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First Amendment Defense Act Protects Freedom and Pluralism after Marriage Redefinition

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In June 2015, the Supreme Court redefined marriage throughout America by mandating governmental entities to treat same-sex relationships as marriages.[1] The Court, however, did not say that private schools, charities, businesses, or individuals must do so if they disagree. Indeed, there is no justification for the government to force these entities to violate beliefs about marriage that, as Justice Kennedy noted, are held "in good faith by reasonable and sincere people here and throughout the world."[2] Americans who believe that marriage is the union of husband and wife should continue to be free to live and work according to their convictions.

The proposed First Amendment Defense Act (FADA) is a good first step to protecting freedom after the Court's redefinition of marriage. FADA, sponsored by Senator Mike Lee (R–UT) and Representative Raúl Labrador (R–ID), is a measured, reasonable, commonsense policy. It would ensure that no federal agency discriminates against individuals or institutions for following their convictions about marriage as a man-woman union by revoking their nonprofit tax-exempt status, or denying them government grants, contracts, accreditation, or licenses. FADA protects freedom and pluralism in the wake of social change—embodying the best of American values.

This paper, in its entirety, can be found at
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FADA Embodies the Best of American Values

Public policy should serve the common good. That requires the government to respect the freedom of all Americans, not just those with whom the powerful agree.

When President Barack Obama changed his position on the marriage issue in 2012, he insisted that those who disagree "are not coming at it from a mean-spirited perspective" but "because they care about families."[3] FADA would ensure that the government respects these people as well.

Respecting religious liberty in public life is particularly important. After all, as First Lady Michelle Obama put it, religion "isn't just about showing up on Sunday for a good sermon and good music and a good meal. It's about what we do Monday through Saturday as well."[4] And that's precisely why FADA protects the rights of individuals and the associations they form—small businesses and charities, schools, and social services—to speak and act in accordance with their belief that marriage is the union of a man and a woman in the public square and the marketplace.

The Need for FADA

The need for FADA is great. Already state and local governments have penalized counselors, adoption agencies, doctors, and small-business owners that declined to act against their convictions concerning sex and marriage.[5] And there are worrying signs that the federal government will do the same.[6]

In the oral arguments before the Supreme Court in *Obergefell* (the case redefining marriage), Justice Samuel Alito asked Solicitor General Donald Verrilli

whether a university or college might lose its nonprofit tax status because of its conviction that marriage is the union of husband and wife. Verrilli's response was chilling: "It's certainly going to be an issue. I – I don't deny that. I don't deny that, Justice Alito. It is – it is going to be an issue."[7]

The Sunday after the Supreme Court's ruling in *Obergefell*, *New York Times* religion columnist Mark Oppenheimer wrote a column for *Time* magazine headlined "Now's the Time to End Tax Exemptions for Religious Institutions."[8] Oppenheimer argued, "Rather than try to rescue tax-exempt status for organizations that dissent from settled public policy on matters of race or sexuality, we need to take a more radical step. It's time to abolish, or greatly diminish, their tax-exempt statuses." But as Americans have long understood, the power to tax is the power to destroy. FADA would prevent the federal government from destroying these nonprofit institutions.

Nonprofit tax status is not the only risk. So, too, is accreditation. Gordon College, an evangelical school near Boston, had its accreditation questioned last year over its beliefs about sex and marriage. Gordon College adheres to the Christian understanding of marriage and its policy forbids students, faculty, and staff—gay and straight alike—from engaging in nonmarital sex. Gordon was investigated by its accreditors—the cartel that holds the keys to receiving federal higher education funding—because its president signed onto a letter asking that its religious liberty be protected from an intrusive executive order dealing with sexual orientation.

Though the school won this accreditation battle, and thus preserved its students' eligibility for student loans, last year's challenge may be merely the first of many for schools that hold fast to their beliefs about marriage. FADA is good policy because it would prevent government discrimination in the scenarios just described and more, while taking nothing away from anyone.

The Principle Guiding FADA

Respect for freedom after the Supreme Court's ruling takes several forms. Charities, schools, and other organizations that interact with the government should be held to the same standards of competence as everyone else, but their view that marriage is the union of a man and a woman should never disqualify them from government programs.

Educational institutions, for example, should be eligible for government contracts, student loans, and other forms of support as long as they meet the relevant *educational* criteria. Adoption and foster care organizations that meet the substantive requirements of child welfare agencies should be eligible for government contracts without having to abandon the religious values that led them to help orphaned children in the first place. Protecting the diversity of private providers, each serving families that share its values, will increase the number of children who are connected with permanent, loving families.

Government rightly withholds taxpayer dollars from certain organizations—those that perform abortions, for example, or those with racist policies—but upholding marriage as the union of a man and a

1. See Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, DC: Regnery Publishing, 2015).
2. *Obergefell v. Hodges*, 576 U.S. ___ (2015), http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed November 24, 2015).
3. "Transcript: Robin Roberts ABC News Interview with President Obama," ABC News, May 9, 2012, http://abcnews.go.com/Politics/transcrit-robin-roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true#.UdCMN4zD_cs (accessed November 24, 2015).
4. Michelle Obama, "Remarks by the First Lady at the African Methodist Episcopal Church Conference Gaylord Opryland Resort, Nashville, Tennessee," June 28, 2012, http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-first-lady-african-methodist-episcopal-church-conference (accessed November 24, 2015).
5. See Anderson, *Truth Overruled*, pp. 85–104, and Ryan T. Anderson and Leslie Ford, "Protecting Religious Liberty in the State Marriage Debate," Heritage Foundation *Backgrounder* No. 2891, http://www.heritage.org/research/reports/2014/04/protecting-religious-liberty-in-the-state-marriage-debate.
6. See Ryan T. Anderson, "Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom," Heritage Foundation *Backgrounder* No. 3082 (forthcoming).
7. Transcript of oral argument, *Obergefell v. Hodges* (Case No. 14-556), U.S. Supreme Court, April 28, 2015, http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf (accessed November 24, 2015).
8. Mark Oppenheimer, "Now's the Time to End Tax Exemptions for Religious Institutions," *Time*, June 28, 2015, http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/ (accessed November 24, 2015).

woman is nothing like killing or racism.[9] Government policy should not trample on the consciences of citizens who dissent from political correctness on sexuality. Government policy that discriminates against social service providers that believe marriage is a male–female union undermines our nation's commitment to pluralism and diversity.

What FADA Does

FADA enacts a bright-line rule that government can never penalize certain individuals and institutions for acting on the conviction that marriage is the union of husband and wife or that sexual relations are properly reserved to such a union. At the same time, FADA strikes a careful balance as to who and when these protections apply. Protected entities include individuals, nonprofit charities, and privately held businesses. FADA, however, would not apply to publicly traded corporations or to federal employees and contractors with respect to their job or contract duties. FADA makes clear that it does not relieve the federal government of its duty to provide government services, medical care, or benefits to all who qualify—it must simply respect conscience in doing so.

FADA, like pro-life conscience protections in federal law, protects both religious beliefs and moral convictions. The First Amendment, after all, protects religious freedom and freedoms of speech, press, and assembly—for the religious and non-religious alike. The Founders rightly understood that all of these freedoms are united, which is why they were all protected in the First Amendment. The constitution protects an *ecosystem of freedom* and government should not carve it up.

Conclusion

The court has redefined marriage, and beliefs about human sexuality are changing. America is in a time of transition. During this time, it is critical to protect the right to dissent and the civil liberties of those who speak and act in accord with what Americans had always believed about marriage—that it is the union of husband and wife. Good public policy is needed at the local, state, and federal levels to protect cherished American values. At the federal level, the First Amendment Defense Act would help achieve civil peace amid disagreement and protect pluralism and the rights of all Americans, regardless of what faith they may practice.

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9. See Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom*, Chapter 6.