



The First Amendment Defense Act Should Not Protect Multiple Views of Marriage

Since the introduction of the First Amendment Defense Act (“FADA”), Family Research Council has been a strong supporter, advocating for co-sponsorship, a hearing, and markup on the bill. Even after the language was significantly narrowed in September of 2015, FRC maintained its support and encouraged other groups to advocate for action on the bill. In fact, in February FRC led a coalition letter signed by almost one hundred different organizations endorsing the September-released language and calling for a vote on that language. Unfortunately, the latest revisions to FADA have forced FRC to withdraw its support of the bill.

The new FADA language says:

(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, speaks, or acts in accordance with a sincerely held religious belief or moral conviction that –

(1) marriage is or should be recognized as the union of –

(A) two individuals of the opposite sex; or

(B) two individuals of the same sex; or

(2) extramarital relations are improper.

Principled Objections to the new language:

- The new language of FADA would force Congress to affirm, for the first time, the construct that marriage can be between two people of the same sex.
- A vast majority of conscience bills based on the life issue, including the recently-passed Conscience Protection Act, protect against government discrimination for one view of abortion – the pro-life view. There is not a constitutional problem with these pro-life laws, and there should be no problem with a pro-marriage law that does not also provide protections for same-sex marriage views.
- If Members were advocating for protections for views regarding same-sex marriage, they should be willing to vote on that specific issue through the amendment process, rather than so significantly changing a bill with such extensive co-sponsorship.
- The new language offers a private right of action for same-sex marriage advocates against the federal government. This could create problems for those who disagree with same-sex marriage and seek grants or contracts from the federal government. The point is not that the government should discriminate against proponents of same-sex marriage. In fact, FADA has always discouraged such discrimination.

- The new language is unnecessary because of a provision of the bill that, from its introduction, said “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.” In other words, federal law already provides benefits and protections to those in, and who agree with, same-sex marriages. FADA does not bar such benefits, but it also should not affirm the illegitimate redefinition of marriage by the Court and Obama administration.

Practical Objections to the new language:

- Protecting same-sex marriage views is unnecessary. The vast majority of federal government actors in the Obama administration and the judiciary endorse and promote a same-sex marriage view. Thus, it is natural marriage views, not same-sex marriage views that need protection. While one rogue District Court judge in Mississippi has held that protecting only natural marriage views is unconstitutional, a vast majority of jurists and scholars disagree. This is likely the reason so many laws that protect the consciences of only pro-life persons from federal government discrimination have not been challenged.
- FADA is a messaging bill, and protecting same-sex marriage views at the federal level sends a bad example to the states. With President Obama in the Executive Office, the First Amendment Defense Act is not going to be signed into law this year. However, the House of Representatives passing a strong conscience bill related to marriage could have sent a strong message to states to pass something similar that would protect individuals like Fire Chief Kelvin Cochran, in Georgia. Protecting views that support same-sex marriage is not only unnecessary at the federal level, but sends the wrong message to the states. Unfortunately, the new language fails to achieve this objective.
- Protecting multiple views of marriage may undermine the protections for people who hold a natural view of marriage. Some may argue that FADA contains language that prevents disparate treatment. As Chai Feldblum pointed out years ago, “There can be a conflict between religious liberty and sexual liberty, but in almost all cases, the sexual liberty should win because that’s the only way that the dignity of gay people can be affirmed in any realistic manner.” In the course of a competition for federal grants and contracts between an organization or institution that affirms natural marriage and one that affirms multiple views of marriage, it is difficult to conceive of a federal government agency awarding a grant or contract to the entity with the more narrow view of marriage. In fact, the Department of Health and Human Services denied Catholic Charities a human trafficking grant stating that it did not offer a broad array of services, because it does not provide or refer for abortions. This is the type of discrimination entities are likely to see from the federal government. The point isn’t that the government will deny grants or contracts to proponents of natural marriage because of their view of marriage, but rather, the government will deny such awards on grounds that the entity that believes in natural marriage does not offer the broadest array of services to the broadest group of people. Whether the pro-same-sex marriage or the pro-natural marriage entities would have stronger protections under FADA would ultimately be a question for the courts. In other words, the new version of FADA undermines the entire purpose of the bill.

- The new language of FADA removes protections for the view that “sexual relationships” are properly reserved for marriage between one man and one woman. The bill replaces that provision with protections for the view that “extramarital relationships are improper.” This new language does not provide sufficient protections for religious individuals, entities, and institutions that have codes of conduct reserving sexual relations for natural marriage. Instead, it seems to apply to views regarding sexual activity outside of any kind of marriage. Thus, this new language raises questions over whether FADA will continue to protect Christian universities and other religious individuals and institutions from government discrimination because of their codes of sexual conduct, even though faculty, students, and staff agree to adhere to those codes of conduct when joining the entities.
- People may disagree over whether sexual relationships should be reserved for natural marriage; however, the government should not punish educational institutions and other entities for such a view. The new language of FADA fails to continue protections for those with a view that natural marriage is the proper place for sexual activity.