



1333 H Street, NW 10th Floor
Washington DC, 20005
Tel: 202 682.1611 • Fax: 202 682.1867

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,

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,

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

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/>