

***Public Rights/Private Conscience Project***

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**Fact Sheet on the Possible Implications of the “First Amendment Defense Act”  
(FADA) H.R. 2802**

The proposed “First Amendment Defense Act” (FADA) aims to immunize a wide range of “persons” from federal penalties 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*. 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 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 or to married same-sex couples.
- 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* 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.
- Assuming discriminatory action is 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).
- **Civil Rights Laws Generally:** The Civil Rights Act, Pregnancy Discrimination Act, Americans with Disabilities Act, Fair Housing Act, and Equal Credit Opportunity Act all prohibit some forms of discrimination against customers, employees, renters, or creditors who are in same-sex relationships, are unmarried and pregnant or parenting, or who have a disability (such as HIV/AIDS) that may be linked to non-marital sex. 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.

- **Employment:**

- FADA could provide an affirmative defense to employers in connection with sex, sexual orientation, pregnancy, and other employment discrimination claims brought by employees under Title VII of the Civil Rights Act of 1964;
- The Family and Medical Leave Act (FMLA) 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, and may bar an action being brought in federal court by an employee against his or her employer to enforce FMLA rights;
- FADA could 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;
- Under FADA, the DOL Employee Benefits Security Administration would be unable to take any enforcement action against employers who refused to provide mandated health benefits to LGBTQ and unmarried pregnant or parenting employees and their families. Title I of ERISA 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.

- **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. For example, FADA would:

- Prevent the federal government from enforcing 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 employees who are married to a same-sex partner or who have extramarital relations/sex;
- Allow a non-profit agency that has contracted with the federal government to provide services to Medicare enrollees to 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;

- Allow group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) to argue that they are 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; 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; 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. Covered health plans could also violate provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA) without being subject to a tax—for example by refusing to consider a divorce a “qualifying event” for same-sex couples;
  - Allow hospitals to claim FADA immunity if they can marshal a religion- or moral conviction-based justification to refuse to provide a wide range of care that is not “necessary to cure an illness or injury,” such as preventive care, reproductive health care, spousal or partner visitation, or counseling or treatment that is sensitive to marital status, sexual orientation, or a diversity of “extramarital relations”;
  - Allow nonprofit religious hospitals to violate provisions of the Patient Protection and Affordable Care Act (ACA) that impose certain obligations on charitable hospitals yet maintain their tax-exempt status. 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.
- **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.
  - **Health Insurance:** 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. 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. FADA would restrict HHS's ability to enforce Title I.

- **Federal Contracting:** FADA would eliminate the federal government's ability to prohibit discrimination by non-profit recipients of federal grants and contracts. FADA may also prevent the federal government from disqualifying a person or entity from receiving taxpayer money, or administering an important state-created or -funded program, because that entity discriminates based on their religious beliefs or moral convictions. For instance,
  - A health clinic would remain eligible for Title IX funding even if it refused to provide family planning care to those patients that were unable to provide a marriage license;
  - A health clinic could receive a Ryan White grant to provide services to people with HIV/AIDS and then decline to work with men or women in same-sex marriages or heterosexual individuals who are unmarried;
  - The federal government would be prevented from denying Title X funding to a health clinic that provides family planning care only to those patients that provide a marriage license and are in a different-sex marriage in order to qualify for such services;
  - The federal government would be prevented 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.
- Deny 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.
- FADA is written so broadly that it could even be interpreted to prevent the Department of Justice from investigating or enforcing the Shepard Byrd Hate Crimes Prevention Act, 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.

This list is meant to be illustrative, not exhaustive. For citations and more thorough explanation of each of the items above, please consult the Public Rights/Private Conscience Project's full testimony on FADA before the House Committee of Oversight and Government Reform on July 12, 2016, available [here](http://web.law.columbia.edu/gender-sexuality/public-rights-private-conscience-project/policy): <http://web.law.columbia.edu/gender-sexuality/public-rights-private-conscience-project/policy>.