599, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 805, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 973, 55th Leg., Reg. Sess. (Okla. 2016); H.B. 3022, 2016 Gen. Assemb., 121st Sess. (S.C. 2016).

[70] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

[71] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

jeopardizing a tax-exempt status or other relationships they may have with the government ..."[72] It is implausible that any party might marshal a credible claim that they are entitled to an exemption from federal law under FADA on account of their religious or moral conviction that marriage is or should be recognized as "two individuals of the same sex."

All of the aforementioned religious accommodations violate the Establishment Clause by shifting a material burden from religious actors to other private citizens. As an overly broad religious accommodation that will harm third parties, FADA violates the First Amendment's Establishment Clause.

**c. FADA Violates the Establishment Clause By Endorsing Particular Religious Beliefs**

Finally, the government may violate the Establishment Clause if its actions tend to express support for a particular religious faith or belief.[73] FADA runs the risk of violating the Establishment Clause by "establish[ing] an official preference for certain religious beliefs over others"[74] and improperly endorsing, or seeming to endorse, particular religious beliefs. In the Mississippi opinion mentioned above, the court found that HB 1523 violated non-endorsement principles since "the State has put its thumb on the scale to favor some religious beliefs over others."[75] The non-endorsement principle is best articulated in several Supreme Court cases that involve expressive actions which may be attributed to the state, such as those taken by government employees, on government property, or during government-sponsored activities.[76] The applicable test in these cases is whether, in light of the context and history of the relevant

[72] Memorandum from House of Representatives Committee on Government Oversight and Reform, noticing: Full Committee hearing: "Religious Liberty and H.R. 2802, the First Amendment Defense Act (FADA)", dated July 8, 2016.

[73] *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community") (O'Connor, J., concurring); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 305 (2000) ("Contrary to the District's repeated assertions that it has adopted a 'hands-off' approach ...the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion."); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) ("the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally"); *U.S. v. Lee*, 455 U.S. 252, 263 fn. 2 (1982) (Stevens, J., concurring) ("The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

[74] *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 47 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction). In evaluating a law very similair to FADA, the Mississipi district court found that "On its face, [the bill] constitutes an official preference for certain religious tenets. If ... specific beliefs are 'protected by this act,' it follows that every other religious belief a citizen holds is not protected by the act." *Id.* at 48.

[75] *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 2 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction).

[76] *See Santa Fe Independent School District*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Backmun, J., concurring) ("Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion"); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). *See also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring) ("[G]overnment speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.").

law or action, a reasonable observer would perceive a state endorsement of religion.[77] If so, such law or action amounts to a violation of the Establishment Clause. For example, if a mail carrier explicitly refused to deliver invitations for a same-sex couple's wedding because of his religious beliefs—a belief that is specifically protected by the introduced version of FADA—this could cause a reasonable person to think that the government has endorsed the religious grounds for such opposition.[78]

What is more, providing public funds to an organization that places religious restrictions on the use of those funds creates the perception that the government has endorsed the organization's religious beliefs.[79] For example, awarding a grant to an organization that, for religious or moral reasons, explicitly refuses to provide services to same-sex couples and unmarried mothers could cause a reasonable observer to believe that the government supports the religious judgement that these populations are sinful or unworthy of assistance. This violates the Establishment Clause, which forbids the government from supporting organizations that "impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endors[ing] the religious beliefs of" that organization.[80]

**Conclusion:**

In summary FADA creates overly broad religious accommodations that will impose manifold harms on private Americans and enable and encourage discrimination. As such, despite its name, it conflicts with the law and spirit of the Establishment Clause of the First Amendment.

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[77] *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) ("To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."); *Santa Fe Independent School Dist. v. Doe*, 30 U.S. 290, 308 (2005) ("In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools") (internal citations omitted).

[78] *See generally*, Memorandum from the Public Rights/Private Conscience Project to Interested Parties, Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages (June 30, 2015) *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriageexemptionsmemojune30.pdf. The fact that the discrimination is permissive rather than mandatory is not dispositive; like the students' religious speech in *Santa Fe Independent School District v. Doe*, the decision of the state to permit such religiously-motivated conduct by government employees on government property in the provision of government services is "clearly a choice attributable to the State." *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 311 (2000).

[79] Of course, the Supreme Court has held that not every grant given to a religious organization or group violates the Establishment Clause. The Court has typically upheld grants where secular services are provided to religious and secular institutions on a neutral basis. *See, e.g., Mitchell v. Helms*, 530 U.S. 793 (2000). Permitting religious grant recipients to discriminate, however, is *not* a matter of merely providing funds for the same services in a neutral way. Rather, by permitting grant recipients to refuse to provide funded services to certain populations based on a religious belief, the government allows the grant recipients to redefine state programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients.

[80] *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds). *See also* *Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989) ("The [government] grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion...would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.").

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Ms. FRANKE. Thank you.

We all agree, I think all of us on this panel agree and I would guess everyone in this room agrees that religious liberty is an important, indeed, a fundamental American value. Yet, as I've said, it receives robust protections under the U.S. Constitution in the First Amendment, under Federal laws including the Religious Freedom Restoration Act, and also including every State's Constitution and many States, more than half of the States have enacted what we call mini-RFRAs or their own religious liberty statutes.

In this sense FADA is a solution in search of a problem. While Chief Cochran's termination raises very troubling issues for sure about religious liberty and public service, FADA would never address his termination. The facts of his termination don't fall under any reading of FADA within the protections that it would create.

So even more worrisome than the fact that FADA is creating a solution to a problem that doesn't exist, FADA does not defend but rather violates the First Amendment. It does so by unsettling the delicate balance our Constitution and our courts have struck between protecting free—the free exercise of religion and preventing the establishment of religion by the Federal Government.

So how is this so? Well, as I've said, and I would insist that religious liberty is very important. No court, including the Supreme Court, and no reasonable scholar of the First Amendment would hold the view that religious liberty rights are always absolute. To be sure, our Constitution adamantly and absolutely protects religious belief, but it does not absolutely protect every single act that one takes in the service of that belief. These beliefs have to be reconciled with other fundamental rights and values that we hold dear.

Yet this is exactly what FADA would do. It creates an absolute immunity from any penalty if a person can justify their actions with religious beliefs or moral convictions about marriage or sexuality. This immunity would attach regardless of the good or even compelling reason that the Federal Government has for a law that might conflict with that person's religious beliefs or moral convictions.

As the ranking member and many of the other members of this committee are well aware, not so long ago, opponents of racial equality made arguments almost exactly similar to those being used to defend the need for FADA today. They relied on a theology of segregation, a well-developed set of religious beliefs that people of different races were designed by God's will to be separate from one another. These religious beliefs justified resistance to an evolving norm, constitutional, political, and social norm about racial equality, and on the basis of those beliefs, they demanded an exemption from laws that mandated racial equality in employment, education, housing, and in marriage itself.

The Supreme Court unequivocally rejected those arguments. It recognized that the Federal Government had a fundamental overriding interest in eradicating racial discrimination and that the public had an interest that substantially outweighed whatever burden may be placed on the religious beliefs the defenders of Jim Crow segregation.

And where my colleague to my right Ms. Waggoner wants to distinguish the kinds of racial violence that we witnessed in the 1960s or really for most of the United States history from the kinds of violence that lesbian and gay people and unmarried people have suffered in this country, I would beg to differ. As Mr. Obergefell has noted and Mr. Frank have noted, we live in a very violent society, and LGBT people are often the victims of that violence, disproportionately so. The statistics show that we are disproportionately the victims of that violence. So I would beg to differ with that differentiation.

But now, as in the history of religious liberty being invoked to justify exemptions from civil rights laws, those liberty rights must be weighed in relationship to other interests that the government may have enforcing laws that secure equality and liberty for—excuse me, for all of our citizens. We have existing principles in the Constitution and in Federal law that allow for that balancing to take place in a sensitive and responsible way that owes fidelity to the fundamental importance of religious liberty and the fundamental importance of other dearly held rights.

But when we miss that balance, when we balance too heavily in the favor of religious liberty, we risk creating another constitutional violation, and that is a violation of the Establishment Clause. Why is this so? Supreme Court again has been very clear that the religious accommodations that cause a meaningful harm to other private citizens violate the Establishment Clause. Protecting the religious liberty of some cannot be accomplished or purchased by sacrificing the rights and intent of others.

And indeed, Senator Lee said just that thing in introducing the virtues of this bill. And if you read it closely, and I have—it is my job, as it is yours, to read bills closely—I would say that we have a rather fundamental disagreement about what the language of the bill says.

So this view about causing harms to third parties is something that the Supreme Court upheld 2 years ago by a majority of the Court in the Hobby Lobby case. This is not an old idea. It's not an idea of the minority of the Supreme Court. It is one that the Court embraces.

So I have prepared—I won't go through it now—but a detailed analysis of all of the ways in which FADA would create substantial material harms on third parties. It's contained in our longer testimony, and it's contained in a shorter version, which I have and have submitted to the committee and would ask be entered in the record.

Thank you so much, Mr. Chairman.

Mr. MEADOWS. Without objection, it will be included.

[The information follows:]

Mr. MEADOWS. Thank you for your testimony.

Dr. Franck, you are recognized for 5 minutes.

**STATEMENT OF MATTHEW J. FRANCK**

Mr. FRANCK. Thank you, Mr. Chairman. I'd like to take just a moment not only to thank the entire committee, Ranking Member Cummings, Chairman Chaffetz who's absent, but also to say good morning to my Congresswoman, Mrs. Watson Coleman. I hail from

Lawrenceville, New Jersey, and I'm a constituent of yours, so very nice to see you.

I'd also like to correct the record, an inadvertent misstatement of Chairman Chaffetz that the Witherspoon Institute where I work is at Princeton University. It's in the town of Princeton but it's independent of the university.

The Supreme Court's decision in Obergefell v. Hodges in June 2015 redefined the meaning of marriage in American law. But many Americans remain opposed to the Court's imposition of same-sex marriage. The reasonable belief that the true meaning of marriage is its traditional meaning, the conjugal union of a man and a woman, can be expected to persist among millions of our fellow citizens. In part, this is because that view is also supported by their religious faith, though moral convictions on the subject can be strongly held for nonreligious reasons, too.

And so Obergefell has cast a shadow over freedom of conscience in our country. People who sincerely hold on religious or moral grounds that marriage can only be between a man and a woman fear that they may be compelled to betray their consciences or suffer grave consequences. Some people have already experienced this, people such as Chief Kelvin Cochran.

Hence, the First Amendment Defense Act preventing the Federal Government from discriminating against those who act on a sincerely held and reasonable view of marriage is vitally important legislation.

The Justices who wrote in Obergefell anticipated the problems we now confront. Quite remarkably, they spoke about religious liberty in a case that seemed to have nothing to do with religious liberty. But the dissenters explicitly mentioned the ruling's dire consequences for religious freedom and noted that in the legislative arena changes in the law of marriage could have included accommodations of conscience rights, as was done in some States that adopted it legislatively.

After a judicial decree, however, it could be said it becomes still more important for legislatures to enact what Justice Thomas called measures "codifying protections for religious practice." In order to avoid the opening of what Justice Alito called "bitter and lasting wounds" in American society.

Justice Kennedy, speaking for the Court, spoke of people's continued freedom to believe and to express a contrary view of marriage, but did he rule in or rule out a freedom to act on a view contrary to the ruling he announced? Was his description of religious freedom a floor or a ceiling?

Justice Kennedy had spoken elsewhere in his opinion of the "decent and honorable religious or philosophical" principles that undergird what people believe about conjugal marriage. And he said the Court should not "disparage" such views. He did not call defenders of traditional marriage bigots whose views deserve no respect like people who once opposed interracial marriage. He treated them as reasonable people who should not be considered outsiders.

Thus, the answer to our question is that Obergefell does not foreclose accommodations by the legislatures of the land, including this one, of full freedom of conscience.

The aftermath of another controversial case decided by the Supreme Court should be our model today. After Roe v. Wade, Congress passed the Church and Weldon Amendments, which honored the consciences of everyone who might otherwise be coerced into facilitating or cooperating with abortions. The proposed First Amendment Defense Act likewise is an appropriate and indeed urgent response to the threats now looming against the rights of conscience regarding marriage. It is in keeping with America's best traditions of honoring freedom of religion and the right of dissent.

The scale of the looming threat is great. People from multiple faith communities and persons of no religion at all have sincerely held conscientious views on marriage that they cannot betray without compromising who they are. FADA would ensure that the Federal Government does not impose a self-destructive choice on these people.

A few words are in order about what FADA is not. It is not a license to discriminate against others, least of all because of who they are. The act says nothing about identity, dignity, status, or orientation. It protects people's core convictions about marriage as an institution, not any attitudes they may have about LGBT persons as persons.

FADA does not get the Federal Government into the business of judging people's relationships. To the contrary, it gets the Federal Government out of taking sides on the contested issue of whose view of marriage or sexual relations is the preferred one or the one everyone must conform to.

FADA is in no way a violation of the Constitution's equal protection principle. Even if we were to grant that it allows one person to discriminate against another, which I do not grant, that is conduct entirely in the private sphere of civil society, not the state action the Constitution reaches. Indeed, by clearing space for opposing viewpoints on marriage to be equally protected in the law, FADA is a significant step for the equal protection of the laws, not against it.

Finally, FADA is not, as Professor Franke and her colleagues have suggested, an unconstitutional establishment of religion. It goes no preferred standing to any religious viewpoint over another. It sweeps across all faith communities, and it honors nonreligious moral convictions as well. Indeed, in its amended form just recently introduced, it is now completely viewpoint neutral, satisfying all reasonable concerns about its open, fair-minded, equal treatment of all.

As a vital after-Obergefell measure, the First Amendment Defense Act prevents no one from getting married or from celebrating a joyous wedding day. It demeans no one and protects people who otherwise might have to choose between their conscience and their livelihood, their ability to serve the public, their education, or their freedom. The passage of FADA would be a great step towards securing the space for people of goodwill and differing views to dissent and to disagree respectfully. It would preserve a free society where no one's decent and honorable views are under threat of being stamped out.

In a time when pessimism is on the rise regarding our "culture wars" FADA is a significant step in the direction of peace and civil-

ity. I urge the committee to move this bill toward its ultimate passage by the Congress and enactment into law, and I ask the committee to enter my longer prepared testimony into the record.

Mr. MEADOWS. Without objection, so ordered.

[Prepared statement of Mr. Franck follows:]

**The First Amendment Defense Act:**
**An Appropriate Congressional Response to Real Threats to Freedom of Conscience**

**Matthew J. Franck**[1]
**Testimony prepared for the Committee on Oversight and Government Reform**
**U.S. House of Representatives**
**12 July 2016**

## I. *Obergefell* v. *Hodges* and its Impact

The Supreme Court's decision in *Obergefell* v. *Hodges* in June 2015 changed the meaning of the Constitution in order to impose on the entire country a change in the meaning of marriage. This should not be regarded as a controversial characterization of the ruling. Justice Anthony Kennedy's opinion for the narrow majority in the case referred to the "new insight" into constitutional meaning that changing circumstances vouchsafe to the justices of the Court, who cannot "allow[] the past alone to rule the present,"[2] and he characterized marriage as an "institution" that has "evolved over time,"[3] the implication from these observations, taken together, being that the Supreme Court is in charge of the evolution that both the Constitution and marriage are to undergo in our country.

It is not surprising that such a sweeping decision, rendered by such a closely divided Court, lacks legitimacy in the minds of many Americans who believe that neither the Constitution nor the institution of marriage can be redefined on the motion of five members of an unelected, unaccountable judiciary. Today, a little more than a year later, there are many Americans who would reverse or overturn *Obergefell*, either politically or judicially, if they could. Over the short, medium, and long term, the numbers of such Americans may shrink or grow, and no one should be confident of what the long-term trend lines will be.

To compare our current situation with other watershed moments in American constitutional history, this is 1974 after *Roe* v. *Wade*, or 1858 after *Dred Scott* v. *Sandford*. Whichever opinion is in the ascendant at any given time, and whatever the relative strength of the contending views, deep divisions over *Obergefell* are bound to continue. And they are exacerbated by the nature of the decision itself, which took from the people the right of self-government over some of the most vital questions that the law can possibly address—the meaning of marriage, the nature of the family, and the rights of children to a mother and father.

While those divisions continue, how will today's victors in the struggle over marriage proceed to treat their fellow citizens who dissent from the ruling in *Obergefell*, and who regard it as a grievous error in law and morality from which they wish to keep their distance? A decent

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[2] *Obergefell* v. *Hodges*, 576 U.S. ___ (26 June 2015), slip op. at 11 (Kennedy, J., for the Court).
[3] Ibid., at 6.

respect for the consciences of other Americans should prompt them to model their treatment on the Church Amendments, adopted after *Roe* in the 1970s, which protect persons and institutions from any discrimination or adverse consequences of their refusal to perform or be complicit in any sterilization or abortion, on grounds of "religious beliefs or moral convictions" that prompt such refusal.[4]

The Church Amendments, and similar provisions of federal law,[5] evince a recognition on the part of Congress that some of our fellow citizens have legitimate, even though not universally shared, moral convictions about the sanctity of human life that it would be wrong to coerce them to betray. The freedom to follow the promptings of conscience in this matter is affirmed whether one's conscience is informed by religious faith or not—hence the typical statutory language of "religious beliefs or moral convictions." The proposed First Amendment Defense Act wisely echoes this language and partakes of the same breadth of coverage for those whose consciences are affected by changes in the legal landscape, but now in the context of those with a "sincerely held" conscientious belief, whether religious or not, that marriage is "the union of one man and one woman."

The impulse that the Church Amendments reject, namely that all should be compelled to conform their conduct to a notion that abortion is part of the public good, should be rejected in this new context as well. A policy of compulsory acceptance of the redefinition of marriage imposed by *Obergefell*, under the threat of the federal government's coercive authority, would be both a sign of political insecurity on the part of the victors in that case, and a reality of gratuitous intolerance, spurring needless conflict and inflicting widespread harm with no counterbalancing benefit other than the satisfaction of having oppressed others who think differently than oneself.

The justices of the Supreme Court who wrote in the *Obergefell* decision foresaw the issues we are discussing today. In some ways this is striking, because the case had nothing in itself to do with religious freedom or the relation between church and state. But the historical intertwining of religious belief and legal principles respecting marriage placed the future of religious freedom prominently in the background of the ruling at hand. Chief Justice Roberts is worth quoting at some length:

> Today's decision . . . creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.
>
> Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may

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[4] "Church Amendments, 42 U.S.C. § 300a-7," available at http://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/42usc300a7.pdf.

[5] See "Current Federal Laws Protecting Conscience Rights," Secretariat of Pro-Life Activities, U.S. Conference of Catholic Bishops, available at http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf.

> continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.
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> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.[6]

Similarly, Justice Thomas wrote: "Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect."[7] He observed that the First Amendment's protections were "far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice" such as the Religious Freedom Restoration Act.[8] Justice Thomas continued:

> Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.[9]

It is exactly such "ruinous consequences"—or some of them, at least—that the First Amendment Defense Act, in my opinion, is well designed to prevent.

Justice Alito also observed the potentially grave consequences for religious liberty that could unfold from the *Obergefell* decision, which he predicted

> will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.
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> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of

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[6] *Obergefell*, slip op. at 27-28 (Roberts, C.J., dissenting) (citations omitted).
[7] Ibid., slip op. at 14 (Thomas, J., dissenting).
[8] Ibid., at 15.
[9] Ibid., at 16.

> conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.
>
> The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.[10]

The First Amendment Defense Act gives Congress the opportunity, with respect to those conscience rights within its reach to protect, to mitigate the harm caused by the Supreme Court's decision to short-circuit the political process and decree a nationwide right of same-sex marriage. Justice Alito rightly observed that in the process of legislation in each state, it was possible to "tie" conscience rights and same-sex marriage together. Indeed, in the small number of jurisdictions where same-sex marriage was established by legislation rather than judicial decree, this is generally what did happen.[11]

Justice Alito *seemed* to say that such accommodation had now been rendered "impossible" by the decision in *Obergefell*. But he said this in a particular context—namely, his critique of the majority's arrogation of power to constitutionalize the question of same-sex marriage, and to decree a result by adjudication rather than letting legislative action take its course. Legislation typically involves more give and take than adjudication, and in the legislative arena it was *possible* to "tie" marriage legislation and conscience protection closely together as a single package subject to a vote. This isn't how courts operate, and so the justices had given a complete victory to one party, without necessity of compromise or accommodation. But Justice Alito's comment by no means ruled out the possibility, or the legitimacy, of *post hoc* efforts to accommodate conscience rights by legislation. Likewise, whereas Chief Justice Roberts remarked (as already quoted above) that the Court's ruling "cannot, of course, create any such accommodations," he by no means averred that the Court's decision rules them out as disallowed by the Constitution. The First Amendment Defense Act represents just such an effort at accommodation, responding to the newly created constitutional status of same-sex marriage by creating a statutory safe haven for the exercise of conscientious dissent from this redefinition of marriage's meaning.

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[10] Ibid., slip op. at 6-7 (Alito, J., dissenting) (citations omitted).

[11] See Robin Fretwell Wilson, "The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom," in *Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe*, ed. Timothy Samuel Shah, Thomas F. Farr, and Jack Friedman (New York: Oxford University Press, 2016), 132-80, esp. 145-50.

In the quotations above from *Obergefell*, we have seen the dissenting justices remark on the majority's passing mention of religious liberty. And it is true that in a crucial passage the majority seemed to express a cramped view of our first freedom. Justice Kennedy wrote:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.[12]

This is the passage of the majority's opinion that elicited the warnings of three of the dissenters. Here Justice Kennedy spoke of the freedom of religion only as the freedom to believe, and to express a belief in, an understanding of marriage as the conjugal union of a man and a woman. That view, on the other hand, was entirely disabled from being embodied in the law as a definition of marriage inasmuch as it kept same-sex couples from enjoying the legal status of marriage "on the same terms."

But what of the space in between? If religious believers, and others sharing their view on non-religious grounds, wished to do more than merely *think* of marriage as a conjugal union of man and woman, but were now told they could not *legislate* that understanding, could they nonetheless *act* on that understanding in their interactions with fellow citizens in educational, charitable, social, and commercial settings? Could they do so, especially, because their beliefs about marriage are integrally bound up with their identity and integrity as believers or as morally conscientious persons?

The *Obergefell* dissenters were clearly worried that such a freedom of action was endangered in the new order the decision called forth. Chief Justice Roberts, as quoted above, gave several examples of concrete threats to such freedom that could be easily foreseen. And Justice Thomas, immediately before his reminder (also quoted above) about our history of providing more legal protection for religious freedom than the judicially interpreted Constitution may be said to require, put his finger on the same problem:

> Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Religious liberty is about *freedom of action* in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.[13]

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[12] *Obergefell*, slip op at 27 (Kennedy, J., for the Court).

[13] Ibid, slip op. at 15-16 (Thomas, J., dissenting) (emphasis added; citation omitted).

Is the *Obergefell* majority's seemingly more restrictive reading of religious freedom in the passage already quoted—mentioning only belief and expression, and omitting the "exercise" of religion that encompasses action in the world—the whole story? Did Justice Kennedy foreclose the possibility that religious freedom to dissent from the redefinition of marriage could go beyond speech to involve those *actions* that conscience must constrain in a person of strongly held religious or moral views?

I do not think he did foreclose that possibility. Consider the following, less frequently noticed, passage from his majority opinion:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.[14]

Although there are other passages in Justice Kennedy's opinion that drew the critical comment from Chief Justice Roberts that he had "sull[ied] those on the other side of the debate,"[15] in this particular passage there is an underappreciated symmetry in Kennedy's treatment of the contending points of view. The views of the supporters of conjugal marriage are not only "sincere" and "personal," they stem from both "religious" and "philosophical premises" that are "decent and honorable"—i.e., reasonable and worthy of respect. Kennedy claims that embodying those views in the law governing who may marry whom would "disparage [the] choices and diminish [the] personhood" of same-sex couples wishing to marry. But by the same token he disavows any reading of *Obergefell* in which the conjugal view of marriage is "disparaged here."

The five-justice majority for whom Justice Kennedy speaks has chosen a victor in this struggle—wrongly, as I and many others would argue—but here he appears to enunciate an evenhanded "no disparagement" principle. On the one hand, he argues, it would be wrongful disparagement of the choices and personhood of same-sex couples to deny them the civil status of marriage. On the other hand, he allows that it would also be wrongful disparagement of the "decent and honorable" views, central to their own personhood as conscientious moral actors, that are advanced by those who hold the conjugal view of marriage for religious or philosophical reasons, for the state to suppress those views. The possibility that Justice Kennedy neither considers *nor rejects*, but which is raised by Chief Justice Roberts and the other dissenters, is the potential for such suppression—amounting exactly to the "disparage[ment]" he disavows—when the government compels *conduct* that contradicts the dictates of conscience as it responds to these "decent and honorable religious or philosophical premises" about the meaning of marriage.

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[14] Ibid., slip op. at 19 (Kennedy, J., for the Court).
[15] Ibid., slip op. at 28 (Roberts, C.J., dissenting).

Justice Kennedy's recognition of these "decent and honorable" views opposed to his own is commendable. This is not the way indefensible bigotry is discussed, even in the detached language of judicial opinions.[16] And in light of this passage, we can justifiably take his opinion's narrower expression of the scope of religious freedom, several pages later, as expressing a minimum of such freedom and not a maximum—a floor and not a ceiling. Thus ample room is implicitly conceded for congressional action such as the First Amendment Defense Act, to protect exactly that freedom of conduct on the meaning of marriage that is the first target of those who would seek to suppress as well the viewpoint informing that conduct.

**II. The Scale of the Problem**

Virtually everyone who has examined the implications of same-sex marriage for religious freedom, and freedom of conscience more generally, has been compelled to recognize that the conflicts ahead of us—some of them playing out already—are very real. In a recent book to which I contributed, scholars from the United States, United Kingdom, and continental Europe examined the issues from a variety of perspectives. Some were for same-sex marriage, some against it. Some of those in favor of same-sex marriage were mindful of the legitimate claims of dissenters; others were more dismissive or unsympathetic toward those claims. But almost without exception the authors were aware of the reality of the conflict, and of the nature of the threat to freedom as the law is brought to bear on the conduct that our consciences will permit us to undertake.[17]

As Justice Thomas remarked in his *Obergefell* dissent, "In our society, marriage is not simply a governmental institution; it is a religious institution as well."[18] By this he did not mean that the laws of marriage previously embodied a purely religious perspective on the institution, much less that they constituted an "establishment of religion." In context, he plainly meant merely the commonplace observation that marriage and family are central features both of our political life, therefore governed by public policy, and of many, perhaps the great majority of, Americans' religious lives, answering morally to teachings and doctrines of faith. Hence, he continued:

> Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.[19]

If anything, the conflicts over religious liberty following in the wake of the Court's decision to redefine marriage threaten to be more numerous, and more acute, than those that followed the abortion decision in *Roe* v. *Wade*. Why is that? As I explained in the book to which I referred above:

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[16] Compare, for instance, the accurate characterization of anti-miscegenation laws as nothing more than "measures designed to maintain White Supremacy," in *Loving* v. *Virginia*, 388 U.S. 1 (1967), at 11.
[17] See *Religious Freedom and Gay Rights*. I rely in part for what follows on my Introduction to this volume, "Religious Freedom, Same-Sex Marriage, and the Dignity of the Human Person."
[18] *Obergefell*, slip op. at 15 (Thomas, J., dissenting).
[19] Ibid.

> [T]he adoption of same-sex marriage in the laws of the United States and the other western democracies is different in kind from previous developments that had relaxed or abandoned the legal enforcement of Christian (but not uniquely Christian) norms of sexual morality. When most of the Christian churches other than the Roman Catholic abandoned the historic condemnation of artificial contraception beginning some 80 years ago, and the laws gradually followed suit in dropping proscriptions of it, there was no inroad on the freedom of those who clung to the ancient teaching to continue following their consciences, as individuals or in their institutions. (Lately this has changed in the United States, with the Health and Human Services mandate for employer provision of contraception under the Affordable Care Act of 2010.)
>
> Likewise, when adultery was decriminalized, or when sodomy laws fell into desuetude, no one who believed in the sinfulness or immorality of such acts was harmed in his own freedom to live conscientiously by such moral or religious norms. The American people's right of self-government—an underappreciated part of their liberty of acting together in community—was arguably harmed by the Supreme Court's invalidation of all sodomy laws in *Lawrence v. Texas* (2003), but religious freedom as such suffered no blow.
>
> Even *Roe v. Wade* (1973), viewed by all who hold life sacred from conception to natural death as a legal horror, a grievous injustice against basic human rights, was not by the force of its own logic a threat to the religious freedom of the ruling's opponents. To be sure, there were medical institutions and others in need of a shield against any coerced complicity in abortions they conscientiously opposed, but in the main (while there were and still are flashpoints here and there) such a shield was ungrudgingly provided by legislators.
>
> The redefinition of marriage, extending the civil status of the institution by law to same-sex couples, propels us into very different territory. As Justice Thomas noted, the claim that was victorious in *Obergefell* was not really, in the logic of the law, a "liberty" claim at all. It was a demand for government recognition and inclusion in an institution whose definition has always included some and excluded others. And marriage is an institution both civil and religious, as Justice Thomas also noted.
>
> More than that, marriage's meaning permeates civil society generally—the economy, education, the structures and activities of intermediate associations generally, all of which are subject in varying degrees to the law's understanding of marriage and family relations. From schools to hospitals to social service agencies to charitable institutions to workplaces to market transactions of myriad kinds, any modern society presents countless micro-environments where conscience, moral choice, and claims of dignity regarding the meaning of marriage can potentially clash in ways that erupt into litigation, prosecution, and/or public administration of where the right should prevail.[20]

The fact that marriage is so interwoven with civil society across so many dimensions, and that it is central and prominent in any understanding of the common good, accounts in large part for its

[20] Franck, "Religious Freedom, Same-Sex Marriage, and the Dignity of the Human Person," 15-16.

centrality in religious traditions as well. All the major world religions in their most traditional or orthodox forms hold that marriage is a union of man and woman, because of the sexes' complementarity and because of the importance of the generation and upbringing of children. At the Humanum Colloquium, a major international, inter-religious meeting held at the Vatican in November 2014, prominent representatives of the Catholic, Evangelical, Anglican, Pentecostal, Eastern Orthodox, Anabaptist, Mormon, Jewish, Muslim, Jain, Buddhist, and Hindu faith communities attested to their shared understanding of the importance of sexual complementarity in marriage.[21]

In many, perhaps most of these faith communities, certainly in those in the historic mainstream of Judaism and Christianity, believers hew to doctrines on marriage and sexual relations that are considered central to the faith's moral teachings, coming to them with all the force and obligation of divine commandments. Marriage is imbued with a sacred character, even a sacramental one.

This is a commonplace observation that I will not belabor further. What bears pointing out, however, is the nature of the consensus across all of these religious traditions. What can account for the agreement of the Jewish and the Jain traditions, the Mormon and the Hindu, the Anabaptist and the Buddhist? These traditions, while differing on so much else, are in agreement on the nature of marriage as a union of complementary sexes because that understanding is fully defensible as a rational matter without recourse to revelation or divine authority. A compelling case for "what was" (in the late Justice Scalia's words), "until 15 years ago, the unanimous judgment of all generations and all societies"[22] can be made entirely without employing theological categories of any kind.[23]

The rational, non-religious case for conjugal marriage is, as it were, self-sufficient. This is why, as with the belief that unborn human life is deserving of protection, it is appropriate for the law to protect a conscientiously held "moral conviction" of no particularly religious character, as well as "religious belief" on the subject. And this is why Justice Kennedy, in *Obergefell*, was able to refer in the same breath to "decent and honorable religious *or philosophical* premises" for the pan-civilizational, historically normative understanding of marriage. Here religion and philosophy do not inhabit different domains so much as they partake of the same practical reason about human relationships and the common good.

To take the tradition that I know best, the historic teachings of Christianity have been a "package deal" of the following interwoven elements: first, a teaching of human freedom, including religious freedom, springing from the *imago Dei*, the scriptural teaching that we are all made in

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[21] See the contributions to the Humanum Colloquium collected in *Not Just Good, But Beautiful: The Complementary Relationship Between Man and Woman*, ed. Steven Lopes and Helen Alvaré (Walden, NY: Plough Publishing, 2015).

[22] *Obergefell*, slip op. at 7 (Scalia, J., dissenting).

[23] See, e.g., Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter, 2012); Patrick Lee and Robert P. George, *Conjugal Union: What Marriage Is and Why It Matters* (New York: Cambridge University Press, 2014).

the image and likeness of God, as rational creatures with free will;[24] second, the understanding of marriage as a union of man and woman and the exclusive scene of morally permissible sexual relations, an ethic advanced as basic to the good of children, women, and men alike;[25] and third, an ethic of service to others through works of charity and mercy, as well as in the marketplace and social relations generally.

From the point of view of the historic mainstream of Christianity, these things are inextricable parts of a whole. The religious faith that impels people to serve their neighbors, in commerce, social action, and good works, is the same faith that agrees with reason in concluding that our consciences must be free and uncoerced, and is also the *same faith* that reinforces and, for many, renders sacred the altogether reasonable moral conviction that marriage is the conjugal union of a man and a woman.

Five justices of the Supreme Court have now said the law of the land is otherwise on the subject of marriage. But if it is treated as compulsory for those who resist this change, and who hold to the older view, to conform their actions in the marketplace and civil society to the new dispensation on marriage, in flat contradiction of their sincerely held religious and moral convictions on the subject, then the "new normal" will amount to an all-out assault on the whole package of the beliefs that constitute their identities. It will be an assault on these believers' ability to participate on an equal footing with others in the marketplace and civil society, and above all an assault on their freedom of conscience.

On the side of coercing rather than accommodating conscientious dissenters from the redefinition of marriage, the claim is typically made that a "dignitarian harm" to gays and lesbians is remedied thereby.[26] The cause of the harm to one's dignity is evidently the felt sense that others evince an "animus" toward one's identity. But as Robin Wilson, a supporter of same-sex marriage, has written:

> Refusals to assist with a same-sex marriage, however are different [from the discrimination targeted by earlier civil rights statutes]—they can stem from something other than anti-gay animus. For many people, marriage is a religious institution and wedding ceremonies are a religious sacrament. . . . Without explicit protection in the non-discrimination or same-sex marriage law, many will be faced with a cruel choice: your conscience or your livelihood.[27]

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[24] For an exploration of the Christian development of the idea of religious freedom, see Matthew J. Franck, "Two Tales of Freedom: Getting the Origins of Religious Liberty Right Matters," *Touchstone: A Journal of Mere Christianity*, July/August 2016, 19-26. See also Ronald Osborn, "The Great Subversion: The Scandalous Origins of Human Rights," *Hedgehog Review* 17:2 (Summer 2015): 90-100; Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Cambridge: Harvard U.P., 2014).

[25] On this point see Kyle Harper, *From Shame to Sin: The Christian Transformation of Sexual Morality in Late Antiquity* (Cambridge: Harvard U.P., 2013).

[26] See Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," *Yale Law Journal* 124 (2015): 2516, 2574-78. But see Sherif Girgis, "Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel," *Yale Law Journal Forum* 125 (2016): 399, available at http://www.yalelawjournal.org/pdf/Girgis_PDF_v7w4z24v.pdf.

[27] Wilson, "The Politics of Accommodation," 164.

More pointedly, religious liberty scholar Steven Smith has written:

> Although there is no uncontroversial metric for assessing relative burdens . . . it seems clear that the risks faced by the opposing sides are different, and asymmetrical. . . . The major risk faced by religious conservatives . . . is that of being put to the choice of violating their convictions or commitments—of being unfaithful to their God, as they perceive the matter—or instead of being increasingly relegated to the margins of society. . . . [P]ossibly with some minor qualifications, the secular citizen [who favors same-sex marriage] is permitted to act on all his beliefs and convictions, but the religious citizen [who opposes it] is commanded to bracket her most essential beliefs and convictions.[28]

The way forward that would honor all Americans' freedom to live according to their beliefs and convictions, so far as it is in Congress's power to honor it, is the First Amendment Defense Act. The Act is fully in keeping with Justice Kennedy's "no disparagement" principle, and it will go far in assuaging the concerns raised by the dissenting justices in *Obergefell*.

**III. Answering Objections**

FADA has been widely misunderstood and mischaracterized in various quarters. Here I would like to summarize and respond to some of the most prominent criticisms lodged against it.

Objection: That the Act would grant special protection to those who "discriminate" against others on the basis of their status or identity as LGBT persons, sending a message that federal law "disapproves" of them.

Response: There is no ground, in the text or evident purposes of FADA, for concluding that the act offers any protection for, or expresses agreement with, discriminatory conduct toward *persons as persons*. The law protects persons and institutions from compulsory acceptance of the new meaning of *marriage*, if they have sincere religious beliefs or moral convictions about that.

Such a misreading of the statute stems from the same ideological impulse that leads some people to see "anti-gay bigotry" in every case of wedding vendors who decline on religious grounds to offer their services for a same-sex marriage ceremony. But as Ryan T. Anderson has noted, none of the cases documented so far has involved "discrimination against gays and lesbians as such. None of these citizens has ever said, 'I don't serve gays.' No, each of these cases involves the conscientious decision not to facilitate a same-sex *wedding*."[29]

Objection: That FADA somehow involves the federal government in making judgments about or intruding into people's sexual morality or relationships.

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[28] Steven D. Smith, "Die and Let Live? The Asymmetry of Accommodation," in *Gay Rights and Religious Freedom*, 190-92.

[29] Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, DC: Regnery, 2015), 92.

Response: To the contrary, FADA would *prevent* the federal government from endorsing a particular set of hotly contested views and compelling everyone within its reach to conform their conduct to those views of marriage and sexual ethics. FADA would leave all those affected by it perfectly free to live as they please, and would deprive those who wish to impose their view on others of any leverage for that imposition that they can derive from the federal government's power. FADA gets the government out of the discrimination business, and is the most significant pro-liberty legislation to be considered by Congress in recent memory.

Objection: That FADA itself violates the equal protection principle of the Constitution and runs afoul of precedents like *Romer* v. *Evans* (1996).[30]

Response: *Romer* was a case about the state of Colorado's placing a disability on a particular interest group's chances of achieving its aims in the political process. FADA, by contrast, is about protecting a conscientious freedom of action in the *private* sphere of civil society with respect to strongly held views on marriage.

Some might say that the Act would create a kind of "state-sanctioned discrimination." But that way of talking obscures the fact that the operative field of FADA is entirely the field of conduct *in the private sector* that is motivated by religious or moral convictions about marriage. Even accepting the dubious proposition (already noted above) that FADA condones or protects "discrimination" against LGBT persons in the private sector, it would not follow that the Act itself denies equal protection of the law to anyone. Instead, FADA should be understood as protecting freedom of conscience in the same way that the Church and Weldon Amendments, and Title VII of the Civil Rights Act do.

FADA would protect the traditional freedom of action in the public square of thousands of religious nonprofits, educational, and charitable institutions, and the millions of people who benefit from their good works in civil society, from compulsion to betray their religious and moral convictions in order to keep serving their fellow citizens. Most notably, it would lift the threat that Justice Alito identified in oral argument in the *Obergefell* case, and that Solicitor General Verrilli admitted could be a real one, of depriving such institutions of their tax exemptions for being true to their beliefs.

Preserving the place such institutions have in our society is a blow *for* the equal protection of the laws, not against it.

Objection: That FADA is somehow an unconstitutional establishment of religion contrary to the First Amendment.

Response: This is the most absurd criticism I have heard about conscience protection legislation. FADA goes above and beyond current interpretations of the free exercise of religion clause of the First Amendment, as all the justices of the Supreme Court have recognized is a legitimate thing for Congress to do. But giving additional legal protection to freedom of religion is in no way an "establishment" of religion.

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[30] 517 U.S. 620.

The argument seems to be that laws like FADA give an "official preference" to a certain set of religious views, informing those who do not share them that they're second-class citizens. But this inverts the reality. Since *Obergefell*, the danger has become acute that it is dissenters from the redefinition of marriage who are being told that their views are unwelcome, unworthy of good Americans. If a law that says people are free to act on their own views of marriage is an "establishment of religion," then obviously an even stronger case can be made that the legal order defining marriage is an establishment of religion—*whatever the definition is*. In that case we had an "establishment of religion" on marriage the day before *Obergefell—and the day after*. And no court has ever seriously entertained such an absurd view.

In addition, FADA speaks of "religious belief or moral conviction" about marriage. As I noted above, strongly held moral convictions about marriage can be held on entirely non-religious grounds. This was recognized by Justice Kennedy, speaking for the Court in *Obergefell*. A view of marriage held across all major faith communities, and among people of no religion at all, which stands *against* the present legal definition of marriage, and only claims the freedom to believe and to act on that belief in private dealings with fellow citizens, is just about the furthest thing I can imagine from an "establishment of religion."

**Conclusion**

The First Amendment Defense Act is an altogether appropriate, indeed urgent, congressional response to the threats to religious liberty, and to conscience more generally, that have arisen in the aftermath of *Obergefell* v. *Hodges*. As more than one dissenting justice pointed out, legislative enactment of same-sex marriage could have been (and as we've seen, sometimes was) accompanied by simultaneous and linked protections of those religious and moral convictions about marriage that dissent from the redefinition of this key social institution. The Supreme Court majority decided the marriage question without any such protections accompanying its ruling. Nor could it really have done so.

But the possibility, and the justification, of doing so remain open for congressional action. Many millions of Americans continue to believe that marriage is the conjugal union of a man and a woman, and some of them will find themselves (as some already have) under pressure in their businesses and workplaces, their schools and colleges, their charities and other vital institutions of civil society, to conform their actions to the redefinition of marriage, contrary to the constraints of their consciences. Such a controversial decision as *Obergefell* threatens to open what Justice Alito called "bitter and lasting wounds."[31] Even the Court's opinion by Justice Kennedy remarked on the injustice of "disparaging" the "decent and honorable" views of conjugal marriage supporters, and thereby rejected the view that such people should be treated like bigots or racists. An enactment like FADA can help immeasurably to heal some of those wounds, and assure that people on both sides of this issue are treated justly.

FADA is not about "licensing discrimination" against any persons because of who they are, nor about inviting "animus" or generating "dignitarian harms." It is narrowly tailored to protect a "religious belief or moral conviction" about the nature of marriage, and that is all. Given the

[31] *Obergefell*, slip op. at 7 (Alito, J., dissenting).

central place that marriage occupies in both religious and philosophical systems of morality, across virtually every faith community existing today, it would be unjust for any government to coerce this new, post-*Obergefell* class of "marriage dissenters" to conform their conduct to this redefinition, just as it is unjust to coerce pro-lifers to facilitate abortions.

Thanks to FADA, no one will be prevented from getting married. No one will be prevented from obtaining the goods and services that go into a successful wedding day. No one will be discriminated against by the state, and no one's personhood will be demeaned or diminished. No one's dignity will be affronted by a government policy, and no one will be compelled to behave as though he approves of moral undertakings of which he actually, conscientiously disapproves. As Justice Kennedy said for the majority in *Obergefell*, there are "decent and honorable religious or philosophical premises" at work in the defense of the traditional, conjugal view of marriage, and our legal order should not gratuitously "disparage" that view. It is not "animus" or disrespect for others that drives the defenders of the now-displaced understanding of marriage, as even the fair-minded advocates of same-sex marriage recognize. It is the call of conscience that drives them.

Finally, there is no "establishment of religion" in statutes like FADA. Only a cramped view of religious freedom, and an overtly or covertly hostile perspective on the place of religious faith in American public life, can account for such an unwarranted conclusion. The First Amendment Defense Act is urgent, freedom-protecting legislation. It does not establish religion in any way, shape, or form. It establishes only the space to dissent, free from the coercive effort to stamp it out that is inimical to a free society.

Mr. MEADOWS. I want to thank all of the witnesses for your testimony, very illuminating testimony.

And the chair recognizes the gentleman from Michigan, Mr. Walberg, for 5 minutes.

Mr. WALBERG. Thank you, Mr. Chairman, and thanks for the panel for being here.

And, you know, I would also give credit and thanks to our Chairman Chaffetz for holding this hearing. I think it is important. We cannot be put off by the fact that there is disagreement and diversity of opinion. In our country today we are very much divided. That has to change. And we have to understand that there are things that we are doing and have done that will promote this disunity as opposed to recognizing the unity that comes in a free people doing free things, and sometimes accepting positions that we don't agree with, but we understand the freedom that this great country, a country established very clearly under Judeo-Christian principles, a Christian nation that afforded more freedom and opportunity for anyone, anyone than any other country in the world.

Also, I thank the chairman for holding the hearing because this is an issue we ought to address. I have had the privilege of performing scores of weddings and turning down some weddings of heterosexual couples who didn't understand the importance of marriage and the sanctity of marriage. I have had the privilege of performing the wedding ceremony of a Rwandan and a Caucasian, an American, my daughter and son-in-law, and see that marriage blessed with now an African-American granddaughter and celebrating what I have always known to be one race, the human race, as God created it.

Marriage is an important thing. We ought to discuss it, so I appreciate the panel being here.

Mr. Cochran, congratulations on your distinguished record of service, which you include what you have indicated to us plus the fact of being the U.S. fire administrator, as well as the first African-American fire chief for Atlanta and your work in Shreveport as well.

You were initially suspended without pay for 30 days by the city of Atlanta. Had the city conducted a review of any facts at the time it suspended you?

Mr. COCHRAN. No, they did not. The investigation ensued after I was suspended for 30 days.

Mr. WALBERG. So no review beforehand?

Mr. COCHRAN. No, sir.

Mr. WALBERG. Just suspension?

Mr. COCHRAN. Yes, sir, without pay.

Mr. WALBERG. Without pay.

Mr. COCHRAN. But subsequently, the investigation cleared me of any discrimination of any sort and certainly no discrimination against a member of the department who was a part of the LGBT community and never discrimination against any member of the city of Atlanta who is a part of the LGBT community.

Mr. WALBERG. So the city of Atlanta ultimately, maybe after reading the book and looking at your record, found that you discriminated against nobody else?

Mr. COCHRAN. That's correct. There was an assumption from the outset of discovering my Judeo-Christian beliefs about marriage and sexuality that, because of my beliefs, I would have a propensity to hate people who had those sexual preferences and beliefs or discriminate against people who have those sexual preferences or beliefs. Their own investigation assured that I had not.

Mr. WALBERG. In your opinion what could have happened to you if you self-published your devotional book when you were a Federal fire administrator for the U.S. Fire Administration in 2009?

Mr. COCHRAN. It's hard to say what would have happened at that time, but in my heart of hearts, I believe that if I would have published that book presently as a Federal employee, the same circumstances I've experienced in the city of Atlanta I would experience as a Federal employee.

Mr. WALBERG. Okay. Regardless of your record?

Mr. COCHRAN. Regardless of my record.

Mr. WALBERG. Ms. Waggoner, you have heard some very powerful testimony today from Chief Cochran and others with strong beliefs and viewpoints regarding his outgoing and ongoing real-life experience. Are there other examples that you could share with us today of similar situations to Chief Cochran having their religious liberty infringed upon?

Ms. WAGGONER. There are numerous examples. At Alliance Defending Freedom, we not only represent Chief Cochran but we represent a number of other individuals who, at the State level, have been forced to choose between their livelihoods and their religious beliefs, including those that have been sued personally and corporately having everything they own at issue if they lose. And all of our clients have willingly served everyone. There is not one case we're aware of in the United States where anyone has denied goods or services because someone says they have a particular sexual preference.

Mr. WALBERG. That includes institutions and welfare organizations ——

Ms. WAGGONER. Absolutely.

Mr. WALBERG.—and churches?

Ms. WAGGONER. Absolutely it includes those. What is at issue is that we're seeing some laws being used by the government to force people to have to participate in religious ceremonies that violate their religious convictions and have to express messages and create art that violate their core religious convictions as well.

I would also note there not only do we have solicitor general's comments threatening tax exemptions for religious institutions, we have a number of Executive orders that the Obama administration has issued or agency interpretations that threaten that, and then we have a number of foster care and adoption agencies who have lost their licenses, not to mention the American Bar Association's investigation of Brigham Young University's Law School, which is currently pending as well, I believe.

Mr. WALBERG. Thank you. I yield back.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the ranking member of the full committee, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Professor Franke, as I understand this bill, it would allow any company to fire employees if they are in same-sex marriages without penalty from the Federal Government. This would mean these employees would be prevented from getting relief for their wrongful termination from the Equal Employment Opportunity Commission. Is that your understanding?

Ms. FRANKE. That's my reading of the bill, Mr. Cummings. It—the bill would prohibit the Equal Employment Opportunity Commission or any other Federal agency from inflicting a penalty. And penalty is a very large and vague term, but any penalty against someone who's religious or moral convictions commit them to the view that marriage is a union of one man and one woman and/or anyone who has extramarital relations, also a very vague term. So unmarried parents may also be vulnerable to termination without recourse to Federal law.

Mr. CUMMINGS. So this bill would apply to small business in huge corporations, private companies, and publicly traded companies. It would allow them to fire employees and take all kinds of other discriminatory actions against them like denying them leave to take care of their spouses or children under the Family and Medical Leave Act without penalty from the Federal Government? Is that correct? Is that ——

Ms. FRANKE. That's ——

Mr. CUMMINGS.—your understanding?

Ms. FRANKE. That's correct.

Mr. CUMMINGS. These companies could pay them less or give them reduced benefits like no childcare benefits for children of same-sex couples. Is that your understanding?

Ms. FRANKE. That is my understanding.

Mr. CUMMINGS. Companies could do this if their CEOs decide that they have religious beliefs or moral convictions that cause them to discriminate in this way, and the Federal Government would be prohibited from taking action. Is that correct?

Ms. FRANKE. That is correct.

Mr. CUMMINGS. Is that your understanding? So since we have a robust panel here today, I would like to ask each of you some basic questions about your views on discrimination. Please raise your hands if you believe it is acceptable for businesses in the United States to discriminate against employees because of their race. If you believe that, would you raise your hands?

Raise your hand if you believe that it is acceptable for companies to discriminate against employees because they are black or white or Hispanic or Latino or Asian?

Now, please raise your hand if you believe it is acceptable for businesses in this country to discriminate against employees who have disabilities?

Please raise your hand if you believe it is acceptable for businesses in this country to discriminate against women, to pay them less than men for the same work?

Okay. Now, raise your hand if you believe it is acceptable for businesses in this country to discriminate against employees who are in same-sex marriages.

So, Professor Franke, this bill would allow Fortune 500, the biggest earners from the past year, including companies like

ExxonMobil, General Electric, Walmart to create new policies tomorrow to fire any employees in same-sex marriages, or they could decide not to provide health insurance, and they would face no recourse from the Federal Government. Is that your understanding?

Ms. FRANKE. Well, that is a very broad statement. It—what the bill does is it allows a company like a Hobby Lobby company who has a view based in sincerely held religious belief or moral convictions that marriage should be between a person—one man and one woman or that a person should not have extramarital relations and take steps in their employment policies to advance those views. In that case, employees would be unable to bring any kind of lawsuit against those companies in Federal court or using Federal laws.

Mr. CUMMINGS. Do you think that is fair?

Ms. FRANKE. I do not think that's fair.

Mr. CUMMINGS. Do you think that is consistent with our Constitution?

Ms. FRANKE. It is absolutely inconsistent with our Constitution.

Mr. CUMMINGS. And why is that?

Ms. FRANKE. Besides the fact that it uses religion as a way to justify a second run if you will at a Supreme Court decision that some people disagreed with. It's unconstitutional on that level that the U.S. Supreme Court has the last word on what the Constitution means. But it also oversteps the Establishment Clause of the First Amendment and creates a violation of the prohibition of the State taking a position in religious matters or favoring particular religious views. The State is supposed to be neutral on these questions, not embrace particular religious views. So there are a number of reasons why I feel like the law is problematic.

Mr. CUMMINGS. I see my time is expired. Thank you very much.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chair.

Mr. Cochran, thank you for being here. Thank you for your service, and thank you for your story. I have got two committees going on and so I wasn't able to listen to your testimony, but I read through your written testimony, overcoming poverty. Your faith inspired you to achieve the things that you did according to your testimony here. I just want to run back through a few things.

You were appointed by the President to be U.S. fire administrator for the United States Fire Administration back in 2009. Is that right?

Mr. COCHRAN. That's correct, Mr. Jordan.

Mr. JORDAN. And that requires a confirmation hearing or some kind of hearing?

Mr. COCHRAN. Yes, sir. It was a Senate confirmation hearing by the Homeland Security Committee.

Mr. JORDAN. And what was the vote there?

Mr. COCHRAN. It was a unanimous vote.

Mr. JORDAN. All right. And then you did that for a while, then went back to the city of Atlanta to become fire chief, correct?

Mr. COCHRAN. Yes, sir.

Mr. JORDAN. And according to your written testimony, "I was nationally recognized," fire chief of the year in 2012?

Mr. COCHRAN. That's correct, sir.

Mr. JORDAN. Anything in your background ever in your work history, your job evaluations, the things that happen each year when you are in this line of work, same kind of things that happen around here, ever have a negative on your employment record, anything like that?

Mr. COCHRAN. No, sir. By the grace of God, it never—there's never been any negative reflections throughout my career.

Mr. JORDAN. And then you wrote a book, right?

Mr. COCHRAN. That's correct.

Mr. JORDAN. You wrote a book talking about how your faith helped you achieve the things that you were able to achieve and how it was such an inspiration and so helpful in your life overcoming some of the obstacles you had overcome, is that right?

Mr. COCHRAN. That was part of it, yes, sir.

Mr. JORDAN. All right. And then what happened?

Mr. COCHRAN. Well, a year after the book was published, it was discovered that I had written a small portion of the book about Biblical sexuality and marriage. Those few paragraphs were shared with the city of Atlanta, which subsequently led to my 30-day suspension without pay. During that 30-day suspension, the city launched an investigation.

Mr. JORDAN. What did the investigation find?

Mr. COCHRAN. That I had never discriminated against anyone throughout my career and certainly not a member of the LGBT community.

Mr. JORDAN. And isn't it true in that investigation there was "no interviewed witness could point to any specific instance in which any member of the organization had been treated unfairly by you," is that right?

Mr. COCHRAN. That's correct, sir.

Mr. JORDAN. So they find out you write something, they suspend you, they do an investigation, and they find you did nothing wrong

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Mr. COCHRAN. That's correct.

Mr. JORDAN.—you got this outstanding record, confirmed by the U.S. Senate unanimously, President appoints you fire administrator, you are fire chief of the year in 2012, and then you got fired?

Mr. COCHRAN. That's correct.

Mr. JORDAN. You got fired. Well, here is what Atlanta City Council member Alex Wan said, according to your testimony: "I respect each individual's right to have their own thoughts, beliefs, and opinions, but when you are a city employee, those thoughts, beliefs, and opinions are different from the city's, you have to check them at the door."

Mr. COCHRAN. That's correct, sir.

Mr. JORDAN. I will tell you, Mr. Chairman, that is exactly why we have a First Amendment. You do not have to check your beliefs, right? That is what this country is about. When you talk about the First Amendment, you have to check your beliefs at the door? Are you kidding me? That is why this bill is so important. That is why Senator Lee and Representative Labrador have brought this bill and why it is so important because people like Mr. Cochran, they

shouldn't have to check their beliefs at the door. Here is a guy who did nothing wrong, believed in strongly held religious beliefs that, as he says in his testimony, that Christians have held for a couple thousand years, and the city council member says you have to check them at the door. That is why we are having this hearing, that is why this legislation needs to pass, and that is why people like Mr. Cochran are heroes for his whole life experience but certainly for standing up for the fact that you don't have to check your religious beliefs at the door.

And with that, Mr. Chairman, I would yield back.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentlewoman from New York, Mrs. Maloney, for 5 minutes.

Mrs. MALONEY. This law that they are discussing today would not apply to Mr. Cochran, but I would like to welcome my friend and colleague Congressman Frank back to the table. And I am concerned that 1 month, this is the anniversary, the month-long anniversary of the extreme slaughter of gay and lesbian men and women at a well-known nightclub in Orlando. And I personally find it shameful that we are holding this hearing that is looking at legislation that would further discriminate against the LGBT community on the anniversary of such a tragic, tragic event.

And, Mr. Frank, as the former chairman of the Financial Services Committee, you spent a great deal of focus on housing policy. And I would like you to clear up for the committee how does this bill enable a not-for-profit housing organization to take Federal money and then discriminate against same-sex couples and deny them rental housing, deny them access when their dollars were literally spent to enable the program.

Mr. FRANK. Thank you, and it is good to be back with you Representative Maloney.

Yes, I was frankly struck that Mr. Labrador went to such great pains to deny this. Ordinarily, when you're having a discussion and one of the people you disagree with denies something that is irrefutably true, that's a good sign. That's a weakness he's trying to argue away.

And I've read the bill many times. And his—let me read from the bill. Page 3, lines 14 through 16, "As used in subsection A, a discriminatory action means any action taken by the Federal Government to"—and then go to page 4, line 1—"withhold, reduce, exclude, terminate, or otherwise made unavailable, deny any Federal grant, contract, subcontract."

And then it says "This does not extend the protection to a Federal employee acting within the scope of employment or a Federal for-profit contractor." Mr. Labrador acknowledged that. He said, well, there aren't that many nonprofits that do the housing. Well, he's wrong about that factually. He hadn't specialized in that, and I understand that, but nonprofit housing groups, religious and others, are very active in doing—in building affordable housing, taking Federal money.

So here's what this indisputably means. A nonprofit contractor takes money from the Federal Government paid for by everybody's taxes, builds rental housing, and then says no same-sex couple can

live there, no same-sex married couple. That's just—I'm not making this up. I'm reading your bill. So don't tell me it's not there. No.

If you want to protect Mr. Cochran from the city of Atlanta, which this bill doesn't, as has been pointed out, if you want to protect somebody at the Federal level, that's a different bill.

You want to deal with tax exemption. Frankly, I understand the concern about tax exemption. This goes way beyond tax exemption. I'm willing to bet the reason is that then you'd lose jurisdiction in the Ways and Means Committee and going to have as much fun here.

But the fact is that this bill—we're not talking about Mr. Cochran's right to say whatever he wants. By the way, I would agree that you should not be fired for your opinion if it's not relevant to your job. But under this bill, you could not say that someone couldn't work for the Equal Employment Opportunity Commission or the Justice Department's Civil Rights Division if they disagreed with this Federal constitutional right.

But let me go back to this point. It's not disputable. A nonprofit contractor, and there are many of them who get tens and hundreds of millions of dollars to build rental affordable housing for low-income people, may under this bill deny that tenancy to the—to same-sex couples or, according to this bill, to people who are not married and are having sex. So if you're gay, lesbian, bisexual, or transgender, I guess you can move in there if you can prove you're celibate. That's an interesting form that I want to see people fill out.

But on same-sex couples—again, I don't understand where you're saying it doesn't—it doesn't—show me how it doesn't.

The last point I do want to note there's been references to the Judeo-Christian one man, one woman, and I may be one of the few representatives of the Judeo half of that here, the last time I was in temple there was a provision about hailing the fathers, Abraham, Isaac, and Jacob, but then they noted that there were four guys and—three guys and four women. So I checked with the rabbi. Well, it turned out that Abraham had a wife and also a concubine with whom he had a child. So much for extramarital relations. Isaac appeared to be pretty conforming, but Jacob wanted to marry this woman, and under the rules, then he had to marry her older sister first. So he married her older sister and then her.

So let's be clear I think at least on the Judeo part the Bible does appear to say that you—marriages between one man and at least one woman.

[Laughter.]

Mr. FRANK. Now, I do want to say I did appreciate the reference to Judeo-Christian. I know Mr. Walberg isn't here. He said this was a Christian nation. I appreciate your—some of you broadening it to let me in on the action.

Mr. MEADOWS. I thank the gentleman for his testimony. I thank the gentlewoman. Her time is expired.

Mr. Frank, just to make sure, you are reading from page 3 of the newest bill?

Mr. FRANK. Yes, the current ——

Mr. MEADOWS. So can you read paragraphs ——

Mr. FRANK. The amendment in the nature of a substitute ——

Mr. MEADOWS. Yes, no—hold on. Hold on. I won't gavel you down. Can you read sentences 9 through 12 ——

Mr. FRANK. Yes.

Mr. MEADOWS.—of your bill to make sure we are talking about the same one.

Mr. FRANK. I appreciate it. You know the thing where when you're losing limb, you reach for it? That's me and the gavel, so I apologize.

Mr. MEADOWS. Yes. No, that's all right.

Mr. FRANK. On page 3—well, on lines 9 ——

Mr. MEADOWS. Lines 9 through 12 to make sure we are talking about the same bill ——

Mr. FRANK. Right.

Mr. MEADOWS.—as modified.

Mr. FRANK. Marriages should be recognized as a union of two individuals of the opposite sex or two individuals of the same sex ——

Mr. MEADOWS. Okay.

Mr. FRANK.—for X amount—yes. So then you go to—I read 14, 15 ——

Mr. MEADOWS. That is fine. I just wanted to make sure ——

Mr. FRANK. No, it's the current draft.

Mr. MEADOWS.—that is the most current version so ——

Mr. FRANK. Mr. Chairman ——

Mr. MEADOWS.—the chair recognizes the gentleman from ——

Mr. FRANK. Mr. Chairman, can I just say one thing? I spent much too much time here to read the wrong bill. I've seen that result in disaster. This is the right bill.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Arizona for 5 minutes.

Mr. GOSAR. Thank you, Mr. Chairman. I would like to thank all the witnesses for being here today as we work together to find ways to protect the fundamental rights guaranteed to all Americans under the Constitution.

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of a religion or prohibiting the free exercise thereof." These two clauses are known as the Establishment Clause and the Free Exercise Clause respectively, and they lay out a clear fundamental right of the free exercise of religious faith for all Americans.

The recent decision in Obergefell v. Hodges presents serious challenges for people of faith and those who believe marriage is between one man and one woman. I believe the Supreme Court got this decision wrong. The Justices and the majority allowed public opinion and their personal views rather than sound judicial interpretation to guide their decision.

Chief Justice Roberts, John Roberts wrote, "The majority's decision is an act of will, not legal judgment. The quote invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia."

In an even more scathing statement, the last Justice Antonin Scalia opined "The Supreme Court of the United States has de-

scended from the disciplined legal reasonings of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."

I am proud to be an original cosponsor of the First Amendment Defense Act introduced by my good friend Raul Labrador, and I commend his leadership. I encourage the House and this committee to pass this much-needed bill in a timely manner.

Dr. Matthew Franck, with the barometer of public opinion and the opinion of the Court so varied and ever-evolving, some worry that important religious protection efforts like the First Amendment Defense Act are themselves contrary to the First Amendment. In your opinion, does FADA constrict or empower the First Amendment?

Mr. FRANCK. On the contrary, Congressman, thank you for that question. FADA stands in a long tradition going back to the founding when militia acts exempted persons scrupulous of bearing arms for conscientious religious reasons. Of this Congress enacting laws that add layers to the protections, the bare-bones protection of the First Amendment, this is pro-First Amendment legislation that does not establish religion but bolsters the protection of the free exercise of religion.

Mr. GOSAR. Thank you. The Obergefell decision has alarmed supporters of traditional marriage, and rightfully so. Many proponents of same-sex marriage are not content with the ruling in this case. Their ultimate goal is to silence opposition to their position on marriage. They see the Supreme Court's ruling as justification for them to trample on the fundamental right of religious freedom that the First Amendment so persistently lays out.

This was made evident almost immediately after the decision when opponents of traditional marriage began calling for churches and religious organizations that support traditional marriage to lose their tax-exempt status.

Ms. Waggoner, in your testimony you mentioned the threat of Gordon College, its traditional view of marriage, and the threat to their accreditation as a result of their religious views. What sort of risks do other religious educational institutes face if protections like those in the First Amendment Defense Act are not enacted?

Ms. WAGGONER. Well, thank you for the question. I would like to move to admit my written statement to the record as well, which includes the Gordon College as an example.

As I mentioned earlier, the American Bar Association is been investigating Brigham Young University related to their views on marriage. In addition to tax exemption, we have a number of religious organizations that face the threat of losing licensures, accreditations, and being inhibited in their operations simply because they want to live and work and operate consistent with their beliefs, foster agencies, adoption agencies.

And I'd like to add that we want to provide diversity in the marketplace. A single mother who's looking to place a child should be able to place that child in the home that she would like and be able to choose from the option of ensuring that child has a mother and a father.

So there are a number of property tax exemptions we've seen at issue at the State level, and then as well we're seeing more and more suggestions that the Federal Government should also be in-

volved in the operation of religious organizations and in how they live out their faith.

Mr. GOSAR. Thank you very much. And that is exactly why it is critical that Congress pass the First Amendment Defense Act. This commonsense legislation will protect religious freedom from hard-working Americans and businesses by preventing discrimination by the Federal Government. Specifically, this important bill ensures that a presidential administration with differing religious views cannot evoke a nonprofit entity's tax-exempt status or prevent individuals and organizations from receiving a Federal contract, grant, or employment based on their fundamental beliefs.

And with that, Chairman, I am going to yield back. Thank you.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentlewoman from the District of Columbia, Ms. Eleanor Holmes Norton, for 5 minutes.

Ms. NORTON. I thank the chairman for yielding to me.

Mr. Chairman, let me say here that on behalf of the people I represent in the District of Columbia of every sexual orientation, I am deeply offended by this bill because it is not only an attack on our own LGBTQ community whose rights we have gone very far in protecting, but it is an attack on the sovereignty of the District of Columbia itself.

This bill was actually withdrawn and rewritten in order to include the Nation's capital, and were it to pass, it would make the capital of this nation a discrimination zone for LGBTQ rights. Actually, this question is for Ms. Franke. And Mr. Frank lived in this city. It is for both of you.

Already, I may note that a Federal court has found a bill much like this unconstitutional, a Mississippi Federal court, and I believe that is going to be the fate of this needless exercise if we still live in a constitutional democracy and one that does not allow discrimination laws to be turned on their heads.

This new bill targets both the Federal and the D.C. government, and the way it gets the D.C. government is particularly offensive. In spite of the Home Rule Act of 1973, it declares the District of Columbia a colony of the Federal Government, indicating that we are a part of the Federal Government, an absurdity. In fact, this bill is more harmful to the District's LGBT community than the residents of the States because the District has a comprehensive antidiscrimination law, and the District's law prohibits discrimination in private and in the public sectors based, of course, on sexual orientation in the same manner that prohibits discrimination based on race and sex.

So the bill not only prohibits the D.C. government from enforcing its LGBTQ antidiscrimination law but could, could prohibit private citizens from enforcing it, too, either by stripping courts in the District of their authority to impose penalties or by allowing defendants in private civil suits to actually raise a First Amendment defense as a defense due to discrimination. Where have we come to?

So, Professor Franke first, please explain. Let's see how this would work. Please explain how a landlord or an employer or—I was once chair of the Equal Employment Opportunity Commission, which of course these provisions are virtually nullified by this bill—by a landlord or employer, I don't know, a restaurant owner

in the District of Columbia who discriminates against an LGBTQ person could avoid liability in a private suit? How would that work?

Ms. FRANKE. Thank you, Ms. Norton. The bill is curiously written in a number of places. It's vague in a number of places. I think the draftspersonship of it is questionable.

Ms. NORTON. Well, for one thing, I think it is in many ways void for vagueness as we say.

Ms. FRANKE. Well, extramarital relations is itself an interesting category. But specifically in the definition section, section 6 that are contained on pages 7 and 8 of the current bill, the District of Columbia is defined first as part of the Federal Government and then lastly as a State. So you are right to note ——

Ms. NORTON. We very much are trying to become a State but we can't be both.

Ms. FRANKE. I understand that. I understand that. But for the purposes of this bill, any nondiscrimination laws that have been enacted by the District of Columbia are treated as Federal law or actions of the Federal Government that would be prohibited from enforcement ——

Ms. NORTON. Let's suppose a private party were involved because our law ——

Ms. FRANKE. Well, from the face of the bill it doesn't seem that the bill would prohibit or would reach actions between private parties. So say I wanted to rent an apartment from a private landlord and the landlord would only rent to people, two adults who had a marriage license ——

Ms. NORTON. So you could invoke the District's antidiscrimination law?

Ms. FRANKE. I do know the District's antidiscrimination law ——

Ms. NORTON. Despite the District being declared part of the Federal Government.

Ms. FRANKE. Right. And part of why the bill in its vagueness is actually quite broad is that at least three circuits have interpreted similar—very—the exact same language under the Religious Freedom Restoration Act as denying Federal courts of jurisdiction over suits between two private parties. So the Federal Government is not affirmatively enforcing the law, whether it be the District of Columbia or, let's say, the Department of Justice. All the individuals are doing is availing themselves of Federal court in order to enforce rights that are created by law, but this could also apply to D.C. courts since the District of Columbia courts are treated as Federal courts under this statute—or under this bill.

And so it wouldn't be unreasonable for future courts to interpret the language of FADA to also reach private suits between a private tenant, prospective tenant, and private landlord brought in the D.C. court to enforce a nondiscrimination—housing nondiscrimination provision under D.C. law, which would be treated as Federal law under the—under FADA.

If I might add, if the sponsors of this bill insist as they do that the law is not intended to overwrite civil rights law, then we should fold into the language of this bill the Do No Harm Act, which is also pending before this Congress, an act that says that religious liberty rights under RFRA and other provisions of reli-

gious liberty Federal law are not designed to override competing civil rights protections. We see none of that language in this law, none of that language in this law as it's currently drafted.

Ms. NORTON. And thus can expect confusion where such a bill—they will particularly never get it through the Senate. But if such a bill were passed, the kind of confusion you would see, especially in the District of Columbia, you have just laid out, and I thank you very much.

Mr. MEADOWS. The gentlewoman's time is expired.

The gentleman from Tennessee is recognized for 5 minutes.

Mr. DESJARLAIS. Thank you, Mr. Chairman, and I thank the panel for being here today to discuss this important issue. Unfortunately, as a nation we have a long history of discrimination, and we have made a lot of mistakes. But we strive to correct those mistakes, and I think that the bill that we are debating and discussing today would go a long way to correct that.

Anybody who didn't get a chance to listen to the testimony of Mr. Cochran should. It tells a great story, the story of shameful discrimination, a story of success, and then another story of failure. And, you know, I think that the First Amendment Defense Act is incredibly important because it helps preserve the constitutionally protected rights of religious freedom.

I support this law, and I believe that it is imperative that we prevent the government from treating Americans unfairly because of their religious beliefs such as Mr. Cochran was and has been.

This bill does not seek to take away rights from one group to confer them onto another, but protecting religious freedom is not a zero-sum game. This legislation is not designed to strip away rights from any group of people but rather to prevent the Federal Government from engaging in discriminating behavior. The text of the bill is crystal clear on this matter.

I would like to commend Senator Lee for his work on this and also my friend Raul Labrador, who I find to be one of the most fair-minded, honest people that I have probably ever met, and I know that he has no intention of discriminating, only protecting everyone's rights equally.

Another such person that I have had the privilege to serve with is Congressman Jim Jordan of Ohio, and with that, I would like to leave the balance of my time to him.

Mr. JORDAN. I appreciate the gentleman yielding.

I just wanted to follow up with Chief Cochran again. When you were dismissed—again, I want to go back to the statement made by the city council member Mr. Wan. He said you have to "check your beliefs at the door." I think the First Amendment says, no, you don't.

But it looks like you actually did, right? When they investigated you, they found no discrimination. They could find no witnesses that said you ever did anything wrong in how you handled your operation at the department, is that accurate?

Mr. COCHRAN. That's accurate. I just—as an American and as a person of faith, I believe that our country has provided an opportunity for us to live out our faith and have our jobs at the same time. In the fire service I believe it's a special calling on a person's life to do what we do for a living. Based upon the fact that what

the fire service does for its communities is rooted in our Constitution, and there's a clause in the preamble of the United States of America that is very fitting for the American fire service, in fact, all public safety agencies, where it says "ensure domestic tranquility." And in the fire service all men and women are called to ensure domestic tranquility.

And on that basis, anyone who believes in that calling on their life, it's very easy to develop a doctrine whereby we all have a consensus agreement on how we should be towards one another and how we should be towards any people group within the scope of our community.

So the Atlanta Fire Rescue doctrine that I continue to talk about developed a vision statement based upon all the—input from all the people groups on a strategic planning team that was developed when I took office. Two of those members happened to be members of the LGBT community that was a part of that process. We also developed a mission statement, and we developed core values that any firefighter under any demographic should actually embrace. One of those core values was we committed to have an -ism-free environment at work, which meant that all of us have an obligation to ensure that there's no racism, sexism, nepotism, or any other -ism that would interfere with our duty to one another ——

Mr. JORDAN. I think everyone needs to understand what happened here.

Mr. COCHRAN. Yes.

Mr. JORDAN. The city council says you have to check your beliefs at the door. The First Amendment says you do not. But you in fact it didn't do anything wrong in your employment, and you actually went further. You developed a policy working with people of different beliefs in your department to come up with this Atlanta Fire Rescue doctrine.

Mr. COCHRAN. Yes.

Mr. JORDAN. And still—so understand again, check your beliefs at the door; no, the First Amendment says you don't have to do that; you didn't do anything to proselytize, you didn't do any of that; everyone interviewed said no wrong conduct here at all; and you went the extra step of developing a doctrine that says we are going to be inclusive, and still they terminated your employment because something you believed and wrote outside your responsibilities as fire chief and you were fired for that.

Mr. COCHRAN. Yes, sir.

Mr. JORDAN. If that doesn't underscore why we need this legislation, Mr. Chairman, I don't know what does.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Massachusetts, Mr. Lynch, for 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman, and welcome back, Barney. Good to see you again.

Before Senator Lee and Representative Labrador left, they were emphatic in asking us all to read the bill. And like Ms. Franke, it is my job and I think all of our jobs to read these bills closely and oftentimes repeatedly. I know that Congressman Frank did that as a chairman, as a Member of Congress here quite well during his time.

So let's go right to this bill. This was only an eight-pager, so if you are sitting at home, this is a pretty easy bill to read, straightforward. I usually don't get hung up on precatory language, but in section 2—it has findings here—section 2, paragraph 6. I am going to read this.

It says, "In a pluralistic society in which people of good faith hold more than one view of marriage, it is possible for the government to recognize same-sex marriage, as required by the United States Supreme Court, without forcing a person with a sincerely held religious belief or moral conviction to the contrary to conform." Basically, what that is is an opt-out provision for a constitutional right. It basically says even though the United States Supreme Court says this is a right, we are going to recognize same-sex marriage, this bill basically says that people get to opt out. They get to opt out.

However, if you go back to the Constitution and you read the 14th Amendment and the Fifth Amendment, if equal protection means equal protection, then you can't have people opting out of constitutional rights that are guaranteed and reinforced by the United States Supreme Court.

And so this bill in its own way is at war with itself, with its own premise that even though there is a constitutional right, people can ignore it, people can opt out. That is a fundamental flaw in this bill.

Let's go to some of the other attestations that have been made here today, that this bill doesn't affect any other Federal right or law. If you just go to section 3, the first sentence, it says "In general, notwithstanding any other provision of law." So what it does, it establishes the primacy of this legislation over every other Federal law.

Now, in another section that goes back to—and that includes any other Federal law, so FMLA, The Affordable Care Act, OSHA, EPA, the Federal Labor Standards Act, the Federal housing statutes that Mr. Frank talked about before, those are all impacted here, the Civil Rights Act as well. It basically requires this law to have primacy over all of those other laws, so it is flatly—the text of it is not consistent with the allegations of colleagues, Mr. Labrador and Senator Lee.

It does provide some language here that points to this issue. It says "under rules of construction," section 5, here is what it says: It says "No preemption, repeal, or narrow construction - nothing in this act shall be construed to preempt State law or repeal Federal law"—and here is the catch—"that is equally or more protective of free exercise of religious belief and moral conviction." So if there is a Federal law out there that is more protective of religious freedoms, that law can stand. All other laws are subsidiary to this law.

And that is the problem. It creates a primacy that someone with a firm religious or moral belief—and morals change; those are very subjective, the sense of right and wrong—it allows an individual person to basically opt out, again, of those constitutional rights that are recognized and upheld by the Supreme Court and embedded in our Constitution.

Let me ask, Ms. Franke, you have read this bill. Am I wrong in pointing to the text of this legislation?

Ms. FRANKE. You're absolutely right. You're absolutely right. And I would give you a parallel example. Many people in this country hold their Second Amendment rights dearly, see them as fundamental, the right to bear arms, the right to carry weapons. And many people in this country, not only Quakers but others, who have religious and moral beliefs of pacifism ——

Mr. LYNCH. Right.

Ms. FRANKE.—who would not want someone walking into their school, in—if they walked into my classroom with a weapon, I would have a moral—deeply held moral opposition to that.

Mr. LYNCH. Right.

Ms. FRANKE. And by the language of this bill, I am allowed to opt out of what is pretty clear constitutional doctrine around the right to carry weapons ——

Mr. LYNCH. Right.

Ms. FRANKE.—the right to bear arms.

Mr. LYNCH. Right.

Ms. FRANKE. Right? So we're opening a door here ——

Mr. LYNCH. Well, I do want to point out, though, that for the cases Mr. Frank pointed out before where someone, a conscientious objector in a military situation may try to opt out from a provision that is mandatory and requires them to carry arms, same-sex marriage is not mandatory.

Ms. FRANKE. Not yet, no ——

Mr. LYNCH. No.

Ms. FRANKE.—thankfully.

Mr. LYNCH. Well, I see my time is almost expired. Mr. Frank, do you have anything you want to add here?

Mr. MEADOWS. The gentleman's time actually has long expired, and so we will let you briefly answer this question.

Mr. FRANK. Okay.

Mr. MEADOWS. It was a good try, Mr. Lynch.

Mr. LYNCH. Well, thank you.

Mr. FRANK. One other point and that is—and you pointed out the limitation on the anti-preemption. It allows everything else to be preempted. But there was one argument that said, oh, you don't have to worry about housing discrimination because these other laws would stay in effect. Well, as you pointed out, they probably wouldn't, but the point is this: There are no Federal laws at this point that explicitly protect you in a statutory way because you're in a same-sex marriage, nor in many States is there any protection at all. So the only protection, the only rule that says that you have to treat same-sex married couples fairly and the availability of housing would be a Federal executive policy, which can be overridden. So, again, the argument about housing is just—is not an argument. It's clearly not.

Mr. MEADOWS. Okay. I thank the gentleman.

Mr. LYNCH. I want to thank the chairman for his indulgence, and I yield back the balance of my time.

Mr. MEADOWS. I thank the gentleman from Massachusetts.

The chair recognizes the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

And, Mr. Obergefell, I want to thank you for your testimony. I want you to know sincerely that I am sorry for your loss, and as a pastor I say my prayers for comfort for you as you continue working through this.

And, you know, I believe that we are created in the image of God, and every life deserves to be respected. And although we may have disagreements, we are here in America where we are able to have those disagreements here in a civil kind of way. But I sincerely want you to know prayers are with you as you work through this.

Chief Cochran, I want to go back to you, fired by the city of Atlanta very clearly because of your religious beliefs. And, in fact, Mr. Chairman, many of us in the Georgia delegation wrote a letter of support on behalf of Chief Cochran to Atlanta Mayor Kasim Reed, and I would like to have that letter submitted to the record.

Mr. MEADOWS. Without objection.

Mr. HICE. Chief Cochran, the mayor of Atlanta stated, in essence, that he was disturbed by the sentiments of your book about marriage, is that correct?

Mr. COCHRAN. Yes, sir.

Mr. HICE. And, in fact, you were banned from having that book distributed in the city, is that correct?

Mr. COCHRAN. Yes, after it came out that I had written a book, from that point forward, yes, sir.

Mr. HICE. Right. That is what I mean. And you personally had to undergo sensitivity training?

Mr. COCHRAN. It was a condition of my return to work, but regretfully, even though the investigation exonerated me of any discrimination, I did not have the privilege of resuming my employment as the fire chief of the city of Atlanta.

Mr. HICE. So you would have had to undergo sensitivity training had you gone back?

Mr. COCHRAN. That's correct.

Mr. HICE. And yet, as you just referred to again, you never had any accusations or any record whatsoever of discrimination. In fact, you put forward, as you describe, in essence, an antidiscrimination panel?

Mr. COCHRAN. Yes, sir. In fact, because of the discrimination that I experienced as a firefighter coming through the ranks in the city of Shreveport, I just made a vow that that could not happen and would not happen under my watch, and I did everything I could to prevent it from happening.

Mr. HICE. Did you put forth that panel as far as you appointing the individuals who served?

Mr. COCHRAN. Yes. It was a consensus development of the group. Because I was the new guy in town, I didn't know any of the members of the department. I relied on the counsel of the deputy chiefs and assistant chiefs to assemble a group of men and women that represented every people group within the department, and we did that.

Mr. HICE. And so there were people in that group who did not agree with your position on marriage?

Mr. COCHRAN. Yes, sir.

Mr. HICE. But they were still on the panel that you put together?

Mr. COCHRAN. That's correct.

Mr. HICE. That speaks volumes as to your resistance to participating in discrimination. Do you believe that the mayor of the city of Atlanta discriminated against you?

Mr. COCHRAN. Absolutely.

Mr. HICE. So they did not express to you the same conduct that you had exhibited in your leadership?

Mr. COCHRAN. That's correct.

Mr. HICE. Do you believe that they discriminated specifically because of your religious beliefs?

Mr. COCHRAN. They made it perfectly clear that the actions that were taken against me were based upon the expressions in my book that I had mentioned about marriage and Biblical sexuality.

Mr. HICE. They certainly did, and the U.S. Commission on Civil Rights actually wrote about your case that it is remarkable to claim, as the city of Atlanta does, that religious beliefs are not a matter of public concern and therefore are unprotected by the First Amendment. It is stunning to me that we can have a State like Atlanta outrightly coming forth saying that religious liberties should not be protected under the First Amendment.

And again, this underscores why we need the First Amendment Defense Act. You do not waive your First Amendment right just because you work for the government, nor do you waive your First Amendment right because you go to work or you go to a church or you are at a school or wherever it is. The First Amendment applies to every citizen of this country.

Ms. Waggoner, let me come to you real quickly. The pendulum of discrimination obviously swings in both directions, and what we are seeing now is government itself doing the discrimination. Can you give us real briefly some examples of that?

Ms. WAGGONER. We have numerous cases at the State level where business owners, small business owners who hire LGBT people, serve LGBT people have declined to create art or to promote messages or celebrate and participate in same-sex ceremonies, and as a result, they're faced with the loss of everything they own. We have a number of religious organizations who their accreditation and licensure has been at issue, and we also know of the tax-exemption issues.

If you would permit me, I would also like to address some of the misstatements as to what this law actually does. For example, the suggestion that employees under the penalty provision could somehow be penalized is simply not true. It does not allow termination of employees. It does not change existing law. The rights that you would have, you continue to have under Federal and State law.

And more importantly, while we have cited different provisions that are preemptory language that is not a part of what this bill does, if you turn to section 3, discriminatory actions are defined explicitly. They're extremely narrow. They don't focus on other provisions of the law. They don't focus on housing or those types of things. They focus on accreditation, licensure, certification, funding, and government contracts, nothing more and nothing less. So again, these misstatements, I would encourage this committee to look at what the bill says. Don't engage in conjecture about it.

And lastly, I would just add the Mississippi decision has been raised here. Mississippi's decision is a trial court decision that was based on a preliminary injunction that if that decision is upheld, every single—virtually every single accommodation we have provided in this nation would be eviscerated by that judge's ruling.

We are confident it will be appealed and, although it didn't need to do this, FADA is very different from the Mississippi law because it covers all viewpoints. You can have a strongly held viewpoint in same-sex marriage or a strongly held viewpoint based on religious and moral convictions, on opposite-sex marriage, and both beliefs are protected. That is about tolerance. That's about diversity. That's about protecting both sides. So again, look at what the provisions of this bill does.

And one last point if you wouldn't mind, Chief Cochran, if he had been in the Obama administration and this would have happened to him, there is no question FADA would protect him. Thank you.

Mr. HICE. I thank the chairman. And I likewise just hope that this marriage question does not become a litmus test for functioning in American society. Thank you, sir.

Mr. MEADOWS. I thank the gentleman. The gentleman's time is expired.

The chair recognizes the gentleman from California, Mr. Lieu, for 5 minutes.

Mr. LIEU. Thank you, Mr. Chair.

America is great because we are not a theocracy, and you have seen the dangers of theocracies today. Some of the most repressive regimes in the world are based on countries that have laws based on religion. The reason we don't do that in the United States is because our Founding Fathers were quite smart. They put in the First Amendment of the United States Constitution—and let's just read that First Amendment one more time. It says "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

So the very first line in the First Amendment says "Congress shall make no law respecting an establishment of religion." That is why when Barney Frank took an oath of office to be a Member of Congress, and when members of this committee took an oath of office, we took an oath to the Constitution, not the Bible. Many of us did place our hand on the Bible when we took the oath of the Constitution, but it was not the other way around.

And the way we have balanced religious liberties where we respect people of any religion, respect those who don't have any religion, is we let religions operate freely within their area. We even allow religions to discriminate within their sphere. We don't allow religion to impose their views on others.

So, Ms. Franke, let me ask you—and by the way, I happen to be Catholic. The Catholic faith, by its very own policy, just flat-out discriminates against women, right, by saying women cannot be in any leadership position? You can't be Pope, you can't be a bishop, you can't be a priest, isn't that correct?

Ms. FRANKE. Well, you're the Catholic. I assume that's correct, yes.

Mr. LIEU. And yet we allow them to have a tax-exempt status, isn't that correct?

Ms. FRANKE. We do, but the—well, I'll let you ——

Mr. LIEU. Right. Islamic mosques, many of them separate men and women when they do their religious practices. We allow them to have their tax-exempt status, right?

Ms. FRANKE. In some cases. It depends on each religious institution certainly, yes.

Mr. LIEU. And our nation has taken this view that we are just going to allow religions to do whatever they want within their religion, to discriminate if they feel like it, to not discriminate. But when we talk about laws, they are secularly based, isn't that right, that we base our laws not on religion but on government officials, on Members of Congress, on the President?

Ms. FRANKE. Yes, that's right.

Mr. LIEU. So this bill to me is dangerous because it does exactly the opposite. For the first time it is actually taking one particular religious belief of one religion and elevating it to secular law. And to me the reason that that is so dangerous is that is now leading us down the road to theocracy.

And I so want to make this point that—I have read the bill, and it is not just that this bill is leading us on the road to theocracy. The way it is written is just crazy. I respect the authors of the bill. I don't believe they are crazy; they are reasonable people. But there is just some crazy language in this bill.

So one of them is, guess what, this bill applies to extramarital relations. So under this bill folks who are having an affair get to be discriminated against under this bill for it to become law. That potentially applies to premarital sex, right, because it is not defined, so if you are not in a marriage and you have sex, under this bill you get to be discriminated against.

We are here in the 21st century. I hope the millennials are watching us. This is crazy language. This is a crazy bill, taking really, really religious beliefs and elevating it to secular law, never been done in the history of the United States, never should it be done.

And I am going to give my colleague Barney Frank some time to ——

Mr. FRANK. Thank you. And I do reiterate if people want to talk about the Bible, Abraham would be excluded there. He did have a child with Hagar outside of his marriage.

But I want to respond to Ms. Waggoner who reads the bill—yes, you read the bill; you don't read every other line. You read every line. Here's what it says on page 4. She says, oh, it's got nothing to do with housing; it's just about certification and licensing. She forgot a few lines. At the top of page 4, "withhold, reduce, exclude, terminate, or otherwise make unavailable or deny any Federal grant," any Federal grant, contract, subcontract, et cetera. Then you get to license and certification. That's what housing is about. You say it doesn't deal with housing. Of course it does. You build housing in part with Federal grants and Federal contracts.

So I'm just astounded that you would say, oh, it's just about certification and licensing. You skipped the first two—the two lines just before that. And it is indisputable that under this bill, a nonprofit could get a Federal contract or grant to build affordable rental housing and say if you have had extramarital relations or if you

are in a same-sex marriage, you're not eligible for the tenancy, and the Federal Government could not refuse to allow you to get that contract under those grounds. It's not just about certification. Again, don't just read the bill; read every line.

Mr. MEADOWS. The gentleman's time is expired.

Mr. LIEU. Thank you.

Mr. MEADOWS. I thank the gentleman.

Mr. LIEU. I yield back.

Mr. MEADOWS. The chairman recognizes the gentleman from South Carolina, Mr. Mulvaney, for 5 minutes.

Mr. MULVANEY. Thank you, Mr. Chairman.

Before we have a legal conversation—I hope we get a chance to do that—I just want to ask maybe a commonsense question or a gut question.

Mr. FRANK. It's supposed to be.

Mr. MULVANEY. And I have heard Mr. Cochran's story for the first time. It's very compelling. To summarize what I understand happened is that you were dismissed from your job even though you didn't discriminate against anybody because in a book you quoted lines out of Scripture? Is that fair, sir?

Mr. COCHRAN. That's correct, sir.

Mr. MULVANEY. Does anybody think that is right, anybody on the panel? No? Everybody is saying no. Okay.

I understand the criticisms today of the bill. In fact, one of the questions I am going to ask Mr. Lee is why he wrote it the way that he did it because I think you are right. I think the bill as written would not protect Mr. Cochran. But if we all agree that what happened to Mr. Cochran is wrong, and I happen to agree with that and apparently everybody else does here—in fact, I would ask everybody here if they think that was right—how do we fix that? Well, Mr. Frank, you know I am going to give you a chance to talk as you and I are friends and I am going to do it, but before we move on, I want to ask a couple other questions and then we figure out how to fix this because that is something that needs to be fixed.

The next question is this: If there is a Jewish school that happens to teach traditional marriage, is there anybody here who thinks they should lose their tax-exempt status?

No one is saying yes. I assume everybody says no. Someone in the back says no. We will talk to them later.

Ms. FRANKE. It depends.

Mr. MULVANEY. And I'm going to come to that in the second. And I'll ask the same questions about Catholic churches. Should they lose their tax-exempt status if they won't marry gay couples? I think the answer is no. Does anyone want to take the position that they should? And none of them have and I want to get to that.

Lastly, I am going to ask the same thing about—pick a list—Islamic charities that choose not to serve homosexual couples, I don't think anybody would take the position here that any of those entities should lose their tax-exempt status. Mr. Frank, I will start with you because I know you are interested in doing this, but ——

Mr. FRANK. They shouldn't lose their tax-exempt status but neither should they be able to go for a Federal grant as they would be under this bill. And among the religions that ——

Mr. MULVANEY. Yes, but you don't get to have it both ways. And what you said before was that you didn't want to have your tax money used to do things that you can't participate in.

Mr. FRANK. Right.

Mr. MULVANEY. There are a lot of people who think that the fact that the Catholic Church receives tax-exempt status—one of them is sitting in this room—that that is using their tax money ——

Mr. FRANK. Well, I mean, that is fine ——

Mr. MULVANEY.—but you are now allowed to avail yourself of that.

Mr. FRANK. No—well, one, I would—frankly, I've been told that the church is interested in conversions, and my understanding is that I'd probably be welcome. But the second point is this—and not only would I be welcome, the Pope wouldn't judge me. But the other point, though, is this. I do guard the station. I hope you're not, Representative Mulvaney, equating a tax exemption with a Federal grant. I think a tax exemption is a lower level of scrutiny that applies for a tax exemption than to getting a Federal grant. The distinction I would make—unless you're equating the two and you're saying that anybody eligible for an exemption should be eligible for a grant ——

Mr. MULVANEY. And what I am saying to you, Mr. Frank, is that I think there are people who disagree with me, by the way, who might be of a different mindset on this who don't differentiate between the two.

Mr. FRANK. Well, I—look, there are people who think Elvis is alive, but I don't think that's accurate. I don't think that's the way the government works.

Mr. MULVANEY. But to Mr. Lee's ——

Mr. FRANK. None of us act on that basis.

Mr. MULVANEY. But to Mr. Lee's point again, I am sorry that he left because I think Mr. Cummings is right. We would have liked to have them stay, but I am going to get a chance to ask them this. He pointed to an exchange during Mr. Obergefell's campaign—during the case in front of the Supreme Court where it seems as if that question is very much open.

Mr. FRANK. And if you want to make ——

Mr. MULVANEY. Look ——

Mr. FRANK. The bill ——

Mr. MULVANEY. There are certain things this administration have said that said they are open-minded to withdrawing ——

Mr. FRANK. I understand that ——

Mr. MULVANEY.—the tax-exempt status. So go ahead.

Mr. FRANK. Divide it up. This tax exemption, there's a question of firing. By the way, I don't think the fire chief should have been fired, but neither do I think that the Equal Opportunity Employment Commission shouldn't be able to inquire into it. And my difference with my formal colleague Mr. Jordan is this. This is not a bill to protect First Amendment rights. That's—that Atlanta City Council—every other First Amendment right except this one would be checked. So how do you protect them? You pass a bill that says no one can be fired because of his or her political or religious opinion that is wholly irrelevant to the job, and you don't single out one

particular aspect of one particular religion. Separately—you deal with tax exemption separately.

But we've always held a different view. Richard Nixon started this when he said you're going to not get a Federal contract if you don't engage in even affirmative action in the construction area, but—you could have your tax exemption but you couldn't get the Federal grant.

So I think there are three levels. There's whether or not you can speak out. There's tax exemption. Yes, you should be protected in your expression of opinion, religious or not, as long as it's irrelevant to your job.

Mr. MULVANEY. Well, there is a lawsuit brought to deny the Jewish school, the Catholic Church, or the Islamic charity their tax-exempt status. I hope they play that.

Now, Ms. Franke—by the way, does anybody else think it is ——

Mr. MEADOWS. The gentleman's time is expired.

Mr. MULVANEY. Oh, I am sorry.

Mr. MEADOWS. Last question, we have been a little generous, so last question very quickly.

Mr. MULVANEY. No, I ——

Mr. FRANK. Mr. Chairman, if I was here I would yield time because I used up his time.

Mr. MULVANEY. I could do it in just a couple ——

Mr. MEADOWS. You have used up a lot of people's time but that is all right.

Mr. MULVANEY. It is not the first time that Mr. Frank has taken my time at one of these hearings, but I always enjoy the back-and-forth. Thank you all for participating. Ms. Franke, I did want you to follow up—maybe somebody else will have a chance to do it—when you said that under certain circumstances you might want to deprive those religious institutions of their tax-exempt status. Maybe you will get a chance to follow through on that with somebody else.

So I thank the chairman. I thank the panel.

Mr. MEADOWS. All right. I thank the gentleman. I am going to recognize one other—there has actually been a vote called on the Floor, a motion to adjourn, which should be one vote. So I am going to recognize the gentlewoman from New Jersey, Mrs. Watson Coleman, for 5 minutes, and then we are going to take a slight recess.

Mrs. WATSON COLEMAN. Thank you, Mr. Chairman. And thank you to all of you.

And, Mr. Cochran, I don't understand why you are here today because I don't understand how your case is involved, but I wish you the best of luck because it seems like something went wrong there.

Mr. COCHRAN. Thank you.

Mrs. WATSON COLEMAN. Ms. Columbia Law Professor Franke, I have a couple of questions for you. Number one, under this proposal, is it conceivable that a woman, a single woman with a child could be denied housing?

Ms. FRANKE. That can happen every day. The question is whether she can bring a complaint against her landlord before a Federal

——

Mrs. WATSON COLEMAN. Under this ——

Ms. FRANKE. Yes.

Mrs. WATSON COLEMAN.—proposal?

Ms. FRANKE. She would have a defense under FADA, the landlord would in those cases of rendering Federal law on this issue on enforceable, and the District of Columbia law as well.

Mrs. WATSON COLEMAN. So under this proposal could an employee technically refuse to allow a member of—an employee from a same-sex marriage or a heterosexual marriage if you are opposed to heterosexual marriage to not be able to do family leave for a sick person?

Ms. FRANKE. Yes.

Mrs. WATSON COLEMAN. Could an employer potentially not hire and/or fire someone because of their marital status?

Ms. FRANKE. Actually, marital status discrimination is not currently prohibited under Federal law, but it is under D.C. law, and since it's treated as Federal law, that would be the case.

Mrs. WATSON COLEMAN. Okay. And the same thing goes for public accommodations to any of those issues as well, right?

Ms. FRANKE. Yes.

Mrs. WATSON COLEMAN. All right. Is it not hypocritical to include the notion that you can apply these principles that are outlined in this proposal to heterosexual couples and unmarried heterosexual couples? Is not more than a facade?

Ms. FRANKE. Well, if I gave this legislation as a final exam question in law—at Columbia Law School, this would probably—it might be a failing exam. The idea that there are people who believe that marriage should be limited only to two people of the same sex, only limited to them, if they believed that out of religious or deep moral conviction, it's an interesting idea, but I'm unaware of anybody that holds those views. Perhaps other members of the panel do.

Mrs. WATSON COLEMAN. Okay. Thank you. You have sort of answered my question.

Ms. FRANKE. Yes.

Mrs. WATSON COLEMAN. I think that I just need to share this. First of all, I find it offensive that any day of the year that this proposal would be raised before us with all the important issues that are confronting us. I think that this is some of the worst form of discrimination that I have ever seen. And I believe that while my colleague referred to it as crazy language, I consider it more hurtful than anything, and that we are considering this one month after what happened in Orlando, Florida. And this evening there is going to be a vigil. It is just another element of disrespect and disregard.

And I for one am sickened by having to come to OGR and to have these kinds of hearings that don't move our society one bit closer to unifying and having respect and understanding of our individual and collective rights. And my right can't infringe upon your right and your right can't infringe upon my right. And my Republican majority colleagues just can't seem to get that, and that is abhorrent and that is a disregard for the job that they have been asked to do here.

Thank you. I yield back.

Mr. MEADOWS. I thank the gentlewoman.

We will go ahead and recess. And just for planning purposes, it will be a short recess so hopefully no more than 5 to 10 minutes, but subject to the call of the chair.

So the committee stands in recess.

[Recess.]

Mr. MEADOWS. The Committee on Oversight and Government Reform will be called back into session. I appreciate all of your flexibility with regards to the vote on the House Floor. I know other members are headed back this way, so I am going to go ahead and recognize the gentleman from Wisconsin, Mr. Grothman, for 5 minutes.

Mr. GROTHMAN. Well, I was going to ask Mr. Cochran some questions, but we are going to have to put Ms. Waggoner on the spot. I assume, you know, from your biography you have represented a lot of people, maybe primarily but not exclusively of the Christian faith. Why don't you in general give—you may be familiar—I don't know what your personal religious background is, but you could in general just give us a Christian perspective or the belief of, say, many mainline Christian churches, be it Baptist, Assembly of God, WELS Lutheran on this issue.

Ms. WAGGONER. Well, I can't speak to all faiths, but I can tell you that I know in terms of the Abrahamic religious tradition that marriage is between a man and a woman. The Holy Scriptures contain many different provisions that essentially say that and that God created man and woman to partner together and in sexual complementary to create human beings in his image. And so the purpose of marriage in religion is to perpetuate the human race and to honor the dignity and equality of all human beings and create families that will be in the image of God and promote human flourishing in that.

Mr. GROTHMAN. Okay. I don't know. Do you have children?

Ms. WAGGONER. I do.

Mr. GROTHMAN. Good. Congratulations.

Ms. WAGGONER. My daughter's here today.

Mr. GROTHMAN. Good. Good, good, good. Your mom is doing a good job. Do you then want—do you hope your children would—you are raising your children hoping they will have the same beliefs that you do? Is that part of the Christian faith that you want to raise your children to also share in that faith, share in those beliefs?

Ms. WAGGONER. It would very much be my hope and my priority that my children choose to walk in the faith that we have chosen and that we are a part of. At the same time, though, what I so much appreciate about the Christian faith is that it's a matter of free will, and they have that choice and need to make their—that decision on their own.

Mr. GROTHMAN. Okay. I will give you a general question because they want me to give you a general question. Could you give us an oversight of what this bill does and why it is important to you?

Ms. WAGGONER. Well, the bill is important because what we're seeing at the State level and also beginning to see at the Federal level is that those who have the politically unpopular view now that marriage is between a man and a woman are being silenced, banished, and punished, including threatened with jail time poten-

tially, threatened with crippling fines, and forced to go out of their business and not earn a livelihood simply because they will not promote a message about same-sex marriage that violates their religious convictions or they won't actually participate in a same-sex ceremony. There is no case in this nation that we're aware of where anyone has been denied services simply because someone expressed a sexual preference. And instead what we have seen is truly the bullying and the penalization of those who just seek to live peacefully and work peacefully consistent with their beliefs.

Mr. GROTHMAN. Okay. Just going through some of the papers we got to prepare today, apparently one issue out there is there are adoption agencies, and apparently some adoption agencies don't like to place children with same-sex couples. If you were ever in a position to put a child up for adoption, would you prefer that your child not be placed with a same-sex couple?

Ms. WAGGONER. Well, I don't know that my personal beliefs would be particularly relevant ——

Mr. GROTHMAN. Well, I will put it this way. Would a whole lot of people with mainstream Christian beliefs not want their child placed with a same-sex couple?

Ms. WAGGONER. I don't know what a whole lot of people would do, but I know that in a diverse and tolerant society, they should be able to have that choice. And that's what's so great about the American system. It's also important to know that there are a number of religiously based adoption agencies and foster care agencies that it's not simply that they don't want to, it's that they don't believe it's in the child best interest because children do best with mothers and fathers. They have the right to know and be loved by their mothers and their fathers.

Mr. GROTHMAN. Are we in danger in this country without a bill similar to this of creating a situation which if you want to put your child up for adoption, you will not be able to assure that your child—if you go through a mainstream adoption agency, you know—you will not be able to assure that your child will be raised by a mother and father?

Ms. WAGGONER. Well, we don't even have to speak in future tense because that's already happened. We can look in D.C. and Illinois and in other States where Catholic charities and other religiously based adoption agencies has been forced to close their doors. They've lost their licenses simply because they are a religious organization that wants to operate consistent with their religious beliefs on marriage.

Mr. GROTHMAN. Okay. I don't believe we can have the government establish a religion, but isn't it true—you are a lawyer—that our forefathers anticipated America being a country in which you would be free to practice your Christian belief and free to raise your children in that belief?

Ms. WAGGONER. Absolutely. And we know that throughout our history in America our Founding Fathers, as well as those in Congress and others, have successfully provided religious accommodations, balanced religious liberty interests against other important State interests, interests that include national security and education and health care. We can do this and there's no reason that we shouldn't here.

Mr. GROTHMAN. Are we headed in this country towards a place in which the Federal Government and State governments are hostile to parents who want to raise their children in a Christian faith?

Mr. MEADOWS. The gentleman's time is expired, but you can answer the question.

Ms. WAGGONER. There's no question that there is government hostility to those who believe that marriage is between a man and a woman. There's no question that they're being silenced, that they're being banished from the marketplace simply because of their views.

Mr. MEADOWS. I thank the gentleman. I thank you.

The chair recognizes the gentleman from Oklahoma, Mr. Russell, for 5 minutes.

Mr. RUSSELL. Thank you, Mr. Chairman. And thank you, panel, for being here today and for your testimonies.

I am not certain whether FADA is the best means for protecting what is constitutionally guaranteed or not. I think it needs more deliberation. But one thing I am certain of, Mr. Chairman, is that in our current day the greatest assault on the free exercise of religion is being perpetuated by those most responsible to protect it, those who uphold the law. Instead of upholding the free exercise clause of the First Amendment, we have now seen this body continue its assault on faith in America.

It is not enough to level accusations of injustice. Many will not be satisfied until their assaults of intolerance on people of faith in this country has produced an elimination of God in public life in America. We are accused of hatred, called out as shameful, and enjoined to use the whole Constitution to support an opposing view that embodies behavior more as an outcome that not only violates our conscience but have been prohibited under the laws of nature and nature's God.

In the last 50 years we have seen the Constitution used by ideologues to kill American children in the womb, eliminate family structure, elevate behavior over belief, redefine marriage, and assault into silence and in action any who oppose them. Not satisfied, we now see them without rest on their quest to eliminate free exercise of faith in the United States.

Do we really want a nation without God? They would call it progress, yet our conscience knows different. The apostle Paul explained why when he said—and I am exercising my First Amendment right to state this—"For the wrath of God is revealed from Heaven against all ungodliness and unrighteousness of men who suppress the truth in unrighteousness because what may be made known of God is manifest in them for God has shown it to them. For since the creation of the world, His invisible attributes are clearly seen, being understood by the things that are made, even His eternal power and Godhead so that they are without excuse because although they knew God, they did not glorify Him as God, nor were thankful but became futile in their thoughts and their foolish hearts were darkened. Professing themselves to be wise, they became fools. Therefore, God also gave them up to uncleanness in the lust of their hearts to dishonor their bodies among

themselves, who exchanged the truth of God for the lie and worshiped and served the creature rather than the Creator."

The Creator. Our nation has always been anchored in the Creator from its inception, throughout its history. God has been the foundation of our republic, as seen in the sweeping lines in the Declaration of Independence. None of the founders of this country believed that a governmental connection to religion was an evil in itself. They oppose the establishment of a national religion because it could prohibit free exercise of faith, but that faith would and should be freely exercised.

The same day the Bill of Rights was introduced, July 13, 1787, this Congress also introduced the Northwest Ordinance to lay guidelines and instruction on new territory acquired by a future United States. Article 3 of that ordinance stated, "Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall be forever encouraged."

Forever be encouraged, Mr. Chairman. Some in this body today would believe forever stops in 2016 and should have stopped much sooner. They claim that Congress grants these inalienable rights and use the powers of government without the consent of the governed to regulate and diminish faith and eliminate it from public life.

In 1798, in response to the claim that Congress could regulate the First Amendment freedoms without abridging them, James Madison condemned it saying, "The liberty of conscience and the freedom of the press were completely exempted from all congressional authority whatever."

Mr. Chairman, forever be encouraged. Is that where we stand today? Shall religious freedom, the hallmark of Columbia's shores, continue to be forever encouraged? Or do we who are so humbly honored to serve in these chambers now step aside as we see the indispensible supports of our religion and morality knocked from under our foundation.

Mr. Chairman, I can't be silent. Since I was 18, I have pledged and defended the Constitution of the United States of this great republic. I have been moved by conscience and dictates to speak out against the coercion of people of faith who are being discriminated against because they hold to the laws of nature and nature's God. Our institutions, once based on the Creator of life, have now appointed themselves to usurp the authority of God, who is the author of life, marriage, and family.

The most elemental sovereign unit, the family, has been destroyed by our foolish decisions. We are told instead by those of us sworn to uphold the law that murder is not murder, marriage is not marriage, family is not family. We have allowed constitutional constructs to kill a child and call it a choice. We have seen discreet behaviors and private sexual preferences now promoted to public display while what is constitutionally guaranteed to be able to express, religion, is now publicly prohibited. This nation at its highest level, it seems, has taken a position against God.

And so I close with this, Mr. Chairman, is it possible to form a more perfect union without God? Can we establish justice absent the giver of law? Can domestic tranquility be ensured when we

abandon His precepts? Can we provide for a common defense absent a mighty fortress and an unfailing bulwark? How do we promote the general welfare when every American is now seemingly unanchored, adrift to do what seems right in his own eyes? Do we suppose we can secure the blessings of liberty without Him? Can we acknowledge our prosperity and expect to obtain His blessing without acknowledging His existence?

And so, Mr. Chairman, like our forebears, I will not be silent while it is still legal to not be. My faith directs that I act with love and civility and gentlemanly manner. My optimism is secured by eternal hope and everlasting truth. My conscience speaks to God's eternal being so that I am without excuse, but His love and mercy cannot be separated from those who answer His call.

Mr. Chairman, I yield back my time.

Mr. MEADOWS. The gentleman's time is expired.

The chair recognizes himself for a series of questions.

And, Dr. Franck, let me come to you. Specifically, a lot has been said here today about penalties and what may happen and what may not happen. So as it relates to this particular piece of legislation, can you speak to the penalty clause and what it is and what it is not?

Mr. FRANCK. Yes. Thank you, Mr. Chairman. I regret that more Democratic members haven't rejoined us because I think that some of them were misreading the text of the bill. I'm willing to forgive them for that error in light of the fact that the Columbia law professor to my right seems also to be misreading the bill and perhaps misleading the members.

The word "penalty" appears one time in FADA as now written, as proposed by Congressman Labrador, and that's in section 3 on page—yes on page 3, line 18, in context that refers only to tax penalties under the Internal Revenue Code. So let me go back to the top, the notwithstanding clause. "Notwithstanding any other provision of law," what, "the Federal Government shall not take any discriminatory action against a person." And discriminatory action is defined several lines later. The very first definition of discriminatory action is a reference to unfavorable tax treatment because of one's religious or moral convictions about marriage.

Mr. MEADOWS. So what you are saying is ——

Mr. FRANCK. It is the only place where penalty is ——

Mr. MEADOWS.—is that if they violate it, the IRS cannot come in and say you owe a penalty ——

Mr. FRANCK. Right.

Mr. MEADOWS.—and they cannot charge a penalty as punishment, is ——

Mr. FRANCK. It's unfavorable tax treatment alone. And what this means is that all the worries I've been hearing today about FADA undoing civil rights protection, the Family and Medical Leave Act, the Fair Housing Act, title VII, title IX, it's all misplaced.

Mr. MEADOWS. So what you are saying ——

Mr. FRANCK. And it ——

Mr. MEADOWS.—is the text of that bill would not support any undoing of the Fair Housing Act or the Civil Rights Act or anything like that? Ms. Waggoner, would you agree with that?

Ms. WAGGONER. Absolutely.

Mr. MEADOWS. So if that is the case and that is obviously something of great debate, if you believed, Ms. Waggoner, that this particular bill would undo the Civil Rights Act or the Fair Housing Act, would you oppose this bill?

Ms. WAGGONER. I would need to look at what the bill actually does, but what I can say ——

Mr. MEADOWS. Well, let's put it in context. Let me just tell you from my standpoint, if this bill undermines those foundational things that have served us to protect civil rights, I will oppose this bill.

Ms. WAGGONER. I would agree with you very much so.

Mr. MEADOWS. Okay. And so I guess what I am here to say is, Dr. Franck, if you are saying that this penalty would not actually be a penalty to say that we could discriminate, is that what you are saying? I don't want to put words in your mouth.

Mr. FRANCK. No, that is what I'm saying. If the Federal Government is obliged under Civil Rights, Family Medical Leave Act, Fair Housing Act, to assess a penalty against persons engaging in unlawful discrimination, FADA does not let those people off the hook. It simply doesn't.

Mr. MEADOWS. So those penalties would stay in place under existing law, and this bill does not do anything to undermine that? Is that your sworn testimony?

Mr. FRANCK. Yes.

Mr. MEADOWS. Okay. Ms. Waggoner, would you agree with that?

Ms. WAGGONER. Yes, I would.

Mr. MEADOWS. Okay. Ms. Franke, I have found that your testimony was very engaging, and I shared that with you personally. And here is where I would like to work with you knowing that we probably come from two different ideological perspectives on this particular issue. However, maybe at the core of that foundation is both of us in the belief that discrimination is something that is abhorrent and something that should not be tolerated. And would you agree that discrimination is something that is abhorrent and shouldn't be tolerated?

Ms. FRANKE. I think I can agree with that.

Mr. MEADOWS. Well, I thought you might. And so in doing that, here is what I would like for all of us to do is let's look at the text of this bill. And, Ms. Franke, you have said that your Columbia law students would have gotten an F if they had drafted it this way, so we will tell Ledge Counsel that they just got an F at Columbia Law School.

Ms. FRANKE. There's a procedure, though, for reopening a grade.

Mr. MEADOWS. Okay. Well, let's look at the procedure for reopening a grade because here is what I would like to do is we have had very robust conversations that disagree. Now, what my concern is is that we are at times missing each other based on misinformation on what the bill is, on what the bill might do, and on what the bill does do. And so I think it is important for us to really start to narrowly focus and start to say the narrowly focused portions of this, what does it protect and what does it not protect because I have heard a number of my colleagues on both sides of this particular seat suggest things that may not be entirely accurate from the context of what is there.

I think we can all agree, Chief Cochran, that the kind of discrimination that you had to face is not only wrong, but it goes against our constitutional founding principles. And even Mr. Frank, who may not agree with you on some of your particular positions, agrees that the way that you were treated was incorrect. Isn't that correct, Mr. Frank?

Mr. FRANK. It is, and I wish we had a bill to protect him.

Mr. MEADOWS. Well, in doing that we can certainly look at a bill, but what we have is something far greater than a bill. We have the Constitution. In the Constitution, the same Constitution that Ms. Frankie will teach her law students to make sure that she upholds, is there to do it.

Now, here is the interesting thing. When jurisprudence starts to come in and starts to look at our founding principles from a constitutional standpoint, then it is important for us to act. Then, it is important for us to clarify. Then, it is important for the legislative body to say this is what we will tolerate, this is what we believe is appropriate, and indeed that, I can tell you in talking to my good friends Senator Lee and Raul Labrador, that is their intent is not to discriminate. In fact, if anything, it is to stop discrimination. And that needs to be the underlying principle here today in all of the argument that goes back and forth.

So, Ms. Waggoner, do I have your commitment that you are willing to work with this committee and indeed members of this committee perhaps individually to help us look at the language and make sure that it does not indirectly or directly violate the Fair Housing Act or the Civil Rights Act or anything like that? Will you be willing to do that?

Ms. WAGGONER. We would very much appreciate that opportunity.

Mr. MEADOWS. Well, you have a standing invitation, and my schedule is open to you.

Ms. Frankie, do I have your commitment to do the same with me as we would sit down, without any cameras, without any reporters, to try to work through this to make sure that those protections are there?

Ms. FRANKE. Absolutely.

Mr. MEADOWS. Thank you, Ms. Franke. Dr. Franck, do I have your same assurances where you can look at this and say here is how we are going to work together to make sure that all rights are protected? Will you be willing to work with us?

Mr. FRANCK. Absolutely.

Mr. MEADOWS. Well, I thank each of you.

The gentleman from Georgia has come in, and so the chair recognizes the gentleman from Georgia, Mr. Carter, for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman, and thank all of you for being here.

Chief Cochran, thank you especially. As a fellow Georgian, I have followed your case since its beginning, and it has saddened me. I will tell you that. It saddened me to hear that your 34-year career during which you were nationally recognized as fire chief of the year came to an abrupt end at the hands of the city of Atlanta, all because you expressed your religious beliefs.

After you were suspended but before you were terminated, the city of Atlanta determined that you had not discriminated against anyone for any reason. None of the witnesses interviewed by the city could point to a single instance in which any member of any organization was treated unfairly by you, is that correct?

Mr. COCHRAN. That's correct, sir.

Mr. CARTER. Yet, because the city of Atlanta, the mayor of Atlanta, and city council had already publicly disagreed with your religious beliefs before the investigation, you were terminated despite no evidence that you discriminated against anyone, is that correct?

Mr. COCHRAN. That's correct, sir.

Mr. CARTER. Do you believe that if you had published your book while you were employed at the Federal level as a fire administrator for the U.S. Fire Administration that you would have been fired from that position for your beliefs?

Mr. COCHRAN. It's hard to say at that time whether or not I would have, but I believe, based upon the tremendous radical shift in the atmosphere in the United States of America on this issue of marriage and sexuality, where I, the U.S. fire administrator, in these times, I would certainly be terminated from employment.

It is my desire to see legislation at the Federal, State, and local level that will protect any American, in spite of or regardless of their belief about marriage and sexuality, be protected from adverse consequences for actually expressing that or living it out in their personal lives.

Mr. CARTER. So, Chief Cochran, you believe that the First Amendment Defense Act will protect Federal employees from suffering the same punishment that you suffered, you, the national fire chief of the year suffered?

Mr. COCHRAN. Yes, sir, I believe that it will, and I think it will also provide a provision whereby people who share different beliefs from the government on marriage and sexuality will not be withheld from employment from the Federal Government as well.

Mr. CARTER. Mr. Chairman, opponents of this First Amendment Defense Act would have us believe that this is a solution in search of a problem and that this doesn't happen at the Federal level. But here we have an example, here we have an example of an award-winning public servant who served both at the State and the Federal level who was fired without evidence of any wrong doing other than elected officials didn't like his religious beliefs. That is it. Simply, they did not like his religious beliefs, no other reason whatsoever, no indication, no proof of any kind of discrimination by anyone at any level.

You know, if someone can get fired by one of the largest cities in the country for freely expressing their religion, which is a constitutionally protected right, then it is only a matter of time before this happens at the Federal level. And it is my belief that this is the reason why we need this legislation, to protect anyone, anyone who expresses their beliefs.

Chief Cochran, do you agree with that?

Mr. COCHRAN. I absolutely agree with you, sir.

Mr. CARTER. Chief, as I said, I have followed your case closely. Two years ago at this time I was in State Senate of Georgia and I followed it very closely. In fact, you may not know, but we both

share the same condo complex in Atlanta, and you are a neighbor of mine. And I am proud to call your neighbor, and I am proud because you are a fine American.

Thank you, Mr. Chairman. I yield back.

Mr. WALKER. [Presiding] Thank you, Mr. Carter.

The chair recognizes himself for 5 minutes.

Thank you again for all the panel in being here today. We appreciate your time. I do have a couple of questions that I wanted to come through just in case we have, yes, about 4 or 5 minutes left. Let me start with Ms. Waggoner. One of the questions that I would like to hear from you if possible if you have time to answer it, if the government was to force faith communities to violate their freedom to believe or to discontinue community services, what would our local communities lose?

Ms. WAGGONER. They would lose all kinds of humanitarian and good works. In many instances we have a number of religiously oriented foster care and adoption agencies. We have Catholic hospitals. We have Islamic hunger programs. We have Jewish food banks. Much of the humanitarian work that is done in the United States is done by those who are motivated by faith. And there's a mistaken notion that they would choose to forgo their religious beliefs to stay open. We've seen that in other cases as well.

Mr. WALKER. I would certainly concur. I have had the opportunity over the years of serving in the inner cities of places like Cleveland and New York and Baltimore, and there is no match for what faith-based organizations can do, specifically in some of these tough-to-reach places. These are the people that hold the hands of the sickest, that reach out.

I am reminded in Moore, Oklahoma, you may have remembered the tornadoes that viciously swept through there. I was compelled to remember the newscast. CBS and NBC did a joint newscast where Harry Smith and Brian Williams both. And I remember the quote by Harry Smith. It says, "As you and I have seen it in so many different places in this country, if you are waiting for the government, you are going to be in for an awful long wait." However, he said this: "The Baptist men, they are going to get it done tomorrow."

And I think about that as an over-context to make sure that as we look at legislation that we are protecting those who are working behind the scenes in places where their names aren't recognized or in headlines or in the press, but they are doing the work because they are driven by their faith to do so."

Chief Cochran, you make us proud. You have survived discrimination both in the civil rights arena, as well as any political correctness arena. The comments that we have heard today about checking your beliefs at the door, you have stood up. And to use a passage that you might be familiar with that I am reminded of, I believe it was Paul that wrote, "Alexander the coppersmith did me much harm, but for what they meant for harm, God meant for good." And I think your life is a story because you have kept your faith, and you have kept the right spirit. And now I believe that you are being celebrated because of that.

My question to Representative Frank would be this: Do you condone the harassment made by the city of Atlanta against Chief Cochran?

Mr. FRANK. Well, I know you've kind of been in and out, but I've said several times that I don't.

Mr. WALKER. Okay.

Mr. FRANK. I did also note that this a bill, of course, would do nothing to prevent that. And the bill, if I can use all these terms, it's over-inclusive and under-inclusive. It protects only one set of statements, a particular religious belief about a particular issue. I think the bill ought to be to give protection to any statement of any political or religious belief as long as it's not job-relevant. In his case, it wasn't job-relevant. If it was for the Justice Department's Civil Rights Division, it would be. So I think a law that protects any statement of religious or political belief that's irrelevant to the job duties should be passed.

Mr. WALKER. How about for elected office?

Mr. FRANK. Oh, I do not believe that we interfere with what the voters can do. I'm against any—as far as elected office, in fact, there was a case you will remember when a Member of this body from South Carolina shouted something out, and the President and the House—unwisely in my judgment—voted to criticize him. I refused to vote on that. I think the relationship between elected officials and his or her constituents is paramount, and nobody else should intrude into that.

Mr. WALKER. That was before I arrived, but I do remember that making news.

My follow-up question, Mr. Frank, is that I know that there have been some comments that you have made in the past, former President Mitt Romney about his particular views on traditional marriage, and I think that you have found him offensive. Is that to a place there that you would say that these people who hold religious belief in traditional marriage should not be protected?

Mr. FRANK. Of course not. In fact—I—again, you're—when a preacher from Kansas, from Westboro went and started harassing or picketing funerals of servicemen because he said God was punishing America because it was too pro-gay, and this House voted 400 to 3 to legally prohibit him from doing so, even when he wasn't intruding on the grounds, I was one of the three and the Supreme Court said we were right. No, I am in favor of any opinion anywhere. I am not in favor of having money go to someone.

And by the way, this does not protect the fair housing law, notwithstanding any other provision of law. I am not for being taxed so people can build housing from which people like me are excluded.

Mr. WALKER. There may be some debate on that. And I want to conclude with my final question here to Dr. Franck if I could, please. Will FADA authorize employees of the Federal Government to refuse to provide services to same-sex couples and/or eliminate any antidiscrimination protections for LGBT employees of such contractors?

Mr. FRANCK. No, not on any fair reading of the—of FADA that I can see. And if I may, former Congressman Frank has now twice referred to persons working in the Civil Right Division of the Jus-

tice Department earlier. He also referred to persons working in the EEOC. And if I understood him correctly, he regarded people's opinions on marriage there as so fundamentally job-related that he would let them go even if they did not act on those beliefs in their official capacity in their job performance.

So perhaps he would like to clarify or quality ——

Mr. FRANK. May I?

Mr. FRANCK.—what he said, and I invite him to do so, but it sounded like—because I'm sure there are people—persons who believe in conjugal marriage between one man and one woman working today in the Civil Rights Division and the EEOC, and it sounded like he'd like them to lose their job.

Mr. FRANK. May I respond?

Mr. WALKER. Just 30 seconds.

Mr. FRANK. Yeah. Just as I would say if you say you'd believe in racial discrimination or religious discrimination, any time you are at an agency that's in charge of protecting and enforcing constitutional rights and you express your view that that constitutional right should not exist and it's damaging to the country, then you should not be in the enforcement position there.

Mr. WALKER. Thank you, Representative Frank. Well, let me say thank you to all of our witnesses for their appearance here today. It has been a little bit of a long hearing, but you have been patient, and we appreciate your testimony.

If there is no other further business, without objection, the committee stands adjourned.

[Whereupon, at 1:27 p.m., the committee was adjourned.]

# APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**NORTHERN DIVISION**

**RIMS BARBER; CAROL BURNETT; JOAN BAILEY; KATHERINE ELIZABETH DAY; ANTHONY LAINE BOYETTE; DON FORTENBERRY; SUSAN GLISSON; DERRICK JOHNSON; DOROTHY C. TRIPLETT; RENICK TAYLOR; BRANDIILYNE MANGUM-DEAR; SUSAN MANGUM; JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH; CAMPAIGN FOR SOUTHERN EQUALITY; and SUSAN HROSTOWSKI** — **PLAINTIFFS**

**V.**

**CAUSE NO. 3:16-CV-417-CWR-LRA**
***consolidated with***
**CAUSE NO. 3:16-CV-442-CWR-LRA**

**PHIL BRYANT, Governor; JIM HOOD, Attorney General; JOHN DAVIS, Executive Director of the Mississippi Department of Human Services; and JUDY MOULDER, State Registrar of Vital Records** — **DEFENDANTS**

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**MEMORANDUM OPINION AND ORDER**

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The plaintiffs filed these suits to enjoin a new state law, "House Bill 1523," before it goes into effect on July 1, 2016. They contend that the law violates the First and Fourteenth Amendments to the United States Constitution. The Attorney General's Office has entered its appearance to defend HB 1523. The parties briefed the relevant issues and presented evidence and argument at a joint hearing on June 23 and 24, 2016.

The United States Supreme Court has spoken clearly on the constitutional principles at stake. Under the Establishment Clause of the First Amendment, a state "may not aid, foster, or

promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cnty., Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (citation omitted). Under the Equal Protection Clause of the Fourteenth Amendment, meanwhile, a state may not deprive lesbian and gay citizens of "the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Romer v. Evans*, 517 U.S. 620, 630 (1996).

HB 1523 grants special rights to citizens who hold one of three "sincerely held religious beliefs or moral convictions" reflecting disapproval of lesbian, gay, transgender, and unmarried persons. Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016). That violates both the guarantee of religious neutrality and the promise of equal protection of the laws.

The Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected – the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells "nonadherents that they are outsiders, not full members of the political community, and . . . adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quotation marks and citation omitted). And the Equal Protection Clause is violated by HB 1523's authorization of arbitrary discrimination against lesbian, gay, transgender, and unmarried persons.

"It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633. The plaintiffs' motions are granted and HB 1523 is preliminarily enjoined.

## I. The Parties

### A. Plaintiffs

The plaintiffs in this matter are 13 individuals and two organizations – Joshua Generation Metropolitan Community Church (JGMCC) and the Campaign for Southern Equality (CSE).

All of the individual plaintiffs are residents, citizens, and taxpayers of Mississippi who disagree with the beliefs protected by HB 1523. They fall into three broad and sometimes overlapping categories: (1) clergy and other religious officials whose religious beliefs are not reflected in HB 1523; (2) members of groups targeted by HB 1523; and (3) other citizens who, based on their religious or moral convictions, do not hold the beliefs HB 1523 protects.

The first group includes Rev. Dr. Rims Barber, Rev. Carol Burnett, Rev. Don Fortenberry, Brandiilyne Mangum-Dear, Susan Mangum, and Rev. Dr. Susan Hrostowski. Rev. Dr. Barber is an ordained minister in the Presbyterian church. Rev. Burnett is an ordained United Methodist minister. Rev. Fortenberry is an ordained United Methodist minister and the retired chaplain of Millsaps College. Mangum-Dear is the pastor at JGMCC, while Mangum is the director of worship at that church. Rev. Dr. Hrostowski is the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi, as well as an employee of the University of Southern Mississippi.

Katherine Elizabeth Day, Anthony (Tony) Laine Boyette, Dr. Susan Glisson, and Renick Taylor comprise the second group of plaintiffs.[1] Day is a transgender woman; Boyette is a transgender man. Dr. Glisson, an employee of the University of Mississippi, is unmarried and in a long-term sexual romantic relationship with an unmarried man. Taylor is a gay man who is engaged to his male partner. The couple plans to marry in the summer of 2017.

The third group of individual plaintiffs includes Joan Bailey, Derrick Johnson, and Dorothy Triplett. Bailey is a retired therapist whose practice was primarily devoted to lesbians.

[1] Mangum-Dear, Mangum, and Rev. Dr. Hrostowski also fall into this group.

Johnson is the Executive Director of the Mississippi State Conference of the NAACP, and Triplett is a retired government employee and a longtime activist.

JGMCC is a ministry in Forrest County, Mississippi, whose members fall into all three categories. It "welcomes all people regardless of age, race, sexual orientation, gender identity, or social status." Docket No. 1, ¶ 16, in Cause No. 3:16-CV-417 [hereinafter *Barber*]. In particular, the church sponsors "a community service ministry that promotes LGBT+ equality." *Id.* Approximately 90% of its members in Forrest County identify as LGBT. Transcript of Hearing on Motion for Preliminary Injunction at 168, Barber v. Bryant, No. 3:16-CV-417 (S.D. Miss. June 23, 2016) [hereinafter Tr. of June 23]. There are over 400 Metropolitan Community Churches worldwide. *Id.*

CSE is a non-profit organization that works "across the South to promote the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life." Docket No. 2-2, at 2, in Cause No. 3:16-CV-442 [hereinafter *CSE IV*]. It is based in North Carolina but has worked in Mississippi since 2012. *Id.* CSE claims to advocate for Mississippians in all three categories of plaintiffs. *Id.* at 4.

**B. Defendants**

Governor Phil Bryant is sued in his official capacity as the chief executive of the State of Mississippi. State law charges him with the responsibility to "see that the laws are faithfully executed." Miss. Code Ann. § 7-1-5(c).

Attorney General Jim Hood is also sued in his official capacity. Among his powers and duties, he is required to "intervene and argue the constitutionality of any statute when notified of a challenge." *Id.* § 7-5-1; *see In the Interest of R.G.*, 632 So. 2d 953, 955 (Miss. 1994).

John Davis is the Executive Director of the Mississippi Department of Human Services. Under Mississippi Code § 43-1-2(5), he is tasked with implementing state laws protecting children. One of the offices under his purview, the Division of Family and Children's Services, is "responsible for the development, execution and provisions of services" regarding foster care, adoption, licensure, and other social services. Miss. Code Ann. § 43-1-51.[2]

Judy Moulder is the Mississippi State Registrar of Vital Records. She is responsible for "carry[ing] into effect the provisions of law relating to registration of marriages." *Id.* § 51-57-43. HB 1523 requires Moulder to collect and record recusal notices from persons authorized to issue marriage licenses who wish to *not* issue marriage licenses to certain couples due to a belief enumerated in HB 1523. HB 1523 § 3(8)(a).

## II. Factual and Procedural History

### A. Same-Sex Marriage

Because HB 1523 is a direct response to the Supreme Court's 2015 same-sex marriage ruling, it is necessary to discuss the background of that ruling.

This country had long debated whether lesbian and gay couples could join the institution of civil marriage. *See, e.g.*, Andrew Sullivan, *Here Comes the Groom*, The New Republic, Aug. 27, 1989. The debate played itself out on the local, state, and national levels via constitutional amendments, legislative enactments, ballot initiatives, and propositions.

In its most optimistic retelling, "[i]ndividuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting). *But see* David Carter, Stonewall: The Riots that Sparked the Gay Revolution 109-10, 183-84 (2004) (describing the 1966

[2] During the 2016 legislative session, Mississippi's lawmakers created the Department of Child Protective Services, a standalone agency independent of the Department of Human Services. *See* 2016 Miss. Laws, SB 2179. The new department was created upon passage, but the bill allows a transition period of up to two years. *Id.*

Compton's Cafeteria riots by transgender citizens in San Francisco, and the famous 1969 Stonewall riots in New York City). Less charitably, but also true, is the reality that every time lesbian and gay citizens moved one step closer to legal equality, voters and their representatives passed new laws to preserve the status quo.

In the 1990s, for example, Hawaii's same-sex marriage lawsuit inspired the federal Defense of Marriage Act (DOMA) and a wave of state-level "mini-DOMAs." *Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906, 915 (S.D. Miss. 2014) [hereinafter *CSE I*]. Mississippi's politicians joined the movement by issuing an executive order and passing a law banning same-sex marriage. *Id.* It was not until 2013 that DOMA was struck down in part. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Mississippi's mini-DOMA lasted until 2015. *CSE I*, 64 F. Supp. 3d at 906.

In the early 2000s, *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, cases that found in favor of lesbian and gay privacy and marriage rights, respectively, resulted in a wave of state constitutional amendments banning same-sex marriage. *CSE I*, 64 F. Supp. 3d at 915. Mississippians approved such a constitutional amendment by the largest margin in the nation. *Id.*; *see* Michael Foust, *'Gay Marriage' a Loser: Amendments Pass in all 11 States*, Baptist Press, Nov. 3, 2004.

The lawfulness of same-sex marriage was finally resolved in 2015. The Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples must be allowed to join in civil marriage "on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605. The decision applies to every governmental agency and agent in the country. "The majority of the United States Supreme Court dictates the law of the land, and lower courts are bound to follow it."

*Campaign for Southern Equality v. Mississippi Dep't of Human Servs.*, --- F.3d ---, 2016 WL 1306202, at *14 (S.D. Miss. Mar. 31, 2016) [hereinafter *CSE III*].

Many celebrated the ruling as overdue. Others felt like change was happening too quickly.[3] And some citizens were concerned enough to advocate new laws "to insulate state officials from legal risk if they do not obey the decision based on a religious objection."[4] Lyle Denniston, *A Plea to Resist the Court on Same-Sex Marriage*, SCOTUSblog, July 9, 2015.

The Supreme Court's decision *had* taken pains to reaffirm religious rights. Its commitment to the free exercise of religion is important and must be quoted in full.

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. . . . In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

*Obergefell*, 135 S. Ct. at 2607.

"As the *Obergefell* majority makes clear, the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to *voice* their personal objections – this, too, is an essential part of the conversation – but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals . . . ." Laurence H. Tribe, *Equal Dignity:*

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[3] It is fair to say that same-sex marriage rights went "from unthinkable to the law of the land in just a couple of decades." Nate Silver, *Change Doesn't Usually Come This Fast*, FiveThirtyEight, June 26, 2015.

[4] Sadly, this was predicted years ago. In 1999, four members of Congress expressed concern that religious freedom legislation "would not simply act as a shield to protect religious liberty, but could also be used by some as a sword to attack the rights of many Americans, including unmarried couples, single parents, lesbians and gays." H.R. Rep. No. 106-219, at 41 (1999), *available at* 1999 WL 462644.

*Speaking Its Name*, 129 Harv. L. Rev. F. 16 (Nov. 10, 2015). *Obergefell*'s author, Justice Kennedy, had also reaffirmed this principle in *Burwell v. Hobby Lobby Stores*. "[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests." 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring).

In the immediate wake of *Obergefell*, the Fifth Circuit issued a published opinion declaring that "*Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court." *Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015) [hereinafter *CSE II*]. The court issued the mandate forthwith. *Id.*

A few hours later, with this mandate in hand, this Court issued a Permanent Injunction and a Final Judgment enjoining enforcement of Mississippi's statutory and constitutional same-sex marriage ban. The Attorney General's Office soon advised Circuit Clerks to issue marriage licenses "to same-sex couples on the same terms and conditions accorded to couples of the opposite sex." *In re Steve Womack*, 2015 WL 4920123, at *1 (Miss. A.G. July 17, 2015).

In physics, every action has its equal and opposite reaction. In politics, every action has its predictable overreaction. Politicians reacted to the Hawaiian proceedings with DOMA and mini-DOMAs. *Lawrence* and *Goodridge* birthed the state constitutional amendments. And now *Obergefell* has led to HB 1523. The next chapter of this back-and-forth has begun.

**B. House Bill 1523**

Mississippi's highest elected officials were displeased with *Obergefell*. Governor Bryant stated that *Obergefell* "usurped [states'] right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of

many in the United States and that are certainly out of step with the majority of Mississippians."[5] Governor Phil Bryant, *Governor Bryant Issues Statement on Supreme Court Obergefell Decision*, June 26, 2015.[6]

Legislative leaders felt similarly. Lieutenant Governor Tate Reeves, who presides over the State Senate, called the decision an "overreach of the federal government." Geoff Pender, *Lawmaker: State Could Stop Marriage Licenses Altogether*, The Clarion-Ledger, June 26, 2015.[7] Speaker of the House Philip Gunn said *Obergefell* was "in direct conflict with God's design for marriage as set forth in the Bible. The threat of this decision to religious liberty is very clear." *Id.*[8] Representative Andy Gipson, Chairman of the House Judiciary B Committee, pledged to study whether Mississippi should stop issuing marriage licenses altogether. *Id.*[9]

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[5] Governor Bryant's statement is only partially true. While states have mostly been permitted to regulate marriage within their borders, the Supreme Court has stepped in to ensure that "self-governance" complies with equal protection. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.").

[6] The Governor's remarks sounded familiar. In the mid-1950s, Governor J.P. Coleman said that *Brown v. Board of Education* "represents an unwarranted invasion of the rights and powers of the states." Charles C. Bolton, William F. Winter and the New Mississippi: A Biography 97 (2013). In 1962, before a joint session of the Mississippi Legislature – and to a "hero's reception" – Governor Ross Barnett was lauded for invoking states' rights during the battle to integrate the University of Mississippi. Charles W. Eagles, The Price of Defiance: James Meredith and the Integration of Ole Miss 290-91 (2009) [hereinafter Price of Defiance].

[7] The State has objected to the Court's use of newspaper articles. In an Establishment Clause challenge, however, a District Court errs when it takes "insufficient account of the context in which the statute was enacted and the reasons for its passage." *Salazar v. Buono*, 559 U.S. 700, 715 (2010). The Fifth Circuit agrees: "context is critical in assessing neutrality" in this area of the law. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir. 2001).

[8] Using God as a justification for discrimination is nothing new. It was Governor Barnett who proclaimed that "[t]he Good Lord was the original segregationist. He made us white, and he intended that we stay that way." Price of Defiance at 282. Warping the image of God was not reserved to Mississippi politicians. In testimony before Congress during the debate on the Civil Rights Act of 1964, a Maryland businessman testified before a Senate committee that "God himself was the greatest segregationist of all time as is evident when he placed the Caucasians in Europe, the black people in Africa, the yellow people in the Orient and so forth." Linda C. McClain, *The Civil Rights Act of 1964 and "Legislating Morality": On Conscience, Prejudice, and Whether "Stateways" Can Change "Folkways"*, 95 B.U. L. Rev. 891, 917 (2015). He continued, "Christ himself never lived an integrated life, and . . . when he chose His close associates, they were all white. This doesn't mean that He didn't love all His creatures, but it does indicate that He didn't think we had to have all this togetherness in order to go to heaven." *Id.*

[9] The suggestion was (again) familiar. A few months after the Supreme Court's decision in *Brown*, Mississippians – those who were permitted to vote, that is – "voted two to one approving a constitutional amendment abolishing the state schools system if it integrated." Dennis J. Mitchell, A New History of Mississippi 404 (2014).

The angst was not limited to the executive and legislative branches. Two Justices of the Mississippi Supreme Court also expressed their disgust with *Obergefell*. In 2014, a lesbian had petitioned that body for the right to divorce her wife in a Mississippi court. *Czekala-Chatham v. State ex rel. Hood*, --- So. 3d ---, 2015 WL 10985118 (Miss. Nov. 5, 2015). While her case was pending, the U.S. Supreme Court handed-down *Obergefell*. Although a majority of the Mississippi Supreme Court concluded that *Obergefell* resolved her case in her favor, Justices Dickinson and Coleman argued that the *Obergefell* Court had legislated from the bench and overstepped its authority. *Id.* at *3 (Dickinson, J., dissenting). They opined that "state courts are not required to recognize as legitimate legal authority a Supreme Court decision that is in no way a constitutional interpretation," and claimed "a duty to examine those decisions to make sure they indeed are constitutional interpretations, rather than . . . an exercise in judicial will." *Id.* at *4, *6.[10] *Obergefell* was "[w]orthy only to be disobeyed," they said. *Id.* at *5.

Mississippi's legislators formally responded to *Obergefell* in the next legislative session.[11] Speaker Gunn drafted and introduced HB 1523, the "Protecting Freedom of Conscience from Government Discrimination Act."[12] The bill overwhelmingly passed both chambers, and the Governor signed it into law on April 5, 2016. It goes into effect on July 1.

HB 1523's meaning is contested. A layperson reading about the bill might conclude that it gives a green light to discrimination and prevents accountability for discriminatory acts.

[10] *But see James v. City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise.").

[11] This had happened before in the religious liberty context. In 1994, "[o]n a wave of public sentiment and indignation over the treatment of a Principal . . . who allowed students to begin each school day with a prayer over the intercom, the Mississippi legislature passed the School Prayer Statute at issue here." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996). The statute was unconstitutional. *Id.*

[12] "'After the Supreme Court decision in Obergefell (v. Hodges), it became apparent that there would be a head-on collision between religious convictions about gay marriage and the right to gay marriage created by the decision,' [Speaker] Gunn said." Adam Ganucheau, *Mississippi's 'Religious Freedom' Law Drafted Out of State*, Mississippi Today, May 17, 2016. One commentator concluded that "HB 1523 was hatched" after the issuance of this Court's Permanent Injunction. Sid Salter, *Constitutional Ship has Sailed on Same-Sex Marriage*, The Clarion-Ledger, May 8, 2016. "Clearly, House Bill 1523 seeks to work around the federal *Obergefell* decision at the state level." *Id.*

Arielle Dreher, *Hundreds Rally to Repeal HB 1523, State Faces Deadline Today Before Lawsuit*, Jackson Free Press, May 2, 2016 (quoting Chad Griffin, President of the Human Rights Campaign, as saying, "it's sweeping and allows almost any individual or organization to justify discrimination against LGBT people, against single mothers and against unwed couples."). Someone else reading the same article might conclude that HB 1523 simply "reinforces" the First Amendment. *Id.* (quoting Speaker Gunn as saying the gay community "can do the same things that they could before"). So any discussion should begin with the plain text of the bill.

HB 1523 enumerates three "sincerely held religious beliefs or moral convictions" entitled to special legal protection. They are,

> (a) Marriage is or should be recognized as the union of one man and one woman;
> (b) Sexual relations are properly reserved to such a marriage; and
> (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

HB 1523 § 2. These will be referred to as the "§ 2" beliefs.

The bill then says that the State of Mississippi will not "discriminate" against persons who act pursuant to a § 2 belief. *Id.* §§ 3-4.[13] For example, if a small business owner declines to provide goods or services for a same-sex wedding because it would violate his or her § 2 beliefs, HB 1523 allows the business to decline without fear of State "discrimination."

"Discrimination" is defined broadly. It covers consequences in the realm of taxation, employment, benefits, court proceedings, licenses, financial grants, and so on. In other words, the State of Mississippi will not tax you, penalize you, fire you, deny you a contract, withhold a diploma or license, modify a custody agreement, or retaliate against you, among many other

[13] HB 1523 § 9(2)-(3) defines "State government" to include private persons, corporations, and other legal entities.

enumerated things, for your § 2 beliefs. *Id.*[14] An organization or person who acts on a § 2 belief is essentially immune from State punishment.[15]

The Governor's signing statement recognized that consequences under federal law are unchanged. States "lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 736 (2009).

Parts of the law provide fodder for both its opponents and its proponents. One section of HB 1523 guarantees that the State will not take adverse action against a religious organization that declines to solemnize a wedding because of a § 2 belief. *Id.* § 3. There is nothing new or controversial about that section. Religious organizations already have that right under the Free Exercise Clause of the First Amendment.

Citizens also enjoy substantial religious rights under existing state law. The Mississippi Constitution ensures that "the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred," and "no preference shall be given by law to any religious sect or mode of worship."[16] Miss. Const., § 18. In addition, a 2014 law called the "Mississippi Religious Freedom Restoration Act" (RFRA) states that the government "may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest." Miss. Code Ann. § 11-61-1(5)(b) (emphasis added). HB 1523 does not change either of these laws.[17]

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[14] This is more expansive than other anti-discrimination laws, such as Title VII or Title IX.

[15] The broad immunity provision may violate the Mississippi Constitution, which provides that "every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." Miss. Const. § 24.

[16] Despite the inclusive language just quoted, § 18 of the Mississippi Constitution then says that "[t]he rights hereby secured shall not be construed . . . to exclude the Holy Bible from use in any public school."

[17] Mississippi's RFRA is also part of the political back-and-forth on LGBT rights. "State-based RFRAs were passed to preemptively provide religious exemptions to people in advance of a Supreme Court ruling on gay marriage, [Professor Doug] NeJaime said." Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against*

We return to HB 1523. Several parts of the bill are unclear. One says the State will not take action against foster or adoptive parents who intend to raise a foster or adoptive child in accordance with § 2 beliefs. HB 1523 § 3(3). It is not obvious how the State would respond if the child in urgent need of placement was a 14-year-old lesbian.

Another section discusses a professional's right to refuse to participate in "psychological, counseling, or fertility services" because of a § 2 belief. *Id.* § 3(4). But some professions' ethical rules prohibit "engag[ing] in discrimination against prospective or current clients . . . based on . . . gender, gender identity, sexual orientation, [and] marital/ partnership status," to name a few categories. American Counseling Association, Code of Ethics § C.5 (2014). Under HB 1523, though, a public university's faculty must confer a degree upon, and the State must license, a person who refuses to abide by her chosen profession's Code of Ethics.[18]

Section 3(8)(a) of the law, in contrast, is crystal clear. It says that a government employee with authority to issue marriage licenses may recuse herself from that duty if it would violate one of her § 2 beliefs. HB 1523 § 3(8)(a). The employee must provide prior written notice to the State Registrar of Vital Records and be prepared to "take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal." *Id.* The State's attorneys agree that this section "effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law by specifying conditions under which a clerk's employee may recuse himself or herself from authorizing or licensing marriages." Docket No. 41, at 6, in Cause No. 3:14-CV-818.

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*Gay Parents?*, The Atlantic, Sept. 23, 2015. Mississippi's RFRA fits this timeline perfectly. In summer 2013, the Supreme Court's ruling in *United States v. Windsor* foreshadowed an imminent victory for same-sex marriage. A few months later, Mississippi's elected officials enacted the State RFRA.

[18] Relatedly, in other states, citizens have successfully sued so-called "gay conversion" therapists for consumer fraud and professional malpractice. *See* Olga Khazan, *The End of Gay Conversion Therapy*, The Atlantic, June 26, 2015. HB 1523 § 4 would bar a Mississippi court from enforcing such a verdict.

The significance of this section is in the eye of the beholder. The plaintiffs argue that it facilitates discrimination against LGBT Mississippians by encouraging clerks to opt-out of serving same-sex couples.

HB 1523's defenders respond that the bill protects *against* discrimination by ensuring that clerks do not have to violate their religious beliefs. When Senator Jenifer Branning shepherded the bill through the Senate floor debate, she argued that the legislation actually *lifts* a burden imposed by *Obergefell*.[19] H.B. 1523, Debate on the Floor of the Mississippi Senate, at 7:02 (Mar. 31, 2016) (statement of Sen. Jenifer Branning) [hereinafter Senate Floor Debate]. In her view, HB 1523 is "balancing" legislation allowing those who oppose same-sex marriage to continue to perform their jobs with a "clear conscience," while protecting the rights of same-sex couples to receive a marriage license from another clerk. *Id.* at 26:55, 32:27.[20]

**C. These Suits**

On June 3, 2016, Rev. Dr. Barber, Rev. Burnett, Bailey, Day, Boyette, Rev. Fortenberry, Dr. Glisson, Johnson, Triplett, Taylor, Mangum-Dear, Mangum, and JGMCC filed the first suit encompassed by this Order. *See* Docket No. 1, in *Barber*. They asserted Establishment and Equal Protection claims against Governor Bryant, General Hood, Executive Director Davis, and Registrar Moulder. *Id.* They requested a declaratory judgment that HB 1523 is unconstitutional on its face, as well as preliminary and permanent injunctive relief enjoining its enforcement.

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[19] Mississippi does not have formal legislative history; however, the Mississippi College School of Law's Legislative History Project archives the floor debate for bills that pass. The HB 1523 videos are available at http://law.mc.edu/legislature/bill_details.php?id=4621&session=2016. Unofficial transcripts were also introduced into evidence. *See* Docket No. 33-14, in *CSE IV*.

[20] These arguments are apparently increasingly common. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2560-61 (2015) (arguing that proponents of traditional morality "now emphasize different justifications for excluding same-sex couples from marriage -- for example, that marriage is about biological procreation or that preserving 'traditional marriage' protects religious liberty. At the same time, in anticipation of the possibility of defeat, they argue for exemptions from laws that recognize same-sex marriage. In so doing, they shift from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity.").

CSE and Rev. Dr. Hrostowski sued the same defendants on June 10, 2016. *See* Docket No. 1, in *CSE IV*. They asserted an Establishment Clause claim and sought the same relief as the *Barber* plaintiffs. *Id.*

The various plaintiffs conferred and moved to consolidate. The State was prepared to argue *Barber*, but objected to consolidation to avoid an abbreviated briefing schedule and a hearing in *CSE IV*. *See* Docket No. 22, in *Barber*. During a status conference, the Court heard the parties' positions and granted the State its requested response deadline. The Court also delayed the motion hearing – which was converted into a joint hearing – by two days. The State renewed its objection to the consolidated hearing and was overruled. These reasons follow.

The State essentially argued that there were too many HB 1523-related lawsuits – there are four – to fully prepare for a hearing in *CSE IV*. It entered into the record a Mississippi Today article in which General Hood said, "'I and over half of our lawyers in the Civil Litigation Division are working overtime and weekends attempting to prepare for the hearings.'" Docket No. 22-2, in *Barber*. General Hood added that budget cuts prevented him from hiring an expert to prepare "for the highly specialized area of the law seldom litigated in Mississippi -- the Establishment Clause." *Id.* (ellipses omitted).

The first hurdle for the State is the substantial overlap in subject matter between *Barber* and *CSE IV*. The similar briefing suggests that little additional work was required to defend *CSE IV*. *Barber*, in fact, has a greater number of substantive claims than *CSE IV*. Having prepared for the more comprehensive hearing, it is difficult for the State to object to the narrower one.

The second, more significant problem with the State's argument is the utter predictability of these lawsuits. The media started reporting the likelihood of litigation on April 5, the day the Governor signed HB 1523 into law. *See, e.g.*, Arielle Dreher, *'Total Infringement': Governor*

*Signs HB 1523 Over Protests of Business Leaders, Citizens*, Jackson Free Press, Apr. 5, 2016 ("'You will see several lawsuits filed before it becomes law if the governor signs it,'" one attorney said); Caray Grace, *Local Residents and City Leaders React to House Bill 1523*, WLOX, Apr. 5, 2016 ("'the lawyers were already starting to draft up lawsuits so that as soon as he signed it, they could start filing them,' said [Molly] Kester.").

General Hood apparently knew these lawsuits were coming as early as April 5, when he said he would make "case-by-case" decisions on whether to defend the lawsuits, and warned that the bill doesn't override federal or constitutional rights. *Legal Pressure May Be Ahead for Mississippi Law Denying Service to Gays*, Chicago Tribune, Apr. 5, 2016.

The media even telegraphed the exact Establishment Clause arguments the plaintiffs eventually asserted. In early April, the press reported that 10 law professors from across the country released a memorandum outlining several ways in which HB 1523 violates the Establishment Clause. *See* Sierra Mannie, *Will Mississippi's "Religious Freedom" Act Impact Children in Public and Private Schools?*, The Hechinger Report, Apr. 8, 2016. In May, Jackson attorney Will Manuel, a partner at Bradley LLP, said, "'[b]y only endorsing certain religious thought, I believe it is in violation of the Establishment Clause of the First Amendment which prohibits government from establishing or only protecting one religion. That should be a fairly clear cut constitutional challenge." Ted Carter, *Feds Unlikely to Ignore Mississippi's HB1523, Lawyers Say*, Mississippi Business Journal, May 26, 2016; *see also* Arielle Dreher, *HB 1523: Bad for the Business Sector*, Jackson Free Press, June 8, 2016 (noting other legal concerns).

Perhaps the State's best argument against a hearing in *CSE IV* was that it would be unprepared to cross-examine religion experts because it did not have time to find its own

expert.[21] Its objection fell flat when its attorneys filed the article in which General Hood said that *budget cuts* caused the lack of expert assistance.[22] If budget cuts explain the State's lack of expert assistance, no extension of time could have helped it prepare for a hearing.

For these reasons, the hearings were consolidated. Now, having considered the evidence and heard oral argument, the motions for preliminary injunction have been consolidated into this Order. The cases remain their separate identities pending further motion practice.

That brings us to the State's initial legal arguments.

## III. Threshold Questions

### A. Standing

The State first challenges the plaintiffs' capacity to bring these suits.

The United States Constitution limits the jurisdiction of federal courts to actual cases and controversies. U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation marks and citation omitted). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

As the party seeking to invoke this Court's jurisdiction, the plaintiffs must demonstrate all three elements of standing: (1) an injury in fact that is concrete and particularized as well as imminent or actual; (2) a causal connection between the injury and the defendant's conduct; and

[21] The Court has sought to understand what kind and amount of evidence would show a forbidden religious preference. In this case, it finds the plain language of HB 1523 and basic knowledge of local religious beliefs to be sufficient. Today's outcome is informed by but does not turn on the expert testimony heard in *CSE II*.

[22] It also weakens the State's objection to the Court's use of newspaper articles.

(3) that a favorable decision is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In a standing analysis, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). Standing is not handed out in gross. *CSE III*, 2016 WL 1306202, at *2. A case with multiple plaintiffs can move forward as long as one plaintiff has standing as to each claim. *CSE I*, 64 F. Supp. 3d at 916.

**1. Injury in Fact**

To establish an injury in fact, the plaintiffs must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation marks and citation omitted). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1. An injury is concrete when it is "real, not abstract." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1556 (2016) (quotation marks and citation omitted). Intangible injuries can satisfy the concreteness requirement. *Id.* at 9. A plaintiff must demonstrate "that he has sustained or is immediately in danger of sustaining some direct injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quotation marks and citations omitted).

**a. Equal Protection Injuries**

The *Barber* plaintiffs in category two – *i.e.*, the LGBT plaintiffs and Dr. Glisson – allege that HB 1523 violates their rights under the Equal Protection Clause of the Fourteenth Amendment.[23] Claims under the Equal Protection Clause can include both tangible and intangible injuries. As noted in *Heckler v. Matthews*,

[23] In discussing the Equal Protection claim, references to LGBT citizens should also be read to include unmarried-but-sexually-active citizens. The latter group may have been a collateral consequence of HB 1523.

> discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

465 U.S. 728, 739-40 (1984) (quotation marks and citation omitted). "Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing doctrine." *CSE I*, 64 F. Supp. 3d at 917 (quotation marks and citation omitted).

The State first challenges standing on the basis that the plaintiffs' injuries are speculative and not imminent, arguing that the plaintiffs have not alleged the denial of any right or benefit as a result of HB 1523. It points to *Clapper v. Amnesty International, USA*, which held that "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." 133 S. Ct. 1138, 1147 (2013) (quotation marks and citation omitted).

This language, however, supports that the plaintiffs *do* have imminent injuries. If it goes into effect on July 1, plaintiffs say, HB 1523 will subject them to a wide range of arbitrary denials of service at the hands of public employees and private businesses.

The plaintiffs also say that HB 1523 will limit the protections LGBT persons currently have under state, county, city, and public school anti-discrimination policies. In the City of Jackson, for example, a municipal ordinance provides protection from discrimination on the basis of religion, sexual orientation, and gender identity, among other characteristics. Docket No. 32-17, in *Barber*. This ordinance protects several of the plaintiffs. *Id.* The plaintiffs then point to

University of Southern Mississippi's (USM) anti-discrimination policy, which guarantees equal access to "educational, programmatic and employment opportunities without regard to" religion, sexual orientation, or gender identity. Docket No. 32-18, in *Barber*. If HB 1523 goes into effect, USM's policy cannot be fully enforced. USM employees who invoke a § 2 belief will enjoy enhanced protection to decline to serve others on the basis of sexual orientation, and USM will not be able to discipline those employees who violate its internal anti-discrimination policy.[24]

In this context, the imminent injury to the plaintiffs, other LGBT persons, and unmarried persons is exactly the same as the injury recognized by the Supreme Court in *Romer*. In striking down an amendment to Colorado's constitution, the Court found that:

> Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions . . . . Not confined to the private sphere, Amendment 2 also operates to repeal and forbid laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.

517 U.S. at 629.

A closer analogue is difficult to imagine. As in *Romer*, HB 1523 "withdraws from homosexuals, [transgender, and unmarried-but-sexually-active persons,] but no others, specific legal protection from the injuries caused by discrimination, and it forbids the reinstatement of these laws and policies." *Id.* at 627. If individuals had standing to file *Romer* before Amendment 2 went into effect, these plaintiffs may certainly do the same.

The State's argument overlooks the fundamental injurious nature of HB 1523 – the establishment of a broad-based system by which LGBT persons and unmarried persons can be subjected to differential treatment based solely on their status. This type of differential treatment

[24] Imagine that two USM students, who are a gay couple, walk into the cafeteria but are refused service because of the worker's religious views. Could that employee be disciplined for refusing service? It is not clear what remedy they would have to remove the sting of humiliation.

is the hallmark of what is prohibited by the Fourteenth Amendment. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) ("The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially."). To put it plainly, the plaintiffs' injuries are "certainly impending" today, and without Court intervention, the plaintiffs will suffer actual injuries. *Clapper*, 133 S. Ct. at 1147.

The State then argues that the plaintiffs lack standing because they are not the "objects" of HB 1523. The argument comes from *Lujan*'s statement that "standing depends considerably upon whether the plaintiff is himself an object of the" government's action or inaction at issue. *Lujan*, 504 U.S. at 561. The true objects of the law, the State claims, are those persons who want to freely exercise a § 2 belief. Docket No. 30, at 18, in *Barber*.

The Court is not persuaded. A robust record shows that HB 1523 was intended to benefit some citizens at the expense of LGBT and unmarried citizens. At oral argument, the State admitted that HB 1523 was passed in direct response to *Obergefell*, stating, "after *Obergefell*, citizens who hold the beliefs that are protected by 1523 were effectively told by the U.S. Supreme Court, *Your beliefs are garbage*." Transcript of Hearing on Motion for Preliminary Injunction at 324, Barber v. Bryant, No. 3:16-CV-417 (S.D. Miss. June 24, 2016) [hereinafter Tr. of June 24].

It is therefore difficult to accept the State's implausible assertion that HB 1523 was intended to protect certain religious liberties and simultaneously ignore that the bill was passed because same-sex marriage was legalized last summer. *See Romer*, 517 U.S. at 626.

Members of the LGBT community and persons like Dr. Glisson will suffer a concrete and particular injury as a result of HB 1523. Part of the injury is stigmatic, *see CSE I*, 64 F. Supp. 3d at 917, but that stigmatic injury is linked to the tangible rights that will be taken away

on July 1, including the tangible rights *Obergefell* extended. There are almost endless explanations for how HB 1523 condones discrimination against the LGBT community, but in its simplest terms it denies LGBT citizens equal protection under the law. Thus, those plaintiffs who are members of the LGBT community, as well as Dr. Glisson, have demonstrated an injury in fact sufficient to bring their Equal Protection claim.

**b. Establishment Clause Injuries**

All plaintiffs have asserted Establishment Clause claims.

In Establishment Clause actions, the injury in fact requirement may vary from other types of cases. *See Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 194 (5th Cir. 2006). "The concept of injury for standing purposes is particularly elusive in Establishment Clause cases." *Id.*

Plaintiffs can demonstrate "standing based on the direct harm of what is claimed to be an establishment of religion" or "on the ground that they have incurred a cost or been denied a benefit on account of their religion." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129-30 (2011). Courts also recognize that taxpayers have standing to challenge direct government expenditures that violate the Establishment Clause. *Id.* at 138-39; *see Flast*, 392 U.S. at 106. The Supreme Court has found standing in a wide variety of Establishment Clause cases "even though nothing was affected but the religious or irreligious sentiments of the plaintiffs." *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049-50 (9th Cir. 2010) (en banc) (collecting cases).

In *Croft v. Governor of Texas*, the Fifth Circuit concluded that a citizen had standing to challenge a public school's daily moment of silence because his children were enrolled in the school and were required to observe the moment of silence. 562 F.3d 735, 746 (5th Cir. 2009)

[hereinafter *Croft I*]. This injury was sufficient because the plaintiff and his family demonstrated that they were exposed to and injured by the mandatory moment of silence. *Id.* at 746-47.[25]

In our case, the State contends that the plaintiffs' alleged non-economic injuries are insufficiently particular and concrete. It cites *Valley Forge Christian College v. Americans United for Separation of Church and State*, which found that:

> [the plaintiffs] fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though that disagreement is phrased in constitutional terms.

454 U.S. 464, 485-86 (1982).

In *Valley Forge*, an organization and four of its employees who lived in the Washington D.C. area challenged the constitutionality of a land conveyance from a government agency to a religious-affiliated education program in Pennsylvania. *Id.* at 468-69. The plaintiffs had learned of the land conveyance from a press release. *Id.* at 469. They merely observed the alleged constitutional violation from out-of-state.

The facts in the present case are quite different. Here, the plaintiffs are 13 individuals who reside in Mississippi, a Mississippi church, and an advocacy organization with members in Mississippi. The plaintiffs may have become aware of HB 1523 from news, friends, or social media, but regardless of how they learned of the legislation, it is set to become the law of *their state* on July 1. It will undeniably impact their lives. The enactment of HB 1523 is much more than a "psychological consequence" with which they disagree, it is allegedly an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others.

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[25] The Fifth Circuit distinguished *Croft* from *Doe v. Tangipahoa Parish School Board*, where it had declined to find standing in a case challenging prayers at school board meetings because the plaintiffs had never attended a school board meeting.

A more applicable case is *Catholic League*. There, the plaintiffs included a Catholic civil rights organization and devout Catholics who lived in San Francisco. 624 F.3d at 1048. They sued over a municipal resolution that expressly denounced Catholicism and the Catholic Church's beliefs on same-sex couples. *Id.* at 1047. The appellate court found that they had standing to bring such a case against their local government.

Similarly, today's individual plaintiffs have attested that they are citizens and residents of Mississippi, they disagree with the religious beliefs elevated by HB 1523, HB 1523 conveys the State's disapproval and diminution of their own deeply held religious beliefs, HB 1523 sends a message that they are not welcome in their political community, and HB 1523 sends a message that the state government is unwilling to protect them. *See, e.g.*, Docket Nos. 32-2; 32-3; 32-5 (all in *Barber*).

Plaintiff Taylor, for example, is "a sixth-generation Mississippian" and "former Navy combat veteran." Docket No. 32-8, in *Barber*. He is also a gay man engaged to be married next year. *Id.* Taylor thinks HB 1523 is hostile toward his religious values and targets LGBT persons. *Id.*

Dr. Glisson describes herself as "a member of the Southern Baptist Church co-founded by my grandparents" who has "studied and reflected upon my faith choice almost all my life." Docket No. 32-6, in *Barber*. "I am convinced that the heart of the Gospel is unconditional love. To condemn the presence of God in another human being, especially using faith claims or scripture to do so, is wrong and violates all of the tenets of my Christian faith." *Id.*

Dorothy Triplett explained her religious objections in detail. "I am a Christian, and nowhere in scripture does Jesus the Christ condemn homosexuality," she said. Docket No. 32-9, in *Barber*. "He instructed us to love our neighbors as ourselves. In St. Paul's Letter to the

Galatians 3:28: New Revised Standard Version (NRSV): 'There is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for all of you are one in Christ Jesus.'" *Id.*

Based on their allegations and testimony, each individual plaintiff has adequately alleged cognizable injuries under the Establishment Clause. The "sufficiently concrete injur[ies]" here are the psychological consequences stemming from the plaintiffs' "exclusion or denigration on a religious basis within the political community." *Catholic League*, 624 F.3d at 1052; *see Awad*, 670 F.3d at 1123.

Their injuries are also imminent. HB 1523 is set to become law on July 1. "There is no need for [the plaintiffs] to wait for actual implementation of the statute and actual violations of [their] rights under the First Amendment where the statute" violates the Establishment Clause. *Ingebretson v. Jackson Public Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996).

**2. Causation**

The State next argues that the plaintiffs have not shown that their injuries have a causal connection to the defendants' conduct. It cites *Southern Christian Leadership Conference v. Supreme Court of Louisiana* for the proposition that an injury cannot be the result of a third party's independent action, and instead must be traceable to the named parties. 252 F.3d 781, 788 (5th Cir. 2001). The contention here is that any injuries will be caused by third parties – like a clerk who refuses to promptly issue a marriage license to a same-sex couple – and therefore that the plaintiffs should sue those third parties.

The argument is unpersuasive. On July 1, the plaintiffs will be injured by the state-sponsored endorsement of a set of religious beliefs over all others. *See Santa Fe*, 530 U.S. at 302; *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. 2010). Regardless of any third-

party conduct, the bill creates a statewide two-tiered system that elevates heterosexual citizens and demeans LGBT citizens. The plaintiffs' injuries are therefore caused by the State – and specifically caused by the Governor who signed HB 1523 bill into law – and will at a minimum be enforced by officials like Davis and Moulder.

In addition, in similar cases under the Establishment and Equal Protection Clauses, the Supreme Court has found a state's governor to be a proper defendant for the causal connection requirement of standing. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Romer*, 517 U.S. at 620.

Accordingly, the plaintiffs have demonstrated that there is a causal connection between their injuries and the defendants' conduct.

**3. Redressability**

The final prong of standing requires the plaintiffs to demonstrate that a favorable judicial decision will redress their grievances. *Lujan*, 504 U.S. at 561. The State argues that "Plaintiffs would still be facing their same alleged injury tomorrow if the Court preliminary enjoins the named Defendants today." Docket No. 30, at 24, in *Barber*. It fails to support this claim with any further argument or facts.

"[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740 (quotation marks and citation omitted). "By declaring the [statute] unconstitutional, the official act of the government becomes null and void." *Catholic League*, 624 F.3d at 1053.

Here, the harm done by HB 1523 would be halted if the statute is enjoined. Nothing in the plaintiffs' briefs, oral argument, or testimony indicates that they expect a favorable ruling to change the hearts and minds of Mississippians opposed to same-sex marriage, transgender

equality, or sex before marriage. They simply ask the Court to enjoin the enforcement of a state law that both permits arbitrary discrimination based on those characteristics and endorses the majority's favored religious beliefs. That is squarely within the Court's ability. *See Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir. 2012).

"Even more important, a declaratory judgment would communicate to the people of the plaintiffs' community that their government is constitutionally prohibited from condemning the plaintiffs' religion, and that any such condemnation is itself to be condemned." *Catholic League*, 624 F.3d at 1053.

The Court concludes that the individual plaintiffs have standing to bring these claims.

**4. Associational Standing**

In some instances, organizations may bring suit on behalf of their members. To establish associational standing, the organization must show that: (1) its members would have standing to sue on their own behalf; (2) the interests it seeks to safeguard are germane to the organization's purpose; and (3) neither the claim asserted nor the requested relief necessitate the participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 343 (1977).

JGMCC seeks associational standing as a church with many LGBT members and a community service ministry that promotes LGBT+ equality. Because members of the church have standing to bring suit on their own behalf – at least two of its members are individual plaintiffs – the first element of associational standing is satisfied. Ensuring that its members are not discriminated against on the basis of sexual orientation, gender identity, or religion is undoubtedly germane to its purpose. And JGMCC's facial challenge does not require the participation of individual members. JGMCC has associational standing.

The same is true for CSE. That organization also has a member participating in this lawsuit, is aligned with the arguments and relief sought in this suit, and need not have additional members to assert its particular cause of action. It has associational standing. *Accord CSE I*, 64 F. Supp. 3d at 918; *CSE III*, 2016 WL 1306202, at *11.

**B. *Ex Parte Young***

The next issue is whether these defendants are properly named in this suit.

**1. Legal Standard**

Under the Eleventh Amendment, citizens cannot sue a state in federal court. U.S. Const. amend. XI; *see Hutto v. Finney*, 437 U.S. 678, 699 (1978). In *Ex parte Young*, however, the Supreme Court carved out a narrow exception to this rule. 209 U.S. 123 (1908). The resulting *Ex parte Young* "fiction" holds that "because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment." *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc). When a plaintiff sues a state official in his official capacity for constitutional violations, the plaintiff is not filing suit against the individual, but instead the official's office, and can proceed with the constitutional claims. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989).

The *Ex parte Young* fiction requires that the state officer have "some connection with the enforcement of the act" or be "specially charged with the duty to enforce the statute," and also that the official indicate a willingness to enforce it. *Ex parte Young*, 209 U.S. at 157, 158. The officer's authority to enforce the act does not have to be found in the challenged statute itself; it is sufficient if it falls within the official's general duties to enforce related state laws.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (quotation marks, citation, and brackets omitted).

**2. Discussion**

All four defendants – the Governor, the Attorney General, the Executive Director of the Department of Human Services, and the Registrar of Vital Records – are state officials sued in their official capacities. These suits are effectively brought against their various offices. All four defendants also have a connection to the enforcement of HB 1523.

Although Governor Bryant is the chief executive of the State, *Ex parte Young* does not permit a suit against a governor solely on the theory that he is "charged with the execution of all of its laws." *Ex parte Young*, 209 U.S. at 157. A more specific causal connection is required. *Id.* That connection is satisfied here. The Governor is the manager and supervisor of his staff, so he is personally required to enforce HB 1523's terms prohibiting adverse action against any of his employees who exercise a § 2 belief. Since the Governor has also indicated his willingness to enforce HB 1523 to the full extent of his authority, he is a proper defendant. *See* CB Condez, *Mississippi Governor: Christians Would Line up for Crucifixion Before Abandoning Faith*, The Christian Times, June 2, 2016 ("'[HB 1523's critics] don't know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and Savior Jesus Christ,' [Governor Bryant] said.").[26]

[26] The Governor's remarks are reminiscent of what Circuit Judge Tom P. Brady, later Mississippi Supreme Court Justice Brady, warned in his infamous Black Monday Speech. Judge Brady called on others to disobey *Brown v. Board of Education* by saying, "We have, through our forefathers, died before for our sacred principles. We can, if necessary, die again." Stephen J. Whitfield, A Death in the Delta: The Story of Emmett Till 10 (1988).

In Establishment and Equal Protection Clause cases in particular, governors are often properly included as named defendants. *See Romer,* 517 U.S. at 620 (Gov. Roy Romer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Gov. Edwin W. Edwards); *Wallace*, 472 U.S. at 38 (Gov. George C. Wallace); *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010) (Gov. Rick Perry, as the sole defendant) [hereinafter *Croft II*]; *Croft I*, 562 F.3d at 735 (same).

General Hood is the state's chief law enforcement officer, but his general duty to represent the state in litigation is inadequate to invoke the *Ex parte Young* exception. Like the Governor, though, HB 1523 prohibits General Hood from taking any action against one of his employees who acts in accordance with a § 2 belief. The Attorney General's Office employs hundreds of people across Mississippi, so he may very well be confronted with an HB 1523 issue.

Executive Director Davis, until authority is formally transferred to the new Department of Child Protective Services, is responsible for administering a variety of social programs. *See* Miss. Code Ann. § 43-1-51. HB 1523 has at least two sections that fall under his purview. *See* HB 1523 § 3(2)-(3). Under HB 1523, for example, DHS cannot take action against a foster or adoptive parent who violates DHS policies based on a § 2 belief. Davis's attorneys have given every impression that he will fully enforce his duties under HB 1523.

As discussed above, Registrar Moulder is responsible for executing state laws concerning registration of marriages. *See* Miss. Code Ann. § 51-57-43. HB 1523 adds a new responsibility to her existing obligations: she must record the recusal of any circuit clerk who refuses to issue a marriage license because of a § 2 belief. HB 1523 § 3(8)(a). Thus, she has a connection with HB 1523's enforcement. Her counsel has also indicated her intent to comply with her new duties.

Lastly, the plaintiffs' requested relief also satisfies the Eleventh Amendment and *Ex parte Young*. In both cases, they have requested declaratory and prospective injunctive relief that would enjoin the enforcement of HB 1523 and prevent state officials from acting contrary to well-established precedent. Courts frequently grant this type of relief against state officials in constitutional litigation. *See, e.g.*, *Romer*, 517 U.S. at 620; *Wallace*, 472 U.S. at 38.

Accordingly, the *Ex parte Young* exception to the Eleventh Amendment applies and these suits may proceed to seek declaratory and injunctive relief against these defendants.

## IV. Motion for Preliminary Injunction

### A. Legal Standard

To receive a preliminary injunction, the movant must show "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012) (citation omitted). "Each of these factors presents a mixed question of fact and law." *Id.* (citation omitted).

"A preliminary injunction is an extraordinary remedy. It should only be granted if the movant has clearly carried the burden of persuasion on all four . . . prerequisites." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

"The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

**B. Substantial Likelihood of Success on the Merits**

The movant's likelihood of success is determined by substantive law. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). "To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which [HB 1523] is constitutional. If the plaintiffs successfully show [it] to be unconstitutional in every application, then that provision will be struck down as invalid." *Croft II*, 624 F.3d at 164.

**1. The Equal Protection Clause**

Under the Fourteenth Amendment, a state may not "deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of this Amendment means that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). The primary intent of the Equal Protection Clause was to require states to provide the same treatment for whites and freed slaves concerning personhood and citizenship rights enumerated in the Civil Rights Act of 1866.[27]

The Equal Protection Clause is no longer limited to racial classifications. That is not because racial discrimination and racial inequality have ceased to exist. Rather, as discrimination against groups becomes more prominent and understood, we turn to the Equal Protection clause to attempt to level the playing field. *Compare Bradwell v. Illinois*, 83 U.S. 130 (1872) (denying women equal protection of the laws) *with United States v. Virginia*, 518 U.S. 515 (1996)

[27] United States Senator Jacob Howard introduced the Fourteenth Amendment in the Senate. "This abolishes all class legislation in the States and does away with the injustice subjecting one caste of persons to a code not applicable to another," he said. "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man . . . the equal protection of law?" Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

(recognizing that women are entitled to equal protection of the laws). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557; *see* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988) ("The Equal Protection Clause . . . has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding."). One hundred and fifty years after its passage, the Fourteenth Amendment remains necessary to ensure that all Americans receive equal protection of the laws.

Sexual orientation is a relatively recent addition to the equal protection canon. In 1996, the Supreme Court made it clear that arbitrary discrimination on the basis of sexual orientation violates the Equal Protection Clause. *See Romer*, 517 U.S. at 635. Seven years later, the Court held that the Constitution protects LGBT adults from government intrusion into their private relationships. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

"After *Romer* and *Lawrence*, federal courts began to conclude that discrimination on the basis of sexual orientation that is not rationally related to a legitimate governmental interest violates the Equal Protection Clause." *Gill v. Delvin*, 867 F. Supp. 2d 849, 856 (N.D. Tex. 2012). Now, *Obergefell* makes clear that LGBT citizens have "equal dignity in the eyes of the law. The Constitution grants them that right." 135 S. Ct. at 2608.

**a. Animus**

"The Constitution's guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of

Written Statement of
David Stacy
Government Affairs Director
Human Rights Campaign

To the
Committee on
United States House of Representatives
Hearing Entitled: Religious Liberty and H.R. 2802, The First Amendment Defense Act
July 12, 2016

Mr. Chairman and Members of the Committee:

My name is David Stacy, and I am the Government Affairs Director for the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality. On behalf of our 1.5 million members and supporters nationwide, I appreciate the opportunity to submit this statement into the record for this hearing on the First Amendment Defense Act. However, before continuing with this statement, I must recognized that today marks the one-month anniversary of the tragic shooting at Pulse nightclub in Orlando, Florida. 49 people lost their lives, 53 were injured, and many more will spend the rest of their lives nursing the invisible scars of trauma and survival. Holding a hearing on legislation designed to undermine federal protections for LGBTQ people on this day is particularly insensitive to the still-grieving national LGBTQ community. It reflects an inexcusable disregard from our elected officials and a callous blindness to our shared humanity.

The right of free exercise of religion is fundamental. This freedom to worship – or not – without fear of government intrusion or compulsion is a core American value. Recognizing this right as a cornerstone of American identity, our country's founders designed explicit, intentional, and seemingly immovable protections. The First Amendment of the U.S. Constitution provides meaningful and weighty safeguards of this right that have consistently been strongly upheld by the courts. Today's hearing isn't about the First Amendment. It's not about freedom. It's not about protecting the vulnerable or the innocent. Today's hearing is an attempt to manipulate our dearest Constitutional words into dangerous tools to undermine the patchwork of federal legal protections the LGBTQ community has managed to piece together over the past decade. The First Amendment Defense Act ignores existing Constitutional protections for religious belief and practice. Perhaps even more troubling, FADA threatens to tip the delicate balance of individual rights and religious liberties that the founders so artfully designed, undermining decades of civil rights protections and leaving some of the most vulnerable members of our society open to unmediated discrimination.

Although we are deeply concerned with the whole of the bill, I would like to take the opportunity today to first address Section 3 of the latest version circulated Monday, July 11 entitled

"Protection of the Free Exercise of Religious Belief and Moral Conviction." The First Amendment provides strong protections from government establishment of religion and for the free exercise of religion. It is silent, however, on protections for so-called "moral convictions." The U.S. Code speaks of "moral conviction" with similarly stark rarity and courts have consistently made clear that the protections afforded to religious belief are not, and should not, be conflated with those lesser protections available for secular convictions. Federal courts have directly addressed the important difference between moral convictions and religious belief. The 3rd Circuit's decision in *Malnak v. Yogi*[1], provided the now well-established and accepted differentiation stating that religion is not "one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive 'truth'." The founders never intended to extend our most sacred Constitutional protections to myopic, singular convictions untethered by religious conviction. However, FADA does just that. It's incorporation of "moral convictions" along-side religious belief in Section 3 Subpart (a) not only ignores the Constitution, but transforms a secular conviction into a religious sanctity in the eyes of the law. This creates a misguided and dangerous precedent that was never intended by the framers.

We also take this opportunity to address Section 3, Subpart (a)(2), which includes the belief that "extramarital relations are improper" as a protected characteristic under FADA. This section of FADA runs contrary to the Constitutional principles of liberty and privacy by explicitly allowing for covered entities – including thousands of employers and service providers operating on behalf of the federal government – to discriminate against individuals based on private sexual conduct. As described in *Lawrence v. Texas*, the right to liberty under the Due Process Clause of the 14th amendment gives individuals "the full right to engage in private conduct without government intervention."[2] The *Lawrence* court also clearly states that laws seeking to regulate adult, consensual conduct – just as the federal government would hereby be condoning discrimination on the part of its agents -- touch "upon the most private human conduct, sexual behavior, and in the most private of places, the home."[3]

Subpart (a)(2) also seeks to circumvent laws prohibiting discrimination on the basis of marital or familial status that have been in place for over three decades. Currently 21 states prohibit such discrimination, and Federal grant-making agencies also uniformly include discrimination on the basis of family or marital status within grant requirements. These protections are essential and often protect some of the most vulnerable members in our society. Recent studies have shown that there is a growing marriage gap that cuts starkly across race, class, and socioeconomic lines.[4] Under FADA, organizations or businesses receiving federal funding could discriminate against families or individuals based on unmarried cohabitation or use of birth control or other forms of family planning. For example, an organization implementing a federal grant and

[1] *Malnak v. Yogi*, 592 F.2d 197, 205 (3d Cir. 1979).
[2] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).
[3] Id. at 562.
[4] Pew Research Center, *The Decline of Marriage and Rise of New Families* (2010).

otherwise bound by federal nondiscrimination provisions could be allowed to fire an unmarried female employee who utilizes birth control for family planning purposes simply by citing their sincerely held religious belief regarding sexual relations and marriage. An emergency shelter receiving HUD funding could turn away unmarried parents from a program designed to keep families just like theirs intact simply because they had engaged in extramarital sex. This undermines decades of civil rights case law and strips the growing number of single parent families of the critical protections they have come to depend on.

The "discriminatory actions" defined in subpart (b) are also deeply troubling. Sections (b)(1) and (2) provide that the Federal Government may not "alter in any way the Federal tax treatment of, or cause any tax, penalty or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986" or "disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person" as a result of discriminatory behavior on the part of a covered entity. These paragraphs are unnecessary at best and irresponsible fear mongering at worst. Religious organizations are considered exempt as charitable organizations under §501(c)(3) of the tax code. As written, FADA prohibits the IRS from revoking tax exempt status on the basis of a religious organization's beliefs on marriage or sexual behavior.

The IRS is loath to deny or rescind a religious organization's tax-exempt status. In fact, research conducted by a leading tax scholar indicated that over the past 37 years the IRS only issued 88 private letter rulings denying or withdrawing tax-exempt status.[5] Although the IRS has denied tax-exempt status on public policy grounds – largely on the basis of race discrimination – there is no record that it has withdrawn an organization's tax-exempt status on these grounds. The Supreme Court case of *Bob Jones Univ. v. United States* created the standard for denying tax-exempt status for organizations violating public policy.[6] In this case, the IRS determined that Bob Jones University, a Christian school, violated public policy by creating and enforcing racially discriminatory policies including a ban on interracial dating 16 years after *Loving v. Virginia*.[7] The Court's decision in *Bob Jones* is measured, providing an almost-clinical analysis of the development of the type of "fundamental public policy" that would warrant denial of tax-exempt status. Here the Court provides, "An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[8]

Aside from blatant race discrimination like that displayed for decades by Bob Jones University, the IRS and the courts have not found any activity to be a fundamental violation of public policy beyond those addressed in criminal and civil statutes. In fact, the Court in *Bob Jones* concluded

[5] Sam Brunson, "The Church Will Not Lose Its Tax Exempt Status," BY COMMON CONSENT, available at http://bycommonconsent.com/2015/07/09/the-church-will-not-lose-its-tax-exempt-status/.
[6] *Bob* Jones Univ. v. United States, 461 U.S. 574 (1983).
[7] Id.
[8] Id. at 593.

that, "these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy."[9] There is also clear federal court precedent that policies that discriminate on the basis of age, disability, and particularly sex are permissible under federal civil rights laws if they are in the context of practicing religion. These broad protections coupled with the IRS's well-documented aversion to denying tax exempt status on public policy grounds makes this provision in FADA misinformed, unnecessary, and irresponsible.

The remaining "discriminatory actions" included in Subpart (b) seek to foster state sanctioned discrimination under the guise of religious liberty. They severely limit the federal government's ability to protect vulnerable communities, and reveal a transparent attempt to co-opt the language of federal civil rights policies in order to undermine their effect. The bill's broad, overreaching language would not only prevent the federal government from combatting harmful discrimination, but could mandate it. Paragraph (b)(3) provides that the Federal Government may not "withhold, reduce, exclude, terminate, or otherwise make unavailable or deny any ***Federal grant, contract, subcontract***, cooperative agreement, guarantee, loan, scholarship, license, certification, accreditation, employment, or other similar position or status from or to such person" based on a covered entity's beliefs on marriage or sexual relations (***emphasis added***).

Under this provision, FADA would allow non-profit organizations and businesses contracting with the federal government to circumvent federal protections designed to protect same-sex couples and their families including Executive Order 11,246. For example, despite clear nondiscrimination policies, this bill would require the federal government to continue to contract with a non-profit business with a record of discriminatory employment practices against married same-sex couples if that employer cited their objection to same-sex marriage as a the reason for the discrimination.

Today, proponents of the bill have argued that these so-called "protections" are narrow and don't "focus on housing" and other critical social services. However, nothing could be further from the truth. Paragraph (b)(3) would also provide a de facto exemption from baseline nondiscrimination grant requirements –undermining access to lifeline programs and protections for those who need them the most. Federal grant making is not an abstract idea and its reach is far from narrow. In 2015 alone, the federal government issued over $600 billion in federal grant funding – much of this going to support programs that provide housing, health care, education and other critical inroads to stability and success for so many in our community. In order to receive a federal grant, organizations must comply with a set of standards to ensure that federal tax dollars are being used in ways that further the mission of the federal programs they are helping to administer. The Department of Housing and Urban Development, for example, provides billions of dollars to state and local governments and organizations to provide

[9] Id. at 598.

emergency housing and supportive services for individuals facing homelessness or housing insecurity. To receive these grants, organizations must comply with HUD's nondiscrimination requirements that not only prohibit discrimination on the basis of sexual orientation and gender identity, but also marital status. Under FADA however, an organization receiving funding from HUD to operate an emergency homeless shelter could cite this Act and provide their religious conviction against same-sex marriage as a reason to put a same-sex couple and their children back on the street.

Subpart (c) entitled "Accreditation; Licensure; Certification" is also deeply problematic. This section provides that, "The Federal Government shall consider accredited, licensed, or certified for purposes of Federal law any person that would be accredited, licensed, or certified, respectively, for such purposes but for a determination against such person wholly or partially on the basis that the person believes, speaks, or acts in accordance with the sincerely held religious belief or moral conviction described in subsection (a)." In practice, this section would allow individuals or schools to practice medicine, engage in mental health counseling, or operate educational programs without a license while receiving public federal endorsement. This undermines state and local control over such licensing procedures and threatens the public health. For example, under FADA a psychologist practicing so-called conversion therapy or engaging in harassing or discriminatory behavior towards LGBTQ patients could continue to receive federal support despite revocation of their license from the state licensing board.

Finally, I will address Section 6 entitled, "Definitions" and paragraph (3) entitled "Person" specifically. The exclusions from personhood incorporated into this section do not provide adequate safeguards for victims of discrimination at the hands of covered entities. Section (3)(A) excludes "federal employee[s] acting within the scope of employment" from coverage under the bill. However, hundreds of federal programs, including the State Child Health Insurance Program and Medicaid, are administered by state and local employees. FADA would empower these state and local employees who personally object to same-sex marriage to refuse to fully perform their jobs. For example, a state worker administering either of these federal health programs could refuse to process a same-sex couple's application for coverage under Medicaid or their child's SCHIP application based on the worker's belief regarding same-sex marriage.

Section (3)(c) also threatens the health and well-being of same-sex couples and single parents in the healthcare context. This section excludes from coverage under the act, "a hospital, clinic, hospice, nursing home, or other medical or residential custodial facility with respect to visitation, recognition of a designated representative for healthcare decision-making, or refusal to provide medical treatment necessary to cure an illness or injury." Under this section, hospitals could deny access to spousal counseling including grief counseling and caregiving support to a same-sex spouse based on their sincerely held beliefs. This section also fails to address access to non-curative palliative care or treatment of other medical conditions including pregnancy. Under FADA, a hospital or healthcare provider could refuse to care for a pregnant or laboring person

based solely on marital status – either as a single parent or as someone in a same-sex relationship. This denial of care could significantly delay access to essential medical intervention and could have life-threatening results.

Proponents of FADA today have argued that the scope and impact of the bill are exceedingly narrow. They have argued that any concerns regarding the rights of third parties are mere "conjecture." Unfortunately, this could not be further from the truth. The testimony we have provided today provides real examples of how this patently unconstitutional legislation would harm real people. LGBTQ Americans face discrimination, bias-motivated violence, and bullying and harassment every day. These problems are real and urgent. This Congress should be working to address these significant challenges rather than considering this ill-conceived legislation.

I appreciate the opportunity to offer this testimony today.

* * *

July 6, 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

**Cancel July 12 Hearing on Discriminatory Anti-LGBT Bill**

Dear Chairman Chaffetz:

Like millions around the world, we were heartbroken by the murder of 49 people and the wounding of 53 others at a gay nightclub in Orlando, Florida on June 12. The overwhelming majority of the victims of this attack were Latino/Latina/Latinx and LGBT. As President Obama movingly reminded the nation just hours after this horrendous attack:

> The shooter targeted a nightclub where people came together to be with friends, to dance and sing-to live. The place where they were attacked is more than a nightclub -- it's a place of solidarity and empowerment where people have long come together to raise awareness, speak their mind and advocate for their civil rights. So this is a sobering reminder that attacks on any American -- regardless of race, ethnicity, religion or sexual orientation -- is an attack on all of us and on the fundamental values of equality and dignity that define us as a country.[1]

July 12 will mark the one-month anniversary of this tragedy. In the month since, Congress has not held a single hearing on the needs of the victims, their families, and survivors, or on ways to better protect the LGBT community from bias-motivated violence or discrimination. We are deeply disappointed to learn that the House Committee on Oversight and Government Reform plans to hold a hearing on a discriminatory, anti-LGBT bill known as the "First Amendment Defense Act" (H.R. 2802) on the one-month anniversary of this tragedy. **We write to urge you to cancel this hearing**.

Rather than focusing on legislation to protect LGBT people and others in America from harm, FADA would permit unprecedented taxpayer-funded discrimination against LGBT people. Among the legislation's many harms, it could even allow any privately owned business to refuse to let a gay or lesbian employee take time off to care for their sick spouse, in violation of family and medical leave laws – a particularly appalling aspect given the many families currently caring for those who were injured in the Orlando shooting. A proposal like this only serves to harm a vulnerable community.

[1] Pres. Barack Obama, Remarks on Mass Shooting in Orlando (Jun. 12, 2016), *available at* https://www.whitehouse.gov/the-press-office/2016/06/12/remarks-president-mass-shooting-orlando

We have seen similar discriminatory bills introduced in state legislatures across the country this year – the vast majority of which were defeated after facing significant, bipartisan backlash. One such proposal that was signed into law in Mississippi was blocked by a federal judge on June 30 as a violation of both the Establishment Clause and the Equal Protection Clause of the U.S. Constitution.[2]

We urge you to cancel the July 12 hearing and instead hold hearings on how best to ensure that no one in this country is subjected to violence or discrimination based on who they are or whom they love.

Sincerely,

National Organizations
Advocates for Youth
American Civil Liberties Union
American Humanist Association
Americans United for Separation of Church and State
Anti-Defamation League
Association of Reproductive Health Professionals (ARHP)
Athlete Ally
Bend the Arc Jewish Action
BiNet USA
Catholics for Choice
Center for Inquiry
CenterLink: The Community of LGBT Centers
Equality Federation
Family Equality Council
Feminist Majority Foundation
Freedom for All Americans
GLBTQ Legal Advocates & Defenders (GLAD)
GLSEN
Hadassah, The Women's Zionist Organization of America, Inc.
Human Rights Campaign
Institute for Science and Human Values
Jewish Women International (JWI)
Keshet
Lambda Legal
The Leadership Conference on Civil and Human Rights
Marriage Equality USA
NAACP
NARAL Pro-Choice America
National Abortion Federation
National Asian Pacific American Women's Forum

[2] Chris Geidner, *Federal Judge Halts Mississippi Anti-LGBT Law From Going Into Effect,* BUZZFEEDNEWS, Jul. 1, 2016, https://www.buzzfeed.com/chrisgeidner/federal-judge-halts-mississippi-anti-lgbt-law-from-going-int?utm_term=.krXv20Gbm#.fyVk3NJ7Y.

National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National LGBTQ Task Force Action Fund
National Latina Institute for Reproductive Health
National Organization for Women
National Partnership for Women & Families
National Women's Health Network
National Women's Law Center
PFLAG National
People For the American Way
Planned Parenthood Federation of America
Population Connection Action Fund
Pride at Work
Religious Institute
Secular Coalition for America
Secular Policy Institute
Sexuality Information and Education Council of the U.S. (SIECUS)
Union for Reform Judaism
Unitarian Universalist Women's Federation

State/Local Organizations
AIDS Alabama
Equality Alabama
Equality California
Equality Florida
Equality Illinois
EqualityMaine
Equality Michigan
Equality New Mexico
Equality North Carolina
Equality Ohio
Equality South Dakota
Equality Texas
Fair Wisconsin
Fairness Campaign
Georgia Equality
One Colorado
OutFront Minnesota
PROMO
The Los Angeles LGBT Center
Whitman-Walker Health

Cc: The Honorable Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform

BEND THE ARC
jewish action

July 12, 2016

The Honorable Jason Chaffetz
Chairman
U.S. House Committee on Oversight
& Government Reform
Washington, D.C. 20515

The Honorable Elijah Cummings
Ranking Member
U.S. House Committee on Oversight
& Government Reform
Washington, D.C. 20515

**Re: Bend the Arc Jewish Action and Faith Leaders oppose the First Amendment Defense Act (H.R. 2802)**

Dear Chairman Chaffetz and Ranking Member Cummings:

As the CEO of Bend the Arc Jewish Action, I submit this letter to you today for the record of this Committee's hearing on "Religious Liberty and H.R. 2802, The First Amendment Defense Act (FADA)." Bend the Arc opposes the so-called First Amendment Defense Act (H.R. 2802) outright, but it is all the more appalling, disgraceful and offensive that a hearing on this legislation was scheduled for the one month anniversary of the tragic mass murder of 49 LGBTQ people and allies in Orlando, Florida.

Within the faith community, there is broad and diverse opposition to this legislation. This is illustrated in the attached letter, which was sent to this Committee in July, 2015, in advance of a possible hearing on this legislation. It is signed by more than 3,000 clergy and faith leaders that Bend the Arc organized with our partners at Auburn Seminary. These faith leaders serve communities across the United States—Baptists, Jews, Muslims, Catholics, and so many others—and are unified by the belief that this legislation does nothing to protect religious liberty. Rather, we believe that draconian legislation like this actually undermines the true spirit of religious liberty by favoring one religious viewpoint over another and, in the process, discriminating against LGBTQ people, single mothers and unmarried couples. Such legislation will open the door to unprecedented taxpayer-funded discrimination, but it will do nothing to support real religious liberty.

Thank you for your consideration.

Sincerely,

Stosh Cotler
CEO
Bend the Arc Jewish Action

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suite 210
washington, dc
20006
202.263.4555
www.jewishaction.us
@bend_thearc
bendthearc

July 21, 2015

The Honorable Jason Chaffetz
Chairman
U.S. House Committee on Oversight
& Government Reform
Washington, D.C. 20515

The Honorable Elijah Cummings
Ranking Member
U.S. House Committee on Oversight
& Government Reform
Washington, D.C. 20515

**Re: Faith Leaders Oppose the First Amendment Defense Act (H.R. 2802)**

Dear Chairman Chaffetz and Ranking Member Cummings:

As clergy and faith leaders who serve diverse communities across the United States and are dedicated to affirming the religious freedom of every individual, we write to express our opposition to the First Amendment Defense Act (H.R. 2802).

The religious liberty upon which our nation was founded has allowed our country's diverse religious landscape to flourish. Recently, however, what we have seen promoted as defending religious liberty too often reflects one particular religious perspective that does not at all respect that diversity of faith and belief, or the intent of our Founders. We believe that the First Amendment Defense Act does not respect the spirit of religious liberty—nor does it reflect fundamental values of treating all people with fairness and equality—and we therefore strongly oppose this legislation. Further, though people of faith are not a monolith and all are not in agreement on whether their faith sanctions LGBT relationships, we cannot in good conscience support legislation that favors one religious viewpoint over another and in the process discriminates against LGBT people, single mothers and unmarried couples.

The religious freedom of individuals and organizations, including clergy and houses of worship, who object to same-sex marriage are already protected by the First Amendment and federal law—and we, as clergy and faith leaders, continue to stand by the right of others to hold beliefs that may differ from our own while recognizing that for many of us, supporting LGBT individuals and families is a principle of our faith. Rather than protecting the First Amendment, this legislation actually undermines true religious liberty. The religious liberty on which our nation was founded guarantees us the freedom to hold any belief we choose and the right to act on our religious beliefs — but it does not allow us to harm or discriminate against others or to infringe on the religious beliefs of others.

By opening the door to unprecedented taxpayer-funded discrimination against LGBT people, single mothers and unmarried couples, this legislation does nothing to protect our rights as people of diverse faith traditions and it has the potential to do considerable harm in the name of religion. For example, were this bill to become law it would:

- allow an organization to accept federal funds to run a homeless shelter or drug treatment program but then turn away from that program LGBT people or anyone who has a sexual relationship outside of marriage;
- allow hospitals to refuse dying patients visitation from their spouse or designated support person; and
- permit a government employee to deny services they have a duty to provide, including Veterans or Social Security benefits to a surviving member of a same-sex couple.

We are also troubled that this bill is so broad it could even prevent the federal government from enforcing longstanding laws designed to combat discrimination and promote equality. For example, it would let commercial landlords violate fair housing laws by refusing housing to a single mother based on the landlord's religious beliefs and allow businesses to violate family medical leave laws by refusing to let a gay or lesbian employee care for a sick spouse.

As people of deep faith committed to a country that supports diverse, robust, and healthy religious expression and in the spirit of equality and justice, we urge you to oppose the First Amendment Defense Act.

Thank you for your consideration.

Sincerely,

Imam Daayiee Abdullah, DC
Sally Abrams, CA
Bishop Bishop Allyson Abrams, MD
Christine Abrams, PA
Michael Abrams, PA
Dwight Adair, TX
Daryl Adams, AZ
Cheryl Adams, CA
Pastor Katherine Adams, IL
Minister Timothy Adams, NE
Reverend Joseph Adams, NY
Marty Adams, WA
Michael Adams Sr, NC
Darley Adare, NC
Minister Michael Adee, NM
David Adelson, NY
Lisa Adolf, WA
Priest Daniel Aerts, MI
Christa Agostino, AZ
Casandra Agustin, AR
Jed Aicher, NY
Marie Alabiso, MA
Donna Aladeen, CA
Priest Stacy Alan, IL
Donald Albert, DC
Lonnie Albrecht, FL
Jill Alcantar, CA
Anita Alcantara, IL
Judy Alexander, CA
Joseph Alfano, NY
Marie Alford-Harkey, CT
Matthew Algren, OH
Babs Allen, AL
Tamara Allen, AZ
Terrie Allen, CA
Richard Allen, CT
Susan Allen, NC
Kendra Allen, OH
Rabbi Adam Allenberg, CA
Veronica Alleyne, NY
Katy Allie, CT
Shirley Allison, CO
Kelly Allison, MD
Jim Allyn, WA
Gregg Alpert, CA
Gloriamarie Amalfitano, CA
Bruce Ambuel, WI
Reverend David Ames, RI
Martha H. Ames, RI
Lorenza Amico, VA
Kara Ammon, NH
Jon Anderholm, CA
Kristen Andersen, CO
Dan Anderson, CA
Dina Anderson, CO
Rev. Chaplain PJ Anderson, MI
Diane Andrulonis, MD
Danice Andrus, CA
JoAnn Anglin, CA
Billy Angus, MT
Louis Anipen, FL
Jennifer Anthony, OR
Stephen Appell, NY
Susaan Aram, CA

Chris Archer, TX
Beverly Archibald, TX
Janice Ardell, CA
Lucille Arenson, CA
Cristine Arlet, FL
Shirley Armand, IL
Bob Armintor, CO
Chris Armitage, UT
James Armour, MO
LeRoi Armstead, NY
Gina Armstrong, AL
Peter Arneson, NY
Marge Arnold, FL
Kay Arnold, TX
John Arnott, NY
Ardith Arrington, WA
Fran Asbeck, MD
Julie Ashmead, MI
Mary Ann Aspan, WI
Ellen Asprooth, NY
Minister Jay Atkinson, CA
Reverend Joy Atkinson, CA
Holly Atkinson, NY
Fred Attebury, MI
Reverend Anne Atwell, FL
Kimberly Au, CA
Pastor john auer, CA
Pastor Gerry Auger, NH
Linda Auld, CO
Samuel Austin, CA
Pastor Priscilla Austin, WA
Darryl Autry, VA
Sara Avery, CO
John Avett, KS
Susan Ayarbe, NV
Loretta Ayrer, SC
Yvonne Baab, VT
Bruce Babcock, CA
Carla Babrick, MO
Harriet Bachner, KS
Meghan Backhouse, MA
Karen Hedwig Backman, WA
Linda Bader, IA
Carolyn Bagby, CO
Ann Bailey, CA
Annette Bailey, NY
Clifton Bain, AL
Matthew Bain, CA
Minister Steven Baines, VA
Sharon Baker, CO
Gerritt Baker-Smith, PA
Elizabeth Baker-Smith, PA
Robert Ballard, TX
Lynn Ballen, CA
Wanda Ballentine, MN
Dan Ballinger, CA
Marie Ballmann, KS
Jonathan Banks, MA
Tamara Bannan, MI
CJ Bannochie, GA
Michelle Baptiste, CA
Clayton Barbeau, CA
Mary Barbezat, IL
Reverend Kay Barckley, WA
Nick Barcott, WA
Joan Bard, CA
Diane Barense, RI
Linda Barger, MI
Lisa Barker, CA
Howard Barker, NY
Jean Barker, PA
Sylvia Barnard, NY
Kathy Barnarr, NM
Sharon Barnes, CA
Susan Barnes, CA
Tracy Barnes, FL
Adam Barnes, VA
Paul Barnett, NJ
Bernadette Barnhurst, PA
William Barnhurst, PA
Karen Barr, VA
Donna Barrett, IL
Carolyn Barrett, NJ
Pat Barry, MA
Deacon Jean Barry, RI
Jeanette Bartz, MI
Eric Bass, CA
Rick Bassett, CT
Madeleine Bateman, OR
Jaime Bateman, TN
Minister Rev. Henry Bates, CA
Reverend Lindsay Bates, IL
Father J. Barrington Bates, NJ
Melvin Bautista, AZ
Corrine Bayley, WA
Richard Beal, NY
Reverend Dave Bean, OR
Lisa Bearden, MI
William Beasley, GA
Diane Beaty, FL
Ervin Beaulier, IL
Shirley Beaupre, NM
John A Beavers, IL
Patrice Beck, WA
Rabbi Shelley Kovar Becker, NY
Stanley Becker, NY
William Becker, OR
Elaine Becker, VA
Brice Beckham, CA
John Beckman, CA
Carla Behrens, CO
Ann Bein, CA
Bernadette Belcastro, NY
Joseph Belisle, MA
Linda Belisle, NH
Bobby Belknap, MI
Robert Belknap, NC
Mother Candace Bell, AK
Minister Rev Renwick Bell, FL
Cari Bell, WI
Angela Bellacosa, WA
Jerry Bellows, MA
Daniel Beltran, CT
Judith Beltz, IN
Reverend Virginia Bemis, OH
CLARA BENIC, OH
Nelly Benko-Hakim, LA
Priest Mandy Bennett, CA
Richard Bennett, MA
Linda Bennett, MI
Henry Bennett, OR
Stuart Bennett, VA
Helen Benson, CT
Pastor Steven Benson, MT
Joan Beregi, PA
Nick Berezansky, NJ
Priest Frank Bergen, AZ
Pat Berger, ME
Judith Bergson, MA
Marjorie Berk, NY
Rabbi Donald R Berlin, MD

Ted Bernard, TX
Patrick and Connie Berry, NM
Craig Bert, CO
Linda Bescript, AZ
Herb Bettin, CA
Terri Betz, OR
Pastor Claire Beutler-Cruise, WI
Emma Beverage, TX
Rabbi Binyamin Biber, MD
Sara Bible, MN
Josh Billings, GA
Gene Binder, NY
Gary Binderim, TX
Sammie Birdsall, MI
Cori Bishop, NJ
Nancy Bishop, OR
Scott Bishop, WA
Hal Bitner, PA
Alan Bixler, NM
Joanne black, NY
Sandra Blackburn, CA
William Blackshear, CO
Katherine Blackwood, VA
Sarah Blain, CA
Anna Blake, WA
Pastor Max Blalock, VA
Rosemary Blanchard, NM
Reverend Tsukina Blessing, WA
Patricia Blevins, CA
Steve Bloom, NY
Sharon Bodman, OR
Brian Boettcher, WI
Phyllis Bogartz, CA
Matthew Boguske, WA
Sonua Bohannon, TN
Scott Boileau, SC
Kathryn Boland, MA
Miss Crystal J Boles, AZ
dan bolger, CA
Ronnie Bolling, FL
Priest Charles Bolser, IL
Barbie Bolt, TN
Mona Bomgaars, HI
Juliana Boner, MN
Christine Bonn, SC
Julia Bonnell, NY
Reverend James J. Boone, Jr., MA
Dave Boorse, PA
Ray Bordine, OH
Bishop Most Rev. Mel Borham DD, MA
Deborah L Born, FL
Anne Borreggine, ME
Francy Pavlas Bose, WA
Father Allan Bouley, MN
Jeremy Bourget, RI
David Bowles, CA
Jason Bowman, CA
Marci Bowman, CO
Karen Boyd, MN
Malaika Boyd, TX
Susan Boyer, GA
Frances Boyle, PA
Sandra Boylston, FL
Lorraine brabham, NJ
Gregg Bracke, KY
Rhonda Bracken, NC
Kathy Bradley, SC
Anita Lynn Brady, CA
Sandra Brady, FL
Mike Brahan, KS
Judy Brahan, KS
Georgia Braithwaite, AZ
Marian Brand, NY
Daniel Brant, WA
Barbara Brass, CA
Valorie Bratcher, MO
Deborah Bratcher, TX
Jim Brauner, MO
Priest Ellen Brauza, NY
James Bray, WI
Elana Brazile, OR
Pastor James Brehler, OH
Dianne Brehmer, NM
Kathleen Brendel, IL
Jane Brennan, PA
Pastor Don Brenneman, CO
Swanson Brent, ID
Thomas Brewster, FL
Deborah Brewster, IL
Margaret Brick, PA
Merlin Brinkerhoff, MT
Mary Brinton, IL
Patricia Briones, CO
Heather Broadfoot, NY
Minister Judy Brock, TX
Father Blaise Brockman, CA
Diana Brodscholl, NJ
Priest Rev. Ruth Broeski, OR
David Brokaw, NY
Alan Bromborsky, MD
Ruth Brooker, MN
Rev. James E Brooking, CA
Claire Broome, CA
Sister Magdalen Broussard, LA
Tina Brown, AR
Bernard Brown, AZ
Duncan Brown, AZ
Minister Molly Brown, CA
Rabbi Jerry Brown, CA
Reverend Rachelle Brown, IL
Sandra S. Brown, MA
Craig Brown, MN
Linda Brown, NV
Brandye Brown, TX
BONNIE BROWN, UT
Robert Brown, WA
Phyllis Browne, MA
Frederick Browne, MO
Minister Geoff Browning, CA
Felicia Bruce, FL
Maureen Brucker, CO
Jim Brunner, CA
Babette Bruton, FL
Stan Bryant, CO
Cade Bryant, FL
Rabbi Shawna Brynjegard-Bialik, CA
Ken and Donna Bubb, NV
Laura Buccola, CA
Eben Buchanan, GA
Kathleen Buckley, NM
Stephanie Budwey, MA
Stephan Bugaj, CA
Kelly Bull, WI
George Bullwinkle, PA
Gail Bumala, OR
Bishop Rev. Pat Bumgardner, NY
Mary Bunker, MD

Robert Burch, OR
Reverend Rev. Max Burg, IL
Patricia Burgert, NC
Bridget Burke, AZ
L Burke, NY
Caroline Burkett, CA
Scott Burkett, OH
Lou Ann Burkle, IA
Carol Burnett, OR
Pastor Stephanie Burns, FL
Reverend Susan Burns, MN
Ian Burns, NY
Bruce Burns, TX
Minister Suzanne Burris, SD
Pastor Victoria Burson, MD
Arthur Burzykowski, IL
Michael Busby, ID
Roberta Bushman, NM
Julie Bushnell, NY
Michael Bussee, CA
Reverend Barbara Bustard-Burnside, MD
Mike Butche, IL
Carolyn Sue Butler, NC
Thomas Butler, RI
Kathleen Button, NY
Grace Byerly, MD
Ted Byers, WA
Rich Caccamo, NJ
Randal Caffarel, GA
Katherine Cagle, NC
Brian Cahill, CA
Charles Calati, MI
Annette Calderone, PhD, RN, PA
Nancy Caldwell, MD
Debra Calkins, WA
Bridget Callahan, PA
Reverend Clark Callender, VT
Mary Calvanese, PA
Priest Roland Calvert, MI
Theresa Cameranesi, CA
Reverend Rebecca Cameron, CA
Scott Cameron, FL
Jean Cameron, TX
Michele Camilleri, MI
Pat Camobell, CT
Rich Camp, CA
Minister Charles Camp, TX
John Campbell, AL
Jaden Campbell, CA
Sister Simone Campbell, DC
Linda Campbell, FL
Julie Campbell, MI
Patricia Campbell, PA
Cantor Russell Campbell, WA
Marilyn Campbell, WA
Henri Campo, CA
Roque Candia Osorio, MA
John Canepa, NH
Roel Canti, TX
John Capalbo, NJ
Reverend Philip L. Capp, WA
Mark Cappetta, CA
Virginia Caraco, SC
Dena Carani-Spire, IL
Susan Caravello, NY
Ann Carberry, CA
Phyllis Cardozo, CA
Deacon Paul Cardwell, TX
Alice Carli, NY
Reverend Ann Carlisle, CO
Helen Carls, TN
Patricia Carlson, CA
Matthew Carlson, PA
Reverend Carole Carlson, VT
Heather Carman, NY
Carl Carmichael, WY
Tom Carpenter, CA
Reverend Robert Carpenter, FL
Laura Carrico, KY
Joan Carrier, ME
Sally Carroll, CA
Reverend Mary Carson, OH
Keren Carter, CA
Jacqueline Carter, TX
Sarah Cascarino, PA
Priest Kelly Casey, MN
Joseph R Cash, NY
Charles Casper, NY
Leslie Cassidy, NY
Susanne Cassidy, PA
Jamie Castaneda, CA
Kicab Castaneda-Mendez, NC
Jon Catanese, OH
Lori Caudill, CA
Lindsey Caudill, TX
Pastor Reverend Dr Neil Cazares-Thomas, TX
Barbara Cerridwen, NC
D. Chalfin, MA
Mikki Chalker, NY
James Chambers, AZ
Minister Tricia Chandler, CO
Susan Chandler, FL
John Chaney, WA
Reverend Mark Charlton, CA
Patti Charlton, TX
Marim Charry, NY
Donna Charter, TX
Tom Chase, IA
Tania Chavez, NM
Melvin D. Cheitlin, CA
G.W. Cheney, NC
Leslie Chester, OR
Susan Chesterman, CA
Noreen Chiaramonte, IL
Anthony Chico, CA
Eileen Chieco, OR
Margaret Chinappi, MA
Andrea Chinn, NY
Mary Chmielowiec, CO
Rikesh Chouhan, MA
She'ree Choy, NY
John Christensen, MO
Jan Christensen, NY
Sharon Christenson, NJ
Danielle Christmas, NC
Logan Chrysler, WA
Mark Chudzik, OH
Marianne Ciardullo, CT
Darlene Cieri, NY
Karen Cignoli, NY
Edna Ciurleo, MN
Maria Clair-Howard, NY
Michael Clancy, NY
Gary Clark, CA
Mary Clark, IN
Morgan Clark, NJ
Cate Clark, NM
Carol Clark, NY
Jacquelyn Clark, OR

Cameron Clark, TN
Charles Clark, WI
Victoria Clark, WI
Julia Clarke, WA
Thad Clarksoles, TX
Gayle Clark-Taylor, WI
Ann Clark-Whitlock, FL
Gretchen Clay, WA
James Cleek, TX
Elise Cleva, VA
Minister Maureen Cleveland-Ryan, VT
Donna Clifford, MA
Minister Rev. Robert Coats, VA
Pastor Rev. Joe Cobb, VA
Deborah Coble, NY
John Cochrane, OR
Patricia Cockrell, MI
Catherine Coco, CT
Margo coffer, MT
Ashley Coffman, IN
Albert Coffman, PA
Minister Marian Coger, NY
Janice Cohen, KY
Shelly Cohen, WA
Craig Colclough, CA
Michele Cole, NY
Nadina Cole-Potter, AZ
Beverly Colgan, NV
Angel Collie, NC
Blythe Collier, CA
Tim Collingwood, OH
Nancy Collins, GA
Peggy S. Collins, MI
Karen Colson, FL
Pastor Rev. CC Coltrain, OH
Albert Coltrane, GA
William Combs, CA
Mary Jo Comerford, IL
Rene Compean, CA
Virginia (Ginger) Comstock, NY
Mariama Congo, MA
Crystal Conklin, OR
Minister Rev.Jim Conn, CA
Reverend Jeffrey Conn, PA
Jan Conner, MN
Adam Conner-Sax, NY
Mindy Connolly, IA
Debra Connolly, NJ
Arthur Connor, CA
Bob Conrich, FL
JoAnn Consiglieri, CA
Patricia Constantino, NY
Sister Elizabeth Conyers, RI
Pastor Jerry Cook, AR
Carol Cook, CA
Beth Cook, MN
Elizabeth Cook, NC
Kathleen Cook, NY
Catherine Cook, TX
Marian Cooley, IN
Laura Cooley, NH
Richard E Cooley, NM
Margaret Coons, SC
Nathan Cordell, TX
Diane Cordelle, NH
Guy Cordelle, NH
Sandra Corder, VA
Joanne Corey, NY
Jared Cornelia, DE
Scott Coronet, IA
Danee Costa, AL
Mary Costello, MD
Mark Costner, NC
Stosh Cotler, NY
Barbara Cotter, VA
Rita Cotterly, TX
Scott Cottrill, NM
John Coughlin, IL
Stephen Courim, TX
Susan Courtney, FL
Arthur Couture Jr, MA
Leonard Cowan, CA
Sister Mary Macrina Cowan, OK
Reverend David Cowell, CA
Kara Cox, VA
Minister John Coyle, NC
Reverend Charlotte Coyle, TX
Jerry Coyle, TX
Bob Craft, CA
Reverend Ann Craig, NY
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HUMAN
RIGHTS
CAMPAIGN

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

July 8, 2016

Dear Chairman Chaffetz and Ranking Member Cummings,

On behalf of the Human Rights Campaign's 1.5 million members and supporters nationwide I write to express deep concern regarding the First Amendment Defense Act (FADA, H.R. 2802/S. 1598). Despite its purported protection of one of our nation's dearest and founding principles, FADA is nothing more than a veiled attempt to allow discrimination against lesbian, gay, bisexual, and transgender people with U.S. tax dollars. This disingenuous attempt to reframe federally sanctioned discrimination as essential free exercise is truly un-American and threatens to tarnish the spirit of the First Amendment. We write today in defense of the principles of freedom behind the Bill of Rights and of the people who need them the most.

FADA seeks to foster state sanctioned discrimination under the guise of religious liberty. The bill's broad, overreaching language would not only prevent the federal government from combatting harmful discrimination, but could mandate it. Under this bill, organizations and businesses contracting with the federal government or receiving federal grants could circumvent federal protections designed to protect same-sex couples and their families. For example, despite clear nondiscrimination policies, this bill would require the federal government to continue to contract with a business with a record of discriminatory employment practices against married gays and lesbians if that employer cited their objection to same-sex marriage as a the reason for the discrimination.

FADA would undoubtedly limit access to federal lifeline programs and protections for those who need them the most. Although same-sex couples are protected under federal regulation, under FADA a hospital could state that allowing a husband or wife to visit an ill or dying same-sex spouse would be a violation of their religious liberty. An organization receiving funding from

the Department of Housing and Urban Development to operate an emergency homeless shelter could cite this Act and provide their religious conviction against same-sex marriage as a reason to put a same-sex couple and their children back on the street. It would also empower federal civilian employees who personally object to same-sex marriage to refuse to fully perform their jobs. For example, an employee at the Department of Veterans Affairs could refuse to process survivor benefits for the same-sex spouse of a servicemember killed in action.

The right to religious belief and free exercise is fundamental. This freedom to worship – or not – without fear of government intrusion or compulsion is a core American value. The U.S. Constitution and federal courts provide strong protections for both individuals and religious organizations to practice their religion and to freely share their beliefs. Nothing in federal law, including the right to receive tax exempt status, a federal grant or contract, or any other federal benefit can be denied on the basis of a sincerely held religious belief. FADA ignores these existing Constitutional protections and threatens to tip the delicate balance of individual rights and religious liberties that the founders so artfully designed— undermining decades of civil rights protections and leaving some of the most vulnerable members of our society open to unmediated discrimination.
The federal government cannot mandate compassion, but it must not mandate discrimination.

Thank you for the opportunity to provide these comments.

Sincerely,

David Stacy

David C. Stacy
Government Affairs Director

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**Written Testimony for**
**"Religious Liberty and H.R. 2802, The First Amendment Defense Act (FADA) Hearing"**
**July 12, 2016**
**2154 Rayburn House Office Building**
**Washington, D.C. 20515**

**For the**
**House of Representatives**
**Committee on Oversight and Government Reform**
**H.R. 2802 "First Amendment Defense Act"**

**Submitted by Carmel Martin**
**Center for American Progress**
**July 10th, 2016**

## Introduction

This testimony is submitted in opposition to advancing H.R. 2802, the so-called First Amendment Defense Act (FADA). Introduced just before the historic 2015 U.S. Supreme Court decision that made marriage equality a reality nationwide, FADA is a broadly written bill that throws religious freedom protections far out of balance, allowing individuals, organizations and businesses to limit the rights of others in the name of religion.

Religious liberty has always been a core American value, enshrined in the First Amendment and central to maintaining the democratic experiment in our perennially diverse society. But FADA's sponsors are departing from the intentions of our nation's founders and are attempting to advance a bill that protects only certain religious beliefs without regard for the harm the imposition of those beliefs could cause to others.

**FADA is not about liberty. It is about enshrining discrimination into federal law, and this means it is clearly unconstitutional. The bill's "Findings" section explicitly references "opposing same-sex marriage" as the core driver of the legislation.**

If passed, the government could not address various forms of discrimination, such as:

- An employer refusing to grant Family and Medical Leave Act leave for an employee to care for her same-sex spouse, even though the two are legally married;

- A school that receives federal funding firing an unmarried teacher it suspects of having sexual relationship with his longtime girlfriend;
- Social services programs that receive federal funds, like homeless shelters, turning away LGBT people and unwed mothers.

Furthermore, FADA would allow anyone who believes they have been somehow required by the government to approve of married same-sex couples or unmarried couples having sex could file a lawsuit seeking taxpayer funds. The most recent version of the bill even applies to publicly traded, for-profit corporations, which could assert a religious belief to gain exemptions to laws that protect workers or consumers.

## FADA Violates the Constitution and the Right to Marriage Equality

FADA would tax some Americans to subsidize individuals who would impose their religious beliefs on others and this is fundamentally out of step with our nation's constitutional values. The legislation demands that our tax dollars be used to subsidize discrimination. And because FADA compels the government to promote one set of religious beliefs, it likely violates the First Amendment.

FADA also likely violates the Equal Protection clause of the 14th Amendment. In *Romer v. Evans*, the Supreme Court struck down a Colorado state constitutional amendment, Amendment 1, which forbid civil rights protections for gay men, lesbians and bisexuals.[1] The amendment, Justice Kennedy explained for the Court, violated the Constitution because it forces sexual minorities into a legal underclass.[2] "Laws singling out a certain class of citizens for disfavored legal status or general hardships are rare," Kennedy wrote.[3] "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[4] As with Amendment 1, FADA explicitly strips same-sex couples of much of their ability to seek aid from the federal government.

A federal judge recently halted a Mississippi law -- which is similar, in many important ways, to FADA – because it violated the rule announced in *Romer*.[5] Mississippi's law went further and allowed discrimination on the basis of gender identity.[6] The judge also struck down the Mississippi law because, like FADA, it gave special treatment to certain religious beliefs over others.

In his ruling, the judge said the Mississippi law is inconsistent with the founding principle of religious freedom, describing the bill as "allegedly an endorsement and elevation by their state government of specific religious beliefs over theirs and all others."[7] The Mississippi law would have allowed anyone to discriminate based on religious beliefs about marriage or gender identity,

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[1] *Romer v. Evans*, 517 U.S. 620 (1996).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Memorandum Opinion and Order, *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA (S.D.Miss. June 30, 2016).
[6] *Id.*
[7] *Id.*

and the judge noted that, given the protection of these specific beliefs, "it follows that every other religious belief a citizen holds is *not* protected by the act. Christian Mississippians with religious beliefs contrary to [the protected beliefs] become second-class Christians."[8]

Both FADA and the Mississippi bill are contrary to the ruling in *Obergefell v. Hodges*, the Supreme Court's landmark marriage equality decision. In *Obergefell*, the Court held that same-sex couples must be afforded the right to marry "on the same terms and conditions as opposite sex couples."[9] The Mississippi judge described the state's new religious freedom bill as an "attempt to put LGBT citizens back in their place after *Obergefell*. The majority of Mississippians were granted special rights to not serve LGBT citizens, and were immunized from the consequences of their actions."[10]

FADA betrays the principles outlined in *Obergefell* as well. The bill permits couples joined in "the union of one man and one woman" to enjoy the full panoply of rights afforded by federal law, while simultaneously stripping many of those rights from married same-sex couples. That is not something that the Constitution permits.

## FADA Would Enable Explicit Discrimination

FADA would allow marriage equality opponents and those with objections to sex outside of marriage to impermissibly refuse to follow laws without penalty or intervention from the government. The bill therefore creates harmful, imbalanced religious liberty protections for certain religious beliefs about gender, marriage, and sexual behavior—with potentially far-reaching consequences. Explicitly, FADA would prevent the government from penalizing any individuals, groups, organizations, institutions, or for-profit businesses that act or discriminate based on the belief that marriage should be between one man and one woman or that sex should be reserved for marriage.

By enabling discrimination and privileging certain religious beliefs at the expense of other beliefs, FADA does not reflect an appropriate interpretation of religious liberty. In recent decades, federal courts have consistently rejected attempts to align animus with religion. "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents," Judge Leon Bazile wrote in an opinion trying to justify Virginia's ban on interracial marriage in 1959.[11] "The fact that [God] separated the races," Bazile claimed, "shows that he did not intend for the races to mix."[12] The Supreme Court rejected Bazile's racism in one of its most celebrated decisions, *Loving v. Virginia*.[13]

Maurice Bessinger distributed literature to customers at his chain of barbecue restaurants claiming that the Bible is a pro-slavery document. He claimed that the Civil Rights Act of 1964,

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[8] *Id.*
[9] *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).
[10] Memorandum Opinion and Order, *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA (S.D.Miss. June 30, 2016).
[11] *Loving v. Virginia*, 388 U.S. 1 (1967).
[12] *Id.*
[13] *Id.*

with its ban on whites-only lunch counters, "contravenes the will of God."[14] Bessinger, too, lost in a unanimous Supreme Court decision calling his efforts to use faith to justify discrimination "patently frivolous."[15]

When Fremont Christian, a religious school, claimed that it could refuse to provide health benefits to its married women employees because of the school's belief that "in any marriage, the husband is the head of the household and is required to provide for that household," the school too lost its bid to excuse discrimination by invoking the name of God when a federal court ruled against it.[16]

And when Bob Jones University claimed that it should continue to receive tax subsidies despite a rule— rooted in the university's religious teachings—which provided that "students who date outside of their own race will be expelled," the Supreme Court rejected this claim as well.[17] "The Government has a fundamental, overriding interest in eradicating racial discrimination in education," the Court explained.[18]

Today, the specific kind of discrimination that religious objectors hope to justify through FADA largely targets LGBT people, women, and people of faith who do not share the same theology of marriage and sexual relationships outlined in FADA. But the principle to reject these justifications remains the same - we do not permit discrimination solely because it is wrapped in the language of faith. Doing so allows discrimination to flourish, undermines existing protections on the basis of sex, sexual orientation, and gender identity, and cheapens religious liberty for all people.

## FADA Disregards Long Held Religious Liberty Principles and Broad Support for Nondiscrimination

Throughout U.S. history, both courts and legislatures have worked to balance the twin components of religious liberty: the right to worship and practice one's faith and the right not to be coerced into following beliefs that are not one's own. Nearly two-thirds of Americans also believe that a strict separation between church and state must be maintained.[19]

Moreover, in a pluralistic society such as ours, the interests of multiple parties are sometimes in competition. As a matter of law in religious liberty cases, this requires striking a balance that avoids causing others to bear the burdens of one's own chosen religious beliefs and practices. According to Douglas NeJaime and Reva Siegel, "Complicity claims are … about how to live in community with others who do not share the claimant's beliefs, and whose lawful conduct the

[14] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).
[15] *Id.*
[16] *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).
[17] *Bob Jones University v. United States*, 461 U.S. 574 (1983).
[18] *Id.*
[19] Public Religion Research Institute, "Survey: What it Means to be American: Attitudes towards Increasing Diversity in America Ten Years after 9/11" (2011).

person of faith believes to be sinful. Because these claims are explicitly oriented toward third parties, they present special concerns about third-party harm."[20]

FADA runs contrary to the intent of the country's founders and the inherent values of Americans by creating harmful, imbalanced religious liberty protections for business owners, government officials, and even private parties opposed to national marriage equality, certain health care decisions, the adoption of children by LGBT people, and more. Conservative efforts to discriminate under the guise of protecting religious liberty cannot and should not have the monopoly on defining religious liberty. Religious liberty belongs to all Americans.

In fact, 88 percent of Americans agree that religious liberty is a founding principle afforded to everyone in this country, even those who hold unpopular religious beliefs.[21] Therefore it is not surprising that FADA is wildly out of step with the beliefs of the majority of Americans. Majorities of both political parties and independents, as well as majorities of all major religious groups, favor LGBT nondiscrimination laws, not more discriminatory religious exemptions. Sixty percent of Americans support the freedom to marry, as recently reported by Gallup.[22] An even stronger majority, nearly 70 percent, support protecting LGBT people from discrimination in employment, housing and public accommodations.[23] Two-thirds of small business owners (66 percent) oppose businesses being able to deny LGBT people goods or services based on religious beliefs.[24] Majorities of Hispanic Protestants (58 percent), white Catholics (58 percent), white mainline Protestants (56 percent), Jewish Americans (72 percent) and religiously unaffiliated Americans (71 percent) reject excusing business owners and other providers from their responsibilities to serve everyone equally, regardless of religious belief.[25] In addition, Millennials—who represent approximately 25% of the U.S. population—overwhelmingly reject discriminatory religious exemptions for business owners (67 percent) and support nondiscrimination protections for LGBT Americans (80 percent).[26] These numbers reflect that Americans across the demographic spectrum intrinsically endorse the fundamental belief that a religion or belief cannot impede on another's constitutionally protected rights.

Progressive religious organizations have often been the first to speak out against discriminatory uses of religious liberty—as did the Christian Church (Disciples of Christ) in 2015 when Indiana

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[20] Douglas NeJaime and Reva B. Siegel. "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," The Yale Law Journal 124 (2015): 2591.

[21] Public Religion Research Institute, "Survey: What it Means to be American: Attitudes towards Increasing Diversity in America Ten Years after 9/11" (2011).

[22] Gallup poll, May 2015, http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx

[23] Public Religion Research Institute survey, June 2015, http://publicreligion.org/research/2015/06/survey-majority-favor-same-sex-marriage-two-thirds-believe-supreme-court-will-rule-to-legalize

[24] Center for American Progress, Small Business Majority, and American Unity Fund July 2015, http://www.smallbusinessmajority.org/small-business-research/non-discrimination/

[25] Public Religion Research Institute, "Beyond Same-Sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from the 2015 American Values Atlas," available at http://publicreligion.org/research/2016/02/beyond-same-sex-marriage-attitudes-on-lgbt-nondiscrimination-and-religious-exemptions-from-the-2015-american-values-atlas/

[26] Public Religion Research Institute, "Beyond Same-Sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from the 2015 American Values Atlas," available at http://publicreligion.org/research/2016/02/beyond-same-sex-marriage-attitudes-on-lgbt-nondiscrimination-and-religious-exemptions-from-the-2015-american-values-atlas/

passed its controversial state Religious Freedom Restoration Act law. A letter signed by Sharon E. Watkins, the Christian Church (Disciples of Christ) general minister and president, as well as additional church officials stated: "Purportedly a matter of religious freedom, we find RFRA contrary to the values of our faith – as well as to our national and Hoosier values. Our nation and state are strong when we welcome people of many backgrounds and points of view. The free and robust exchange of ideas is part of what makes our democracy great."[27]

## Conclusion

Despite a significant lack of public support for new religious exemptions to the law—on both the federal and state levels—some lawmakers have disregarded their constituents and invested their energies into these unnecessary and dangerous laws. Laws like FADA pose a dangerous threat to true religious liberty, civil rights, comprehensive health care access, and the economic security of women and families, especially the most vulnerable communities among them. This bill is taking valuable time and attention away from policies that would truly strengthen America's democracy and the well-being of its citizenry—such as Medicaid expansion; the enforcement of the ACA comprehensive health care mandate; nondiscrimination protections for LGBT Americans; and the enforcement of religious and civil liberty protections for religious minorities.

Resisting dangerous, overly broad interpretations of religious liberty affirms our nation's core values by ensuring that the American dream remains in reach of all Americans, and it reflects the values of people of faith who are committed to equality and opportunity for all. For these reasons, the Center for American Progress strongly opposes this legislation.

Respectfully Submitted,

Carmel Martin
Executive Vice President, Policy
Center for American Progress

[27] Cherilyn Williams, "General Board commits to seek new venue for 2017 General Assembly," Christian Church (Disciples of Christ), March 31, 2015, available at http://disciples.org/general-assembly/ministry-leaders-sendletter-to-governor/

WASHINGTON
LEGISLATIVE OFFICE


July 11, 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Elijah Cummings
Ranking Member
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*TREASURER*

**First Amendment Defense Act (H.R. 2802) is Unconstitutional, Taxpayer-Funded, Anti-LGBT Discrimination**

Dear Chairman Chaffetz and Ranking Member Cummings:

The American Civil Liberties Union is providing this statement on the so-called "First Amendment Defense Act" (H.R. 2802) in advance of Tuesday's hearing in the Committee on Oversight and Government Reform.

As introduced, this legislation opens the door to unprecedented, taxpayer-funded discrimination against LGBT people, single mothers, and unmarried couples. The definition of "discriminatory action" is extraordinarily and dangerously broad. It is designed to allow anyone – including government employees, contractors, and for-profit businesses – to act with impunity based on a religious belief or "moral conviction" objection to marriage for same-sex couples, or to sexual relationships outside of a heterosexual marriage.

The proposed definition of discriminatory action in this legislation would, ironically, significantly undermine the ability of federal agencies tasked with enforcing our nation's civil rights laws, such as the EEOC, to protect LGBT people and women from discrimination in education, employment, or housing.

This kind of sweeping discrimination flies in the face of the Supreme Court's landmark ruling in 2015 that extended the freedom to marry to same-sex couples across the country. In addition, proponents of this legislation claim it is necessary to protect the religious liberty of churches, clergy, and others who

oppose marriage equality. In reality, the First Amendment is already very clear on this point. Since the founding of our country, no church or member of the clergy has been forced to marry a couple in violation of their faith. That has not changed since same-sex couples gained the freedom to marry.

Among this legislation's many potential harms, it could give rise to claims seeking a right to:

- permit government employees to discriminate against married same-sex couples and their families by refusing to process tax returns, visa applications, or Social Security checks for all married same-sex couples;
- allow commercial landlords to violate longstanding fair housing laws by refusing housing to a single mother based on the moral conviction that sexual relationships are properly reserved to a marriage; and
- allow any individual, business, or group who believes they may somehow be required by the federal government to do something that implicitly condones marriage for same-sex couples or sexual relationships outside of a heterosexual marriage to file a lawsuit.

This legislation is intended to enable discrimination without consequence specifically against LGBT people. This is not only wrong, but unconstitutional as well.

**The "First Amendment Defense Act" is unconstitutional.**

As a Mississippi federal court recently held in blocking a state law similar to this legislation from taking effect, the Establishment Clause, the Due Process Clause, and the Equal Protection Clause in the U.S. Constitution prohibit the government from offering special protection to particular religious beliefs.[1]

This legislation, as introduced, violates the Establishment Clause because it provides special favor to a particular set of religious beliefs, while offering no protection to people who hold contrary beliefs, and because its dispensations come at other citizens' expense. Under the Establishment Clause, a state "may not aid, foster, or promote one religion or religious theory against another."[2] "When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[3] By putting a thumb on the scale in favor of a particular set of religious beliefs – that marriage is the union between a man and a woman, and that sexual relations are only proper within such a marriage – the government tells "nonadherents that they are outsiders, not full members of the community, and . . . adherents that they are insiders, favored members of the political

[1] *See* Barber v. Bryant, No. 3:16-cv-417, Mem Opinion & Order (S.D. Miss. June 30, 2016).
[2] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
[3] McCreary Cnty., Kentucky v. ACLU of Kentucky, 545 U.S. 844, 860 (2005) (citation omitted).

community."[4] Further, this legislation violates the Establishment Clause by affording religious exemptions that impose significant harm on same-sex couples and people involved in sexual relationships outside of a heterosexual marriage.[5]

This legislation, as introduced, also violates the Due Process and Equal Protection Clauses by authorizing arbitrary discrimination against lesbian, gay, bisexual, and unmarried persons.[6] As the Supreme Court made clear in *Romer v. Evans*, which struck down a Colorado constitutional amendment that preempted local anti-discrimination protections for lesbians, gay men, and bisexual people: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[7] Such laws also interfere with same-sex couples' right to access marriage "on the same terms and conditions as accorded to" different-sex couples, including the "symbolic recognition and material benefits to protect and nourish the union."[8] Like the unconstitutional "Defense of Marriage Act," struck down in *United States v. Windsor*, this legislation identifies the marriages of same-sex couples as a "subset of state-sanctioned marriages and makes them unequal" to all other types of legal marriages.[9]

When "sincere, personal opposition [to the marriage of a same-sex couple] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[10] That is precisely what this legislation would do. "It is not within our constitutional tradition to enact laws of this sort."[11]

**FADA 2.0 and FADA 3.0**

While the focus of this hearing is on H.R. 2802, as introduced, we understand that the lead sponsors of this legislation in both the House and Senate have drafted at least two revised versions of the bill.[12] Neither version has been formally introduced in either chamber of

[4] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (internal quotation marks and citation omitted).
[5] *See* Estate of of Thornton v. Caldor, 472 U.S. 703, 709–10 (1985) (holding that the Establishment Clause prohibited a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath," because the statute took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"); *see also* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (stating that the Establishment Clause requires courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries").
[6] Although the Fourteenth Amendment's Equal Protection Clause applies only the states, its protections apply to the federal government as well under the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).
[7] Romer v. Evans, 517 U.S. 625, 633 (1996).
[8] Obergefell v. Hodges, 135 S. Ct. 2584, 2601, 2604 (2015).
[9] U.S. v. Windsor, 133 S. Ct. 2675, 2694 (2013).
[10] *Obergefell*, 135 S. Ct. at 2602.
[11] *Romer*, 517 U.S. at 633.
[12] Press Release, Senator Mike Lee, Lee Releases Finalized First Amendment Defense Act (Sep. 15, 2015), http://www.lee.senate.gov/public/index.cfm/press-releases?ID=8E6FC9C9-730F-49A6-AD32-82E486F6E5BB.

Congress. While not as sweeping, the revised versions continue to present a dangerous threat to LGBT people, single mothers, and unmarried couples. Potential harms that could occur under "FADA 2.0" and/or "FADA 3.0" include:

- allowing social service programs that receive federal grants to provide emergency services to turn away anyone who has a sexual relationship outside of marriage, including single mothers and unmarried couples; or
- allowing privately owned businesses to discriminate by refusing to let a gay or lesbian employee care for their sick spouse, in violation of federal family and medical leave laws.

Indeed, the fact that the sponsors have repeatedly had to go back to try and scale back the discrimination and harm that would result from this legislation demonstrates why it should be so resoundingly opposed. The inclusion of married same-sex couples in Sec. 3(a)(1)(B) in the latest iteration from Representative Labrador is simply an effort to mask the anti-LGBT animus that lies at the very center of this legislation.

**Conclusion**

Whether in its original version or in the rumored revisions that have not been introduced, this legislation represents a sweeping legislative attack on the basic dignity and equality of LGBT people. The First Amendment does not need "defending" through a bill that discriminates against same-sex couples or single parents. The ACLU is strongly opposed to the misnamed "First Amendment Defense Act."

Sincerely,

Karin Johanson
Director, Washington Legislative Office

Ian Thompson
Legislative Representative

Cc: Members of the Committee on Oversight and Government Reform

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NATIONAL LGBTQ TASK FORCE ACTION FUND TESTIMONY REGARDING THE FIRST AMENDMENT DEFENSE ACT

SUBMITTED: JULY 12, 2016

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Exactly one month after the hate crime that killed 49 people at a gay nightclub in Orlando, we recognize the significance this hearing has in the national conversation on the rights and dignity of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people in the United States. We also note that in the month since this horrendous attack on the LGBTQ community, Congress has not held a single hearing on the needs of the victims, their families, and survivors, or on ways to better protect the LGBTQ community from additional hate crimes or discrimination.

It is critical that Congress sends a strong message that discrimination against LGBTQ people, even under the guise of religious liberty, cannot and will not be tolerated.1 The National LGBTQ Task Force Action Fund asks the Committee to consider the substantial negative impacts that passing the First Amendment Defense Act (FADA) would have and the ways in which it would embolden others to attack our community. Many LGBTQ people are also people of faith; yet this bill disingenuously suggests that faith and LGBTQ identity are always at odds.

We submit this testimony in part to expose FADA for what it is – a license to discriminate. This bill does not exist in a vacuum. Its introduction and ongoing support operates within a context of pervasive anti-LGBTQ animus. The LGBTQ community is disproportionately targeted by discriminatory laws and harassment, and as a result, suffers increased rates of unemployment, poverty, sexual violence, health and mental health care discrimination, housing instability, and other disparities. Rather than promote religious freedom, FADA would further compound these systemic disparities and undercut the few protections LGBTQ people have against discrimination. For these reasons, the National LGBTQ Task Force Action Fund strongly urges the Committee not to move forward with the First Amendment Defense Act of 2015.

[1] American Psychiatric Association, *Leading Mental Health Organizations Urge an End to Harmful 'Religious Freedom' Laws*, April 20, 2016, https://www.psychiatry.org/newsroom/news-releases/leading-mental-health-organizations-urge-an-end-to-harmful-religious-freedom-laws. https://www.psychiatry.org/newsroom/news-releases/leading-mental-health-organizations-urge-an-end-to-harmful-religious-freedom-laws. https://www.psychiatry.org/newsroom/news-releases/leading-mental-health-organizations-urge-an-end-to-harmful-religious-freedom-laws. https://www.psychiatry.org/newsroom/news-releases/leading-mental-health-organizations-urge-an-end-to-harmful-religious-freedom-laws.

## FADA builds upon a legacy of anti-LGBTQ discrimination

The tragedy in Orlando is not an isolated incident of violence against the LGBTQ community – over 20% of hate crimes in the U.S. target people based on their sexual orientation and/or gender expression.[2] Unfortunately, attacks on gay bars, which have historically served as community centers for LGBTQ people, are also not unprecedented. In 1969, in response to yet another targeted police raid, the patrons of Stonewall Inn began a powerful uprising that sparked the LGBTQ liberation movement.[3] However, anti-LGBTQ violence has continued since then. Six years after Stonewall, a gay bar was set on fire in New Orleans, killing 32 people.[4] In 1997, a bomber targeted an Atlanta lesbian bar in a hate-motivated attack against the "homosexual political agenda."[5] In 2000, a gunman opened fire at a gay bar in Virginia, and declared that he "was on a mission to kill gay people."[6]

These attacks on the LGBTQ community are not random, disconnected events – they are part of an environment flooded by relentless anti-LGBTQ legislation. This year alone (noting that it is only early July), state legislatures have introduced over 150 anti-LGBTQ bills that would affect LGBTQ people's ability to marry, adopt and foster children, access healthcare, education and homeless shelters, as well as public spaces and facilities.[7] Thirty-five bills specifically targeted one of most marginalized groups within the LGBTQ community – transgender people.[8]

Transgender people are disproportionately affected by unemployment, poverty, harassment, sexual violence, and homelessness.[9] Furthermore, this community, especially transgender women of color, are often targeted for

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[2] The Federal Bureau of Investigation, *FBI Releases 2014 Hate Crime Statistics*, Nov. 16, 2015, https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-hate-crime-statistics.
[3] Garance Franke-Ruta, *An Amazing 1969 Account of the Stonewall Uprising*, Jan. 24, 2013, http://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/.
[4] *After Upstairs Lounge Fire, Gay and Straight New Orleans Changed: Frank Perez*, June 22, 2013, http://www.nola.com/opinions/index.ssf/2013/06/after_upstairs_lounge_fire_gay.html.
[5] NPR, *Full Text of Eric Rudolph's Confession*, Apr. 14, 2005, http://www.npr.org/templates/story/story.php?storyId=4600480.
[6] Chris Kahn, *Four Life Terms in a Gay Bar Shooting*, Jul. 23, 2000, http://abcnews.go.com/US/story?id=92822&page=1.
[7] ACLU, *LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, https://www.aclu.org/lgbt-nondiscrimination-and-anti-lgbt-bills-across-country.
[8] *Id.*
[9] Jaime M. Grant, Ph.D. Lisa A. Mottet, J.D. Justin Tanis, D.Min., *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, 2011 (finding that transgender and gender non-conforming children in grades

hate crimes. Last year alone, at least 21 were murdered in the United States.[10] As of today's hearing, 14 transgender people have already been murdered this year.[11] There are countless others whose attacks go unreported or who are misgendered in news reports.

LGBTQ people already face termination, housing discrimination, and denial of healthcare access under state laws that enshrine discrimination in the name of religious liberty.[12] One hundred and ten of the anti-LGBTQ bills proposed this year specifically allowed discrimination under the guise of religious freedom – an increase from 79 last year.[13] FADA will further exacerbate this discrimination and deny basic human rights to LGBTQ people.

It is especially difficult to believe FADA is intended to "[p]rotect...the free exercise of religious beliefs and moral convictions"[14] when many of the bill's supporters are members of Congress who have an established anti-LGBTQ track record. For example:

- A key Senator has been openly described as a good friend of Bryan Fischer, a radical radio personality who has compared gay people to terrorists.[15] This comparison is especially distasteful in the light of the violent attacks the LGBTQ community has suffered, including the tragic events in Orlando.
- Another Senator started a GOP policy meeting with a Bible passage "calling for the death of homosexuals" and implied that colleagues who voted for a bill designed to protect LGBTQ people from discrimination were going to hell.[16]
- Yet another Senator has compared same-sex relationships to incest and pedophilia.[17]

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K-12 reported 78% rate of harassment, 35% physical assault, and 12% sexual violence; further finding that 90% of transgender and gender nonconforming adults experienced harassment, mistreatment, or discrimination).

[10] The Advocate, *These are the Trans People Killed in 2016*, http://www.advocate.com/transgender/2016/6/03/these-are-trans-people-killed-2016.

[11] *Id.*

[12] ACLU, *supra* note 6.

[13] ACLU, *Anti-LGBT Religious Exemption Legislation Across the Country*, https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country#2016; ACLU, *supra* note 6.

[14] First Amendment Defense Act, H.R. 2802, Sec. 3

[15] RWW Blog, *Fischer: Gay Sex is Just Like Terrorism*, YouTube, Sep. 15. 2010, https://www.youtube.com/watch?v=915mBWkoLiU&feature=player_embedded.

[16] Jennifer Shutt, *Congressman Who Read Anti-Gay Bible Verse Prays for Orlando Victims' Loved Ones*, Jun. 15, 2016, http://www.rollcall.com/news/policy/congressman-read-anti-gay-bible-verse-prays-orlando-victims; *see also* Scott Wong and Mike Lillis, *Bible Verse Prompts GOP Walkout After LGBT Vote Labeled a Sin*, May 16, 2016, http://thehill.com/homenews/house/281437-bible-verse-launches-gop-meeting-spurs-walkout.

- In a statement denouncing same-sex marriage, a Senator implied same-sex parents were inferior and claimed that children of such parents would be "shortchanged."[18]
- Another Senator has written that children are preyed upon by "pro-gay indoctrination and recruitment." The same Senator later compared being gay to alcoholism and drug addiction, and supported conversion therapy, which has been banned in many states as dangerous.[19]
- One Senator attempted to remove protections for LGBTQ students, claiming that discussing sexuality in sex education is part of "an agenda" that is recruiting children into homosexuality.[20]
- Another Senator claimed same-sex marriage is a threat to the survival of the United States.[21]

These remarks demonstrate a fundamental disrespect for – and in many cases explicit animus towards – LGBTQ people and our families, and fail to "contribute to a more respectful, diverse, and peaceful society."[22] If these are the "religious belief[s] or moral conviction[s]"[23] of some of the supporters of FADA, the discriminatory intent behind the bill cannot be any clearer. Anti-LGBTQ bills like FADA are instruments of discrimination against people whose basic human rights and dignity continue to be denied based on their sexual orientation and gender identity.

## FADA will affect more than "gay weddings"

Given the discrimination, animus, and violence that LGBTQ people face, we expect Congress to take the lead in protecting the rights and dignity of this targeted community. Instead, FADA is being pushed forward to permit an unprecedented level of taxpayer-funded discrimination.

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[17] Zack Ford, *Vicky Hartzler's Slippery Slope on Marriage: 'Why Not Allow a 50-Year Old Man to Marry 12-Year Old Girl?'*, Jun. 3, 2011, http://thinkprogress.org/lgbt/2011/06/03/235891/vicky-hartzlers-slippery-slope-on-marriage-why-not-allow-a-50-year-old-man-to-marry-12-year-old-girl/.
[18] Brian Tashman, *Huelskamp: Marriage Equality is Unpatriotic and Furthers 'The Destruction of the Family,'* Apr. 1, 2013, http://www.rightwingwatch.org/content/huelskamp-marriage-equality-unpatriotic-and-furthers-destruction-family.
[19] *Id.*
[20] Shawn Doherty, *Vital Signs: Grothman Suggests "Don't Ask Don't Tell" for State Schools*, Feb. 11, 2010, http://host.madison.com/ct/news/local/health_med_fit/vital_signs/article_f0ca35e4-1737-11df-b146-001cc4c03286.html.
[21] Verbicide, *Top Seven Ridiculous Anti-Gay Marriage Quotes*, Jun. 19. 2012, http://www.verbicidemagazine.com/2012/06/19/top-ridiculous-anti-same-sex-gay-marriage-quotes/.
[22] First Amendment Defense Act, H.R. 2802, Sec. 2(5).
[23] First Amendment Defense Act, H.R. 2802, Sec. 3(a).

Under current law, houses of worship already may decline to perform or recognize same-sex marriages without losing their tax-exempt status. FADA expands existing, narrowly tailored protections of religious institutions in a marriage context. In fact, the bill would allow anyone "regardless of religious affiliation or lack thereof, and regardless of for-profit or nonprofit status" to discriminate against same-sex couples, whether they are priests, business owners, or large for-profit corporations. Worse still, there is no definition of "religious belief" or "moral conviction," which means potentially any kind of discrimination against LGBTQ people would be acceptable so long as the discrimination is claimed to be "in accordance with a religious belief or moral conviction."

For example, federal employees could refuse to perform their duties if they disapprove of a person they are otherwise expected to assist, claiming that FADA gives them that right. This could result in individual employees declining to process paperwork such as SSI or SSDI applications, federal tax returns, federal student aid applications, or Social Security checks. These denials, and the ensuing lawsuits based on these FADA-enabled claims, would have significant, adverse consequences, particularly for low-income people. Statistics show that LGBTQ people are disproportionately impacted by poverty, and therefore more likely to rely on these services.[24]

FADA would not fulfill its purported goal of "contribut[ing] to a more respectful, diverse, and peaceful society." Instead, it would allow individuals to create hostile working environments that target their colleagues from diverse backgrounds.[25] A federal agency office, for example, would be forced to either hire someone as a counselor even though she has expressed outright animus against LGBTQ patients, or else risk a lawsuit under FADA. LGBTQ people are disproportionately impacted by mental health concerns such as depression, anxiety, and suicidality, and may be more likely to seek out their employer's counseling services. With FADA, however, these

[24] National LGBTQ Task Force, *Fact Sheet: Poverty & Economic Injustice in the LGBTQ Community*, Oct. 8, 2014 (Reporting that 24% of lesbian and bisexual women make less than the federal poverty line, compared to 19% of heterosexual women. Bisexual women are almost twice as likely as heterosexual women to receive food stamps. While 12% of children of different-sex couples live in poverty, almost 20% of children of women in same-gender couples and 25% of children of men in same-gender couples live in poverty; for children of Black men in same-gender couples, the number is over 50%) Available at http://www.thetaskforce.org/static_html/downloads/reports/fact_sheets/poverty_factsheet_10_8_14.pdf.
[25] H.R. 2802, Sec. 2(5).

federal employees or contractors would be subjected to this counselor's anti-LGBTQ hostility in their attempt to seek treatment.

FADA would carve out an enormous exception to existing federal laws, regulations, and guidance to allow any recipient of federal grants or any federal employee or contractor to violate nondiscrimination. A Head Start program could refuse to admit children of married same-sex couples. Federal contractors could refuse to provide spouse or dependent health insurance coverage to employees with same-sex spouses, refuse to grant leave to an employee to care for an ill same-sex spouse in violation of the Family and Medical Leave Act, or refuse to hire or promote married LGBTQ people in violation of a presidential executive order, all without any consequences.

Hospitals could deny visitation rights to same-sex couples and still keep Medicaid and Medicare funds. Emergency shelters receiving Violence Against Women Act funds could refuse to help LGBTQ survivors of domestic violence, placing survivors at high risk for immediate danger. A clinic receiving Ryan White HIV/AIDS Program funding could refuse to treat gay or bisexual men (or even men suspected to be gay or bisexual), particularly disadvantaging Black and Latino men in the LGBTQ community who are disproportionately impacted by HIV.

Students from graduate psychology or counseling programs who insisted on using conversion therapy with LGBTQ clients could still receive their degrees at colleges or universities receiving federal funds, even though the American Psychological Association standards and state accreditation boards reject the practice.[26] College and universities receiving federal funding could also fire faculty or staff upon learning of their sexual orientation or becoming pregnant while unmarried, without losing those funds.

Furthermore, FADA will exacerbate housing instability for LGBTQ people by circumventing fair housing laws and HUD guidance for nondiscrimination in homelessness services.[27] A landlord could refuse to rent to an unmarried lesbian because of "moral convictions." If the prospective tenant then became homeless and went with her same-sex partner to a shelter, staff could send them back to the streets because of a policy against "immoral

[26] American Psychological Association, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, http://www.apa.org/about/policy/sexual-orientation.aspx. http://www.apa.org/about/policy/sexual-orientation.aspx. http://www.apa.org/about/policy/sexual-orientation.aspx. http://www.apa.org/about/policy/sexual-orientation.aspx.

[27] Equal Access to HUD Programs Regardless of Sexual Orientation or Gender Identity, published in Federal Register vol. 77, no. 23, 5662, available at http://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf.

sexual behavior." Under FADA, that shelter could not only keep their tax-exemption but also retain HUD grants despite recent guidance against discrimination based on sexual orientation. As anywhere from 20 to 40% of all youth experiencing homelessness are LGBTQ: FADA's license to discriminate could severely undermine social services by increasing the risk that LGBTQ youth could be denied services, and prevent the federal government from rescinding grants to discriminatory programs.

Perhaps the most disturbing provision of FADA is that it would allow individuals, groups, or businesses to file lawsuits and receive money damages from taxpayer funds so long as they *believe* that the federal government *might* require them to implicitly condone same-sex marriage or even the existence of LGBTQ people. In the example of the homeless shelter, the shelter could actually demand money damages and essentially expect to the public to pay for their discrimination in addition to keeping its grant funds.

In the guise of protecting against discrimination, FADA would legally enshrine anti-LGBTQ discrimination, and allow anyone to discriminate – without consequences under existing federal protections – against someone known or believed to be in a same-sex partnership or unmarried heterosexual partnership.

## Conclusion

We urge the Committee to reject the First Amendment Defense Act (FADA) as the most recent attempt to legislate hate. This bill does not fulfill its purported aim of protecting religious freedom but in fact only perpetuates existing prejudice against LGBTQ people. The National LGBTQ Task Force Action Fund believes in the importance of religion and promotes faith-based organizing. For many LGBTQ people, faith is a personal, positive, and affirming part of who they are. Nevertheless, we oppose the use of religion as a vehicle for discrimination. FADA distorts the principle of religious freedom and is an affront to basic human dignity.

In addition, this bill's introduction at the present time is perverse and insulting in the aftermath of a major violent attack on the LGBTQ community in Orlando, especially while Congressional lawmakers have failed to introduce any proposals to meaningfully address the causes of that violence. FADA is situated in a context of continuous anti-LGBTQ legislative proposals and overt violence targeting our community centers. We urge members of the Committee to vote against FADA and stand on the side of justice for all Americans.


**Testimony of**

**Maggie Garrett**

**Legislative Director of**
**Americans United for Separation of Church and State**

**Submitted to the**

**U.S. House of Representatives**
Committee on Oversight and Government Reform

***Written Testimony* for the Hearing Record on**

**"Religious Liberty and H.R. 2802, the First Amendment Defense Act (FADA)"**

**July 12, 2016**

On behalf of Americans United for Separation of Church and State, I submit this written testimony for the hearing titled "Religious Liberty and H.R. 2802, the First Amendment Defense Act (FADA)." We strongly oppose FADA because it would sanction discrimination under the guise of religious freedom—harming couples and families, and violating the U.S. Constitution. When state legislatures across the country considered similar measures, faith communities, businesses, civil rights organizations, legal scholars, and the public strongly voiced the same objections. It was no surprise, therefore, that the U.S. District Court for the Southern District of Mississippi just struck down a nearly identical law in Mississippi as unconstitutional, concluding that FADA "violates both the guarantee of religious neutrality and the promise of equal protection of the laws."[1]

Freedom of religion is a fundamental American value that is protected by the First Amendment. It allows all of us the freedom to believe or not as we see fit, but it does not allow us to use religion as an excuse to deny couples the legal rights and benefits of marriage. The right to believe is fundamental; the right to discriminate—especially with taxpayer dollars—is not. Accordingly, we oppose this bill.

**FADA Is a Sweeping Bill That Would Allow Discrimination By Many Against Many.**
FADA allows those who hold the religious belief that marriage is between "one man and one woman, or that sexual relations are properly reserved to such a marriage," to ignore laws that conflict with that belief. Individuals, businesses, healthcare providers, government employees, and taxpayer-funded entities would all be entitled to use FADA to get around nondiscrimination protections. The result: same-sex couples, unmarried couples, couples in which one person had been married before, single mothers, and anyone who has had sex outside of marriage could face discrimination. Even the children of parents who fall within any of these categories could lose nondiscrimination protections they would otherwise have.

A few of the many troubling claims we could see if FADA were enacted include:

- An employee at the IRS could refuse to process the joint tax return of a same-sex couple, or an employee at the Federal Emergency Management Agency (FEMA) could refuse to help an unmarried couple who lost their home in a natural disaster.
- A homeless shelter or food bank that receives federal money could refuse to serve a same-sex couple, a single mother in need, or their children.
- A landlord could refuse to rent to an unmarried couple or an unwed mother.
- A business could deny gay and lesbian employees family and medical leave to care for a sick spouse.

Such discrimination cannot be justified.

[1] *Barber v. Bryant*, No. 3:16-cv-417-CWR-LRA, 2016 WL 3562647, at *1 (S.D. Miss. June 30, 2016).

**FADA Would Violate Rather than Protect the First Amendment of the U.S. Constitution.**
Ironically, the First Amendment Defense Act violates both the Establishment and Free Speech Clauses of the First Amendment.

*FADA Favors Certain Religious Viewpoints Over Others.*
"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[2] A law that gives a stamp of approval to one particular religious viewpoint "must be treated as 'suspect'" and, thus, "must be justified by a compelling governmental interest," and "closely fitted to further that interest."[3] FADA cannot meet this standard.

FADA gives preference to the religious beliefs that marriage should be between "one man and one woman" and "that sexual relations are properly reserved to such a marriage" by allowing adherents to ignore certain laws. As explained in *Barber v. Bryant*, which held the Mississippi FADA unconstitutional, the law "put its thumb on the scale to favor some religious beliefs over others."[4] Yet, the government lacks a compelling interest to do so.[5]

Although some claim that FADA accommodates free exercise, there are not "any actual, concrete problem of free exercise violations" that this bill would address.[6] FADA would grant nearly any person or entity a blanket exemption from any law that conflicts with their beliefs about marriage and sex, even if they cannot demonstrate their religion has been burdened. There is, however, no compelling interest in granting an exemption that does not lift a religious burden.[7] Even if one were to argue the law serves a compelling interest, the exemption is sweeping in scope and not narrowly tailored.

*FADA Would Harm Others.*
Although the state may offer religious exemptions even where it is not required to do so by the Free Exercise Clause of the U.S. Constitution,[8] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion"[9] that violates the Establishment Clause of the U.S. Constitution. Thus, a religious exemption "must be measured so that it does not override other significant interests" and may not "impose unjustified burdens on other[s]."[10] In *Estate of Thornton v. Caldor, Inc.*,[11] for

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[2] *Larson v. Valente*, 456 U.S. 228, 244 (1982).
[3] *Barber*, 2016 WL 3562647, at *30 (citing *Larson*, 456 U.S. at 246-47).
[4] *Id.* at *1.
[5] *Id.* at *30.
[6] *Id.*
[7] "Of course, in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring).
[8] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[9] *Corp. of the Presiding Bishop*, 483 U.S. at 334-35 (internal quotation marks omitted).
[10] *Cutter v. Wilkinson*, 544 U.S. 709, 722, 725 (2005); *see also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989).
[11] 472 U.S. 703, 704 (1985).

example, the Supreme Court struck down a blanket exemption for Sabbatarians because it "unyielding[ly] weight[ed]" the religious interest "over all other interests," including the those of co-workers.

FADA fails to take into account any of the sweeping harms it would cause to others. It empowers those with certain religious views to deny people—most obviously, but not only, same-sex couples—the rights and benefits of marriage, access to public accommodations, protections from nondiscrimination laws, and access to healthcare. The bill provides "an absolute right to refuse service to LGBT [and other] citizens without regard for the impact on their employer, coworkers, or those being denied service."[12] Under this bill, for example, a taxpayer-funded homeless shelter could refuse a single mother and her child a bed or a taxpayer-funded domestic violence shelter could refuse to provide a woman safety because she is living with a man who is not her husband. The clear result is an "unjustified burden" on and harm to others. That is impermissible under the Establishment Clause.[13]

*FADA Would Give Religious Organizations Discretionary Government Powers.*
In accordance with FADA, nonprofit organizations could take state, local, and federal funds to provide services to the public and then use a religious litmus test to determine whom they will and will not serve. This is not just unfair, but unconstitutional. In *Larkin v. Grendel's Den*,[14] for example, the Supreme Court overturned a law that allowed churches to veto applications for liquor licenses in their neighborhoods. The Court explained that that the Establishment Clause prohibits the government from delegating or sharing "important, discretionary governmental powers" with religious institutions.[15] FADA, however, would delegate government authority to religious organizations and specifically allow them to use religious criteria to determine who gets and who is denied public services.

*FADA Constitutes Content-Based Discrimination.*
Laws that target speech based on content, or subject matter, are subject to "strict scrutiny" and are "presumptively unconstitutional."[16] In *Reed v. Town of Gilbert*,[17] a church successfully challenged a sign ordinance that treated political signs more favorably than the church's meeting signs. Justice Clarence Thomas, writing for the Court, explained that a law that "singles out [a] specific subject matter for differential treatment, even it if does not target viewpoints within that subject matter" is "a paradigmatic example of content-based discrimination."[18] FADA falls into the same trap: On its face, it treats speech and activities "related to marriage between two people, including the belief that marriage should only be between a man and a woman or that sexual relations are properly reserved to such a union," differently than all other

[12] *Barber*, 2016 WL 3562647, at *31.
[13] *Id. at* *31-32 (explaining that the Mississippi FADA violates "this 'do no harm' principle.").
[14] 459 U.S. 116, 127 (1982).
[15] *Id.*
[16] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[17] *Id.*
[18] *Id.* at 2223.

speech on other subject matters. This differential treatment cuts across a host of topics spelled out under the bill, including taxes and government benefits.

*FADA Constitutes Viewpoint Discrimination.*
As also explained in *Reed,* "government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'"[19] Indeed, "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[20] In *Rosenberger v. Rector & Visitors of the University of Virginia,*[21] the U.S. Supreme Court explained that a state university newspaper could not treat "student journalistic efforts with religious editorial viewpoints" differently. FADA runs afoul of this rule because it treats religious viewpoints on marriage differently.

**FADA Would Violate the Equal Protection Clause of the U.S. Constitution.**
FADA would affect many people—unmarried couples, couples in which one person had been married before, single mothers, anyone who has had sex outside of marriage, and the children of people whose relationships are disfavored. Yet, it is clear that the main target of FADA is LGBT couples. This violates the most basic principles of Equal Protection: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[22]

For example, when the state of Colorado adopted a constitutional amendment to overturn all state and local nondiscrimination protections for LGB Coloradans and to prohibit state and local governments from instituting new nondiscrimination protections, the justification for the law was that it would protect those "who have personal or religious objections to homosexuality."[23] The Supreme Court, however, rejected these justifications and determined that the law was unconstitutional because its intent was to make LGB Coloradans "unequal to everyone else."[24]

FADA has the same insufficient and unconstitutional justification because it is explicitly aimed at treating LGBT Americans differently than all others. FADA grants "special rights," to those who do not want to serve LGBT Americans.[25] LGBT Americans, on the other hand, "are 'put in a solitary class with respect to transactions and relations in both the private and governmental spheres' to symbolize their second-class status."[26] In short, FADA "would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal

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[19] *Id.* at 2230 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).
[20] *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)).
[21] 515 U.S. at 831.
[22] *Romer v. Evans*, 517 U.S. 620, 633 (1996).
[23] *Id.* at 635.
[24] *Id.*
[25] *Barber*, 2016 WL 3562647, at *20.
[26] *Id.* (citing *Romer*, 517 U.S. at 627).

treatment under the law."[27] As explained in *Barber*: "The deprivation of equal protection of the laws is [FADA's] very essence."[28]

**Congress Cannot Fix FADA.**

Although no member of Congress has formally introduced a substitute version of FADA, some have proposed that FADA can be fixed if amended to prohibit government employees, publicly traded businesses, and federal contractors from using it.[29] Even with this amendment, however, individuals, closely held corporations,[30] and entities that accept taxpayer-funded grants could still use FADA to discriminate. For example, a taxpayer-funded mental health facility could still turn away a teenager because his parents are a same-sex couple. And Hobby Lobby, a company with an estimated $3.3 billion revenue and 23,000 employees,[31] could still disregard nondiscrimination laws that protect their employees and customers.

The underlying goal behind FADA is to allow discrimination. There is no way to fix a bill that maintains that goal. Thus, there is unlikely to be any version of FADA that would not harm others and could survive constitutional scrutiny. Rather than tinkering around the edges, Congress should simply reject this bill.

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[27] *Id.* at *21.
[28] *Id.* at *23.
[29] Press Release, Sen. Mike Lee, *Lee Releases Finalized First Amendment Defense Act* (Sept. 14, 2015), *available* at http://www.lee.senate.gov/public/index.cfm/press-releases?ID=8e6fc9c9-730f-49a6-ad32-82e486f6e5bb.
[30] The 2012 U.S. Census found that there are 2.9 million closely-held S corporations employing more than 29 million Americans. Drew Desilver, *What is a 'Closely Held Corporation,' Anyway, and How Many Are There, Pew Research Center*, http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there.
[31] *Id.*

NCLR NATIONAL CENTER FOR LESBIAN RIGHTS

WASHINGTON DC OFFICE
1100 H Street, NW
Suite 540
Washington DC 20005

United States House of Representatives

Committee on Oversight and Government Reform

"H.R. 2802: The First Amendment Defense Act"

July 12, 2016

Statement of the National Center for Lesbian Rights

The National Center for Lesbian Rights (NCLR) is a non-profit, public interest law firm that litigates precedent-setting cases at the trial and appellate court levels, advocates for equitable public policies affecting the lesbian, gay, bisexual, and transgender (LGBTQ) community, provides free legal assistance to LGBTQ people and their legal advocates, and conducts community education on LGBTQ issues. NCLR has been advancing the civil and human rights of LGBTQ people and their families across the United States through litigation, legislation, policy, and public education since it was founded in 1977. We appreciate the opportunity to provide this statement for the record in opposition to H.R. 2802.

## I. H.R. 2802 Would Harm Those Who Currently Suffer from Discrimination and Violence

One month ago today, the LGBT community was devastated by a horrific hate crime in Orlando, Florida, in which the lives of 49 people were brutally taken. Rather than convening a hearing to address nonexistent threats that LGBT people are claimed to pose to First Amendment religious liberties, members of Congress should be exercising leadership in the face of widespread and ongoing discrimination and violence against LGBT Americans, people of color and the Muslim community. Expending legislative time and resources to advance legislation that would write into federal law sweeping exemptions from essential anti-discrimination laws is especially unfortunate – and deeply insensitive – at this particularly painful time in our nation. Instead, this Congress should swiftly consider and pass the Equality Act (H.R. 3185), a measure that would amend our existing civil rights laws to ensure that LGBT Americans are afforded the basic protections they need to live full and productive lives.

What happened in Orlando – while profoundly shocking in its magnitude - was not an isolated incident. Members of the LGBTQ community consistently make up the second-largest number of hate crimes victims every year.[1] Last year alone, the number of reported LGBTQ victims of

[1] *Crime Statistics*, THE FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/stats-services/crimestats (last visited July 7, 2016).

homicides increased by 20%.[2] Additionally, LGBTQ individuals and their families are more likely than their peers to experience homelessness, poverty, family disruption, obstacles to positive youth development, violence, and other difficulties.[3] In the absence of inclusive and comprehensive federal and state anti-discrimination laws, housing and employment discrimination continue to plague the LGBTQ community. H.R. 2802 would only exacerbate the institutional and societal bias that already subjects members of the LGBTQ community to disproportionate risks to their economic, physical, and social well-being.

## II. H.R. 2802 Would Promote Taxpayer-Funded Discrimination

H.R. 2802, if enacted, would be an invitation to engage in widespread and unprecedented taxpayer-funded discrimination against LGBT people, single mothers, and unmarried couples. The bill would:

- permit government employees to discriminate against married same-sex couples and their families -- federal employees could refuse to process tax returns, visa applications or Social Security checks for all married same-sex couples;
- allow businesses to discriminate by refusing to let employees care for a sick same-sex spouse, in violation of family medical leave laws;
- allow federal contractors or grantees, including those that provide important social services like homeless shelters or drug treatment programs, to turn away LGBT people or anyone who has a sexual relationship outside of a marriage;
- let commercial landlords violate longstanding fair housing laws by refusing housing to a single mother based on the religious belief that sexual relations are properly reserved to marriage;
- permit a university to continue to receive federal financial assistance even when it fires an unmarried teacher simply for becoming pregnant;
- impair the ability of federal agencies like the EEOC to enforce laws that offer protections to LGBT people from discrimination in education, employment or housing;

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[2] Emily Waters, et al., *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2015*, THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, 9 (2016), available at http://www.avp.org/storage/documents/ncavp_hvreport_2015_final.pdf.

[3] Andrew Burwick, et al., *Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs*, xi (Dec. 2014), available at http://www.acf.hhs.gov/sites/default/files/opre/lgbt_hsneeds_assessment_reportfinal1_12_15.pdf.

- prevent the government from refusing to employ an employee assistance counselor who lost their license or accreditation because of telling LGBT patients that their relationships are an abomination; and

- allow any of these individuals, businesses or groups, or anyone else who believes they may somehow be required by the federal government to do something that implicitly condones marriage for same-sex couples or sexual relationships outside of marriage, to file a lawsuit and potentially receive damages from taxpayer money.

Proponents of H.R. 2802 and similar legislation maintain that it is necessary to prevent the government from forcing churches to officiate same-sex weddings or else lose federal tax benefits. This is completely untrue. Clergy and houses of worship of all faith traditions are already protected under the Constitution, federal law, and Supreme Court precedents from being required to sanctify or approve of any marriage or other relationships that violate their religious tenets. H.R. 2802 would address a fictitious harm while imposing actual harms of millions of Americans.

## III. Congress Should Not Advance Legislation That Has Been Rejected by the States and the Courts

In the past two years, several state legislatures have introduced bills similar to H.R. 2802, which have elicited nationwide opposition and concern. For example, following enactment of Indiana's so-called "religious freedom" law in 2015, both business leaders and members of the general public expressed such serious concerns about the law that the legislature was forced to quickly pass, and the governor to sign, an amendment to ensure legal protection for LGBT people. Measures in other states have been defeated after similarly encountering significant bipartisan opposition. One of the very few such measures that have been enacted into law, HB 1523 in Mississippi, was struck down two weeks ago by a federal district court judge, who found that it violated both the Establishment Clause and the Equal Protection Clause of the U.S. Constitution. U.S. District Court Judge Carlton W. Reeves, in a lengthy and detailed opinion, found that HB 1523 ran afoul of the First Amendment in two ways – by establishing "an official preference for certain religious beliefs over others" and because "its broad religious exemption comes at the expense of other citizens."[4] H.R. 2802 would similarly violate the First Amendment, the very provision of the Constitution that it purports to defend.

These state-level versions of H.R. 2802 have been widely recognized, condemned and rejected as the broad attack on LGBT people that they are. Under the guise of invented threats to religious freedom, opponents of LGBT equality are now attempting to bring this misguided effort to enshrine discrimination to the federal level, through both amendments to appropriations measures stand-alone legislation such as H.R. 2802. This effort should be rejected.

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[4] *Barber v. Bryant*, 2016 WL 3562647, *27, 31 (S.D. Miss. June 30, 2016).

## IV. Conclusion

Religious freedom is a cornerstone of our nation. That venerable and foundational freedom has never been—and must not become—a license to mistreat and discriminate against others. The term "religious freedom" should not be misused to justify laws designed to stigmatize, isolate, and harm vulnerable and marginalized groups. H.R. 2802 seeks to empower those who wish to harm those families that look different from their own, or who differ from a particular vision of family promoted by certain religious tenets. LGBT couples, single mothers, and unmarried couples would become targets of legally sanctioned mistreatment. We urge this committee to reject this dangerous legislation and instead devote its efforts to ensuring that all people, and all families, are afforded the full and equal protection of our laws.

LOG CABIN REPUBLICANS
1090 Vermont Avenue, NW | Suite 850
Washington, DC 20005

July 5, 2016

The Honorable Jason Chaffetz
Chairman, House Oversight & Government Reform Committee
2157 Rayburn House Office Building
Washington, DC 20515

Chairman Chaffetz,

Next week the House Oversight and Government Reform Committee will be holding a hearing on H.R. 2802, the First Amendment Defense Act. Log Cabin Republicans strongly urges against advancing this flawed and unnecessary legislation.

Log Cabin Republicans has long advocated for a balance between religious liberty and equality for LGBT Americans, and declared that it is possible for people of good will on all sides to come together to reach compromise. The First Amendment Defense Act does not seek compromise, and instead provides an overly broad framework that will only lead to needless litigation and unintended consequences.

In allowing people to claim "moral convictions" as a legal justification for refusal of service, the First Amendment Defense Act goes beyond protecting the free exercise of religion and provides justification for discrimination based on mere whim.

People of faith are protected by our nation's ultimate law: The Constitution of the United States of America. LGBT Americans have no such federal protections; in 28 states there are no laws whatsoever protecting LGBT Americans from discrimination.

Log Cabin Republicans will continue in dialogue with common-sense conservatives and people of faith as we work to strike a balance between LGBT equality and religious liberty. Discussion — not legislation — is what is needed at the present time.

Gregory T. Angelo
President

cc: Oversight & Government Reform Committee members

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

July 12, 2016

Chairman Chaffetz
Ranking Member Cummings
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

On behalf of the National Women's Law Center, which has been working since 1972 to secure and defend women's legal rights and to help women and families achieve economic security, we write in opposition to the First Amendment Defense Act ("FADA"; H.R. 2802), a discriminatory bill that undermines and weakens established federal civil rights law—with particularly negative implications for unmarried working women. This bill is the latest attempt in a prolonged campaign to legislatively sanction discrimination against women, LGBTQ individuals, and others, under the guise of moral or religious beliefs. By prohibiting the federal government from penalizing otherwise unlawful behavior when it is motivated by a belief that marriage should be limited to different-sex couples and that sexual relations should only occur within such a marriage, FADA invites discrimination on the basis of sex, pregnancy, sexual orientation, and gender identity. LGBTQ women; unmarried women who use contraception or become pregnant; and unmarried mothers would all be targets of discrimination that the federal government would be prohibited from opposing under this bill.

For example, H.R. 2802 would empower federal contractors to terminate unmarried women who became pregnant, or women in same-sex married couples who become pregnant, by prohibiting the federal government from terminating any contract on the basis of actions motivated by a belief that sexual relations should only occur between married different-sex couples. The alternate version of the bill circulated by Senator Lee would have the same effect as to non-profit federal contractors. Similarly, both H.R. 2802 and Senator Lee's version would have the effect of prohibiting the federal government from enforcing Title IX's protections against pregnancy discrimination and sex discrimination if a school receiving federal grants sought to expel unmarried pregnant students or unmarried female students with children. Under both H.R. 2802 and Senator Lee's version, an insurance plan that denied coverage of contraceptives and maternity coverage for women not married to men, in violation of federal law, could not be excluded from the federal health insurance exchange on this basis. Both

versions of the bill would empower hospitals and other health care providers to deny reproductive health care to unmarried women. Indeed, the bill could give many employers the mistaken impression that they are permitted to discriminate against unmarried pregnant employees without fear of federal enforcement of Title VII of the Civil Rights Act of 1964[1] and the Pregnancy Discrimination Act (PDA).[2] For all these reasons and many more, FADA jeopardizes women's economic security and reproductive freedom. Deciding whether and when to have children is a private health decision of enormous economic consequence and women must be able to make that decision without fear of discrimination. We strongly oppose this bill's contravention of civil rights law and a woman's constitutional right to make reproductive health decisions, most recently affirmed in the case of *Whole Woman's Health v. Hellerstedt*.[3]

The bill also threatens grave harm to women in same-sex marriages or same-sex relationships, by hamstringing federal enforcement of a range of federal protections against discrimination on the basis of sexual orientation or gender identity. For example, H.R. 2802 would render enforcement of Executive Order 13672, prohibiting federal contractors from discriminating in employment on the basis of sexual orientation or gender identity, nearly impossible if a contractor claimed its discrimination was based on a moral objection to sexual relations outside marriage between different-sex couples. Senator Lee's alternative would have the same effect as to non-profit federal contractors.

Advancing legislation that promotes discrimination under the guise of religious or moral freedom is deeply harmful to women. It is time to end the campaign to undermine women's freedom to make personal health choices without interference or repercussions. We oppose FADA, which only promotes intolerance, discrimination, and inequality.

Sincerely,

Emily J. Martin
Vice President of Workplace Justice
& General Counsel
National Women's Law Center

Jamil George
Director of Federal Reproductive
Rights & Health
National Women's Law Center

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[1] *Id.*
[2] 42 U.S.C. § 2000e(k).
[3] 579 U.S. ___ (2016).

BARRY LOUDERMILK
11TH DISTRICT, GEORGIA

HOMELAND SECURITY COMMITTEE

SCIENCE, SPACE, AND TECHNOLOGY COMMITTEE

– CHAIRMAN OF SUBCOMMITTEE ON OVERSIGHT

# Congress of the United States
## House of Representatives
## Washington, DC 20515–1011

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February 10, 2015

The Honorable Kasim Reed
Mayor of Atlanta
Office of Communications
55 Trinity Avenue, Suite 2500
Atlanta, Georgia 30303

Dear Mayor Reed:

As Members of Congress representing the state of Georgia, we write to express our concern about the recent termination of Chief Kelvin Cochran of the Atlanta Fire Rescue Department on January 6, 2015.

Chief Cochran's termination appears to have occurred because he wrote a 160 page book for his bible study in which one and a half pages describe his Christian beliefs regarding proper sexual ethics. Despite writing the book on his own time, Chief Cochran has been accused of engaging in "discrimination" for merely expressing his religious beliefs.

Chief Cochran's book was published over a year ago, and there is no evidence that Chief Cochran has ever discriminated against or been the subject of any complaints of discrimination while serving in the Atlanta Fire Rescue Department.

Your action against Chief Cochran appears to violate fundamental principles of free speech and religious freedom. Chief Cochran relied upon religious text from the Bible to express his opinions in his personal writings. The only way Chief Cochran could avoid his views would be to disown his religion. Indeed, in terminating him, the City of Atlanta itself engaged in an act of discrimination, and worse, did so on the basis of his religious beliefs.

As fellow Georgians, we are extremely troubled that a capable and long-standing public servant in our state can be targeted for retaliation and dismissal solely because of his religious views. Chief Cochran's views did not harm his ability to carry out his duties at the Atlanta Fire Rescue Department, and thus his speech should have been protected.

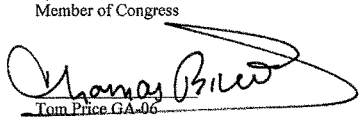
Chief Cochran notes that the city justified his termination on the grounds of "tolerance" and "inclusion" yet asks, "What could be more intolerant and exclusionary than ending a public servant's 30 years of distinguished service for his religious beliefs?" We agree and respectfully ask that you reconsider your decision to terminate Chief Cochran, and reinstate him in his position.

Sincerely,

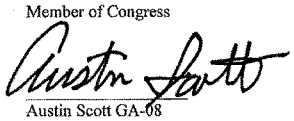
Barry Loudermilk GA-11
Member of Congress

Buddy Carter GA-01
Member of Congress

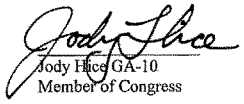
Lynn Westmoreland GA-03
Member of Congress



Tom Price GA-06
Member of Congress



Austin Scott GA-08
Member of Congress



Jody Hice GA-10
Member of Congress

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114TH CONGRESS
1ST SESSION

# H. R. 2802

To prevent discriminatory treatment of any person on the basis of views held with respect to marriage.

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IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 2015

Mr. LABRADOR (for himself, Mr. COLLINS of Georgia, Mr. JONES, Mr. SESSIONS, Mr. DUNCAN of South Carolina, Mrs. HARTZLER, Mr. CRAMER, Mr. NEUGEBAUER, Mr. PEARCE, Mr. LAMBORN, Mr. SAM JOHNSON of Texas, Mr. SANFORD, Mrs. BLACKBURN, Mr. ROTHFUS, Mr. FRANKS of Arizona, Mr. MULLIN, Mr. POMPEO, Mr. SMITH of Texas, Mr. PITTENGER, Mr. WALBERG, Mr. JODY B. HICE of Georgia, Mr. MARCHANT, Mr. LIPINSKI, Mr. JORDAN, Mr. PALMER, Mr. MEADOWS, Mr. ALLEN, Mr. HUELSKAMP, Mr. PITTS, Mr. GRAVES of Georgia, Mr. MILLER of Florida, Mr. GARRETT, Mr. FINCHER, Mr. SALMON, Mr. WESTMORELAND, Mr. SMITH of New Jersey, Mr. GROTHMAN, Mr. HARRIS, Mrs. WAGNER, Mr. WEBER of Texas, Mr. FLEMING, Mr. KELLY of Pennsylvania, Mr. BABIN, Mr. YOHO, Mr. CHAFFETZ, Mr. FORTENBERRY, Mr. PALAZZO, Mr. CARTER of Texas, Mr. ROUZER, Mrs. BLACK, Mr. BRAT, Mr. MOONEY of West Virginia, Mr. GOSAR, Mr. BISHOP of Utah, Mrs. LOVE, Mr. GOWDY, Mr. ADERHOLT, and Mr. STEWART) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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# A BILL

To prevent discriminatory treatment of any person on the basis of views held with respect to marriage.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "First Amendment Defense Act".

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) Leading legal scholars concur that conflicts between same-sex marriage and religious liberty are real and should be legislatively addressed.

(2) As the President stated in response to the decision of the Supreme Court on the Defense of Marriage Act in 2013, "Americans hold a wide range of views" on the issue of same-sex marriage, and "maintaining our Nation's commitment to religious freedom" is "vital".

(3) Nevertheless, in 2015, when asked whether a religious school could lose its tax-exempt status for opposing same-sex marriage, the Solicitor General of the United States represented to the United States Supreme Court that "[i]t's certainly going to be an issue".

(4) Protecting religious freedom from Government intrusion is a Government interest of the highest order. Legislatively enacted measures advance

this interest by remedying, deterring, and preventing Government interference with religious exercise in a way that complements the protections mandated by the First Amendment to the Constitution of the United States.

(5) Laws that protect the free exercise of religious beliefs and moral convictions about marriage will encourage private citizens and institutions to demonstrate tolerance for those beliefs and convictions and therefore contribute to a more respectful, diverse, and peaceful society.

**SEC. 3. PROTECTION OF THE FREE EXERCISE OF RELIGIOUS BELIEFS AND MORAL CONVICTIONS.**

(a) IN GENERAL.—Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

(b) DISCRIMINATORY ACTION DEFINED.—As used in subsection (a), a discriminatory action means any action taken by the Federal Government to—

(1) alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986 of, any person referred to in subsection (a);

(2) disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person;

(3) withhold, reduce, exclude, terminate, or otherwise deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person;

(4) withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit program from or to such person; or

(5) otherwise discriminate against such person.

(c) ACCREDITATION; LICENSURE; CERTIFICATION.—The Federal Government shall consider accredited, licensed, or certified for purposes of Federal law any person that would be accredited, licensed, or certified, respectively, for such purposes but for a determination against such person wholly or partially on the basis that the person believes or acts in accordance with a religious belief

or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

**SEC. 4. JUDICIAL RELIEF.**

(a) CAUSE OF ACTION.—A person may assert an actual or threatened violation of this Act as a claim or defense in a judicial or administrative proceeding and obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief against the Federal Government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) ADMINISTRATIVE REMEDIES NOT REQUIRED.—Notwithstanding any other provision of law, an action under this section may be commenced, and relief may be granted, in a United States district court without regard to whether the person commencing the action has sought or exhausted available administrative remedies.

(c) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended by inserting "the First Amendment Defense Act," after "the Religious Land Use and Institutionalized Persons Act of 2000,".

(d) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.—The Attorney General may bring an action

for injunctive or declaratory relief against an independent establishment described in section 104(1) of title 5, United States Code, or an officer or employee of that independent establishment, to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

**SEC. 5. RULES OF CONSTRUCTION.**

(a) BROAD CONSTRUCTION.—This Act shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the terms of this Act and the Constitution.

(b) NO PREEMPTION, REPEAL, OR NARROW CONSTRUCTION.—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally or more protective of free exercise of religious beliefs and moral convictions. Nothing in this Act shall be construed to narrow the meaning or application of any State or Federal law protecting free exercise of religious beliefs and moral convictions. Nothing in this Act shall be construed to prevent the Federal Government from providing, either

directly or through a person not seeking protection under this Act, any benefit or service authorized under Federal law.

(c) SEVERABILITY.—If any provision of this Act or any application of such provision to any person or circumstance is held to be unconstitutional, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected.

**SEC. 6. DEFINITIONS.**

In this Act:

(1) FEDERAL BENEFIT PROGRAM.—The term "Federal benefit program" has the meaning given that term in section 552a of title 5, United States Code.

(2) FEDERAL GOVERNMENT.—The term "Federal Government" includes each authority of any branch of the Government of the United States.

(3) PERSON.—The term "person" means a person as defined in section 1 of title 1, United States Code, and includes any such person regardless of religious affiliation or lack thereof, and regardless of for-profit or nonprofit status.

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