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SETTING THE RECORD STRAIGHT ON THE RESPECT FOR MARRIAGE ACT

Three claims have been made about the Respect for Marriage Act:

A. that the RFMA's religious liberty provisions were instrumental in a federal district court's rejection of an attack on the constitutionality of Title IX's religious exemption;

B. that the law does not codify same-sex marriage; and

C. that the RFMA's religious liberty provisions are very meaningful.

These claims are false.

A. The RFMA and Title IX

Title IX of the Education Amendments of 1972 forbids sex discrimination by education programs or activities receiving federal financial assistance. Its religious exemption protects faith-based schools from applications of Title IX that would violate their religious tenets.

The Department of Education and some courts hold the position that Title IX reaches discrimination on the basis of sexual orientation and gender identity, requiring covered schools to grant access to private spaces and athletics based on gender identity. This interpretation of Title IX also forbids schools from maintaining admissions and student conduct standards that require adherence to biblical teaching related to human sexuality. It also restrains schools' freedom in the employment context.

Many faith-based educational institutions have successfully invoked Title IX's religious exemption to protect themselves from these interpretations of Title IX.

Angered by that reality, a group of current and former religious college students challenged the constitutionality of Title IX's religious exemption in a case called *Hunter v. U.S. Department of Education*. The plaintiffs claimed that the exemption violated the Equal Protection Clause, the Establishment Clause, the Free Exercise Clause, and the Religious Freedom Restoration Act.

Represented by Alliance Defending Freedom, three institutions of higher education successfully intervened in the case as defendants.

All the defendants (including ADF's clients) moved to dismiss the case. On January 12, 2023, the district court granted their motions.

The RFMA had absolutely no relevance whatsoever to the legal issues raised in the *Hunter* litigation. This should be self-evident, as a federal *statute* cannot affect a court's interpretation of *the Constitution*. Even if a statute could do so, it certainly did not in *Hunter*—the RFMA says nothing about the constitutional provisions the *Hunter* plaintiffs invoked. The district court's opinion, of course, did not mention the RFMA.

Prior to the court's decision, another intervenor-defendant (the Council for Christian Colleges and Universities or CCCU) filed a supplemental brief claiming, rather implausibly, that the recent enactment of the RFMA was somehow relevant to the case. That brief concedes that the RFMA "does not directly control this litigation"—an understatement if there ever was one. The brief attempts to concoct some tenuous connections between the RFMA and the lawsuit.

Again, in its opinion and order dismissing the case, the district court mentioned neither the RFMA nor the assertions made in the CCCU supplemental brief. The claim that the RFMA somehow affected the *Hunter* decision is wildly speculative at best and almost certainly just flat-out false. The court's reasoning is laid out in its opinion—which does not mention the RFMA at all.[1]

B. The RFMA and the "Codification" of Same-Sex Marriage

It has been claimed that the RFMA did not codify same-sex marriage into federal law. This contention is deceptive to the point of being outright false.

Marriage has traditionally been a matter of state law. Prior to the emergence of same-sex marriage, the Constitution's Full Faith and Credit Clause generally required states to recognize marriages considered valid in the state in which the marriage was entered into. The differences among states regarding eligibility for marriage were not fundamental.

That changed when Hawaii was poised to deem same-sex marriages valid. Other states rightly became concerned that they would be compelled to recognize same-sex marriages entered into in Hawaii. In response, Congress passed the Defense of Marriage Act (DOMA). Section 2 of the Act relieved states of the obligation to give full faith and credit to same-sex marriages. Section 3 defined marriage for purposes of federal law as the union of one man and one woman.

In *Windsor v. United States*, the Supreme Court struck down Section 3 of DOMA, thereby requiring the federal government to recognize same-sex marriages. In *Obergefell v. Hodges*, the Court held that the Fourteenth Amendment's Equal Protection Clause required governments at all levels to recognize same-sex marriages.

RFMA proponents argued that the prospect of the Supreme Court overturning *Obergefell* made it necessary for Congress to codify same-sex marriage. The congressional findings in the Act state that same-sex couples deserve "stability."

[1] It bears noting that the CCCU played a role in the legislative effort to pass the RFMA and that a CCCU representative attended the White House signing ceremony. These actions were controversial among its members.

So what does the RFMA actually do? Is there any merit to the contention that it does not "codify" same-sex marriage?

The RFMA:

1. repealed Section 2 of DOMA, which relieved states of the obligation to recognize other states' same-sex marriages;
2. forbids states from refusing to recognize same-sex marriages from other states;
3. requires the federal government to recognize any two-person marriage valid in the couple's state.

It is difficult to understand why some believe that the RFMA does not "codify" same-sex marriage. We assume that the argument rests on two things: (1) the fact that the Act doesn't simply say something like "marriage is the union of two people, regardless of their sex" or "marriage includes same-sex couples," and (2) language like that is the only thing that qualifies as "codification."

What does it mean to "codify" same-sex marriage? Same-sex marriage is "codified" when states and the federal government are required to recognize same-sex marriage. So, does the RFMA assure that? Yes.

How does the RFMA "codify" same-sex marriage? Prior to the RFMA, the legal status of same-sex marriage rested on multiple foundations—state court decisions, state statutes, *Windsor*, and *Obergefell*. The RFMA's stated purpose is to assure continued legal recognition of same-sex marriage in the (highly unlikely) event the Supreme Court overrules *Obergefell* (and, presumably, *Windsor* as well). How does the RFMA assure continued recognition of same-sex marriage in the event the Court overrules those cases?

To answer that question it is necessary to ask and answer another question: without the RFMA, what would the landscape look like if *Obergefell* and *Windsor* were overruled?

The demise of *Obergefell* and *Windsor* would not change the situation in those states that have fully embraced same-sex marriage, either through a state court decision or a state statute. As for the other states, their previously unconstitutional marriage statutes would spring back to life. Such states would not be required to recognize out-of-state same-sex marriages, because of Section 2 of DOMA, which relieves states of the obligation to recognize other states' same-sex marriages.[2] As for the federal government, DOMA Section 3 would once again define marriage for purposes of federal law as the union between one man and one woman.[3]

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[2] Given the tremendous shift in American attitudes towards same-sex marriage, it is likely that some (but not all) states would embrace and legally codify same-sex marriage in the event *Obergefell* were overturned.

[3] It conceivable that Congress would repeal DOMA in the event the Court overturned *Obergefell* and *Windsor*. Doing so would result in nationwide same-sex marriage, as states would be required to recognize out-of-state same-sex marriages by the Full Faith and Credit Clause. That said, in a hard-to-imagine world in which the Court overturns *Obergefell* and *Windsor*, it is difficult to make confident predictions about what Congress might do.

How would the RFMA alter this reality? First, states would be legally required to recognize other states' same-sex marriages. Second, the federal government would recognize all two-person marriages valid under state law. It would therefore recognize all same-sex marriages.

In a world without *Obergefell* and with the RFMA, the only scenario in which there wouldn't be nationwide same-sex marriage is the one in which *every* state voluntary rejected same-sex marriage. If this virtually impossible scenario is the basis for the claim that the RFMA doesn't "codify" same-sex marriage, then the claim is patently ridiculous.

In sum, there is more than one way to skin a cat, and just because the RFMA chose a less direct method doesn't mean the cat isn't skinless. There is more than one way to "codify" same-sex marriage, and the method Congress used in the RFMA doesn't mean that same-sex marriage hasn't been "codified."

C. The Significance of the RFMA's Religious Liberty Provisions

The heart of the RFMA's purported protections of religious liberty is Section 6(b). RFMA supporters claim that it provides houses of worship and other religious non-profits categorical protection from being forced to help celebrate same-sex weddings. And they assert that this is a significant religious liberty advance.

Neither of these claims holds up.

First, Section 6(b)'s "protection" addresses one of the few settings where same-sex marriage (and accompanying sexual orientation laws) *hasn't* created religious liberty problems. Laws are simply not being used to force houses of worship to celebrate same-sex weddings. In its 2018 *Masterpiece Cakeshop* decision, the Supreme Court said that would violate the First Amendment.

Same-sex marriage has been legally recognized in at least one state since 2003 and nationwide since 2015. The number of cases challenging a religious organization's refusal to host a same-sex wedding? Our research uncovered ... zero.

Second, in addition to this scenario apparently never arising, this is one context in which existing legal protections (such as the First Amendment and analogous state constitutional provisions) are entirely adequate. No reasonable person thinks the government could get away with forcing houses of worship to do same-sex weddings. So, if activists someday try to force churches to host and perform such ceremonies, they won't need the RFMA to win their cases.

Third, the RFMA may not work like its supporters say. Supporters confidently contend that the protections in Section 6(b) are absolute. But the entire subsection of the bill is qualified with the phrase "consistent with the First Amendment." Judges may use that language to conclude that this provision is no more protective than the First Amendment—meaning that this provision of the bill does nothing.

RFMA supporters also tout Section 6(a) of the bill, which says the statute won't be read to diminish existing legal protections (like the Religious Freedom Restoration Act and the First Amendment).

This hardly deserves praise. It just means that the RFMA clears the very low bar of being better than the pernicious Equality Act, which strips Americans of their Religious Freedom Restoration Act rights. And saying "the First Amendment is still available" is hardly some sort of generous concession to religious liberty, given that Congress (thankfully) lacks the authority to repeal the First Amendment in the first place. After all, the Biden administration is currently asking the Supreme Court to interpret the First Amendment to let governments compel people to speak views of marriage contrary to their faith.

The flimsiness of the RFMA's religious liberty "protections" is made worse by the bill's utter failure to address the real and serious problems religious Americans face in the wake of *Obergefell*.

Right now, government officials across the country—including the Biden administration—argue in court that individuals and religious organizations who work with people from all walks of life should face civil and criminal penalties if they don't abandon their beliefs on this issue. Faith-based adoption and foster placement agencies are denied the opportunity to serve needy children. States deny parents equal support if they choose religious schools with the "wrong" views on marriage. Governments force gospel rescue missions to hire people who deny the gospel.

The RFMA addresses none of this. It instead fuels hostility towards Americans who hold beliefs about marriage rooted in honorable or philosophical premises.

RFMA supporters claim that they protected the tax-exempt status of non-profits that believe that marriage is the union between one man and one woman. They point to a provision stating that "[n]othing in this Act, or amendment made by this Act, shall be construed to deny or alter any benefit, status, or right of an otherwise eligible entity or person, including tax-exempt status, tax treatment, educational funding, or a grant, contract, agreement, claim, or defense."

This provision of the bill does *not* stop the Internal Revenue Service from invoking the RFMA to withhold tax-exempt status from a religious non-profit that follows its belief that marriage is the union of one man and one woman. How can that be? Well, it's necessary to understand how the IRS determines whether a non-profit organization deserves tax-exempt status.

In making that determination, the IRS assesses whether the entity is "charitable." To be "charitable," the entity may not act in a manner "contrary to public policy." In determining "public policy," the IRS looks at Supreme Court decisions, congressional statutes, executive orders, and the like. Our concern is that the IRS will use the RFMA's embrace of same-sex marriage to help build the case that non-profits that do not recognize same-sex marriage are acting contrary to public policy and thus not entitled to tax-exempt status.

The quoted provision does not satisfy this concern. That language simply means that no court or agency should interpret or apply the RFMA itself to *require* revocation of tax-exempt status. No one has argued that the RFMA could be construed that way. The fear has always been that the IRS would use the RFMA as evidence of a national public policy. The section of the bill RFMA supporters invoke does not stop the IRS from doing this. To be sure, this is a subtle distinction, but the law is full of subtle but sometimes immensely important distinctions.

In short, the RFMA imposes a new obligation to recognize same-sex relationships on religious organizations that work closely with government. It creates new tools for progressive activists and the Department of Justice to enforce that obligation. It gives the Internal Revenue Service a new argument for taking tax-exempt status away from religious non-profits. It makes religious freedom and free speech cases harder to win by elevating the federal government's interest in same-sex marriage. The religious liberty "protections" added to the RFMA by the Senate do not adequately address these concerns.