



## The First Amendment Defense Act Q&A

The First Amendment Defense Act (H.R. 2802/S. 1598), sponsored by Senator Mike Lee (R-Utah) and Rep. Raul Labrador (R-Idaho), would prevent the federal government from discriminating against supporters of natural marriage. Here are questions and answers about the bill.

### What does the First Amendment Defense Act (FADA) do?

**The First Amendment Defense Act would prevent the federal government from discriminating against individuals and entities because they affirm marriage as between a man and a woman or that sexual relationships are best reserved for such marriage.**

FADA would prohibit the federal government from penalizing persons for their personal, moral, or religious beliefs in natural marriage in grants, contracts, tax treatment, and other programs. It also protects individuals and some entities that believe, teach, or establish in codes of conduct that sexual relations are best reserved for natural marriage.

### Who supports this bill?

**An overwhelming majority of Americans** support this bill. Polling commissioned this year by the Family Research Council and performed by WPA Opinion showed that 81 percent of Americans believe that individuals should be able to live and work in accordance with their belief in marriage as between a man and a woman. Even those who support same-sex marriage oppose government discrimination against those who believe in marriage between one man and one woman. In fact, in an AP Poll released in July 2015, 56 percent of those polled said protection of religious liberties should take precedence over homosexual rights, and a whopping 82 percent of Republicans held that opinion. That is a very large majority.

### Is this bill necessary?

**Absolutely.**

The federal government has been redefining marriage in federal law since *Windsor* was issued in June 2013, without any conscience protections for persons of faith. In July 2014, the president issued an executive order requiring employers and faith-based organizations to effectively endorse same-sex relationships in order to compete for certain federal contracts, with no express protections for those who disagree. Then, on June 26, 2015, the Supreme Court ruled in *Obergefell v. Hodges* that all states must license and recognize marriages between same-sex couples, yet the Court failed to sufficiently explain how, at the same time, religious freedom would remain protected in the public square. Indeed, during oral arguments in this case, the Solicitor General admitted before the Supreme Court that the tax-exempt status of religious universities would “be an issue” after the Supreme Court found a Constitutional right to same-sex marriage. While Justice Kennedy, writing the majority opinion, offered some

acknowledgement of religious freedom protections for teaching principles related to natural marriage, his statement did little to address when and how Americans are permitted to express, and act in accordance with, their beliefs in natural marriage. For example, there remain questions as to whether faith-based non-profits will be cut off from working with the federal government to serve the poor, whether students who wish to attend Christian universities will be eligible for federal loans and grants, and whether individual Christians are permitted to speak about natural marriage in their personal lives while being employed by the federal government, among other questions.

Already at the state level we have seen governments cancel contracts to Christian-run adoption agencies because of their desire to place a child with a mother and a father. Magistrates have been forced to decide between their employment and violating their conscience. FADA prevents similar acts of government discrimination at the federal level. FADA does not affect the definition of marriage or alter the president's executive order related to sexuality. It simply prevents federal government discrimination against persons who believe marriage should be between one man and one woman or that sexual relationships are properly reserved for such marriages.

### **Does this bill alter state and local laws?**

**No.**

This bill only prevents the *federal* government from discriminating against those who believe marriage is between one man and one woman. FADA does not interfere with state or local laws; it simply prohibits the *federal government* from penalizing persons for their personal, moral, or religious beliefs in natural marriage in grants, contracts, tax treatment, and other programs. Simply, we have seen state discrimination against those who believe in natural marriage and do not want the federal government to do the same. FADA stops, at the federal level, what we have seen in several states. For instance, in California judges have already been barred from joining organizations due to those organizations' positions on natural marriage. Additionally, a Washington State judge was admonished by the state judicial commission for saying in an administrative meeting that he was "uncomfortable" with performing same-sex marriages due to his religious beliefs, and was ordered to not make such statements in the future.

At the federal level, agency actions redefining marriage have put pressure on entities to violate their belief that marriage is between one man and one woman. FADA is necessary to ensure the federal government does not use its authority over grants, contracts, tax treatment, and other programs to unfairly discriminate against persons because of their belief in natural marriage.

### **Does FADA change *Obergefell* or federal sexual orientation regulations?**

**No.**

Similar to the conscience protections passed by Congress after the Supreme Court's *Roe* opinion was issued in 1973, conscience protections are needed now, in the wake of *Obergefell*. These conscience protections do not change the Supreme Court decisions, change civil rights laws, or eliminate special protections for sexual orientation and gender identity that President Obama provided in executive orders. Rather, FADA simply prevents the federal government from discriminating, in contracts, grants, and other instances, against individuals and some entities that believe in natural marriage, and that sexual relations should be reserved for natural marriage. Just as certain individuals are protected in various other anti-discrimination laws, people with religious and moral convictions about natural

marriage should be protected in the wake of *Obergefell*. Such protections do not, however, overturn the Supreme Court's redefinition of marriage, or laws and regulations that provide special rights based on sexual orientation and gender identity. FADA does provide some entities governed by these laws and regulations with protection from federal government discrimination.

## **Are these protections really needed when we already have the Religious Freedom Restoration Act (RFRA)?**

**Yes.**

RFRA and FADA do not protect the same things. RFRA balances government interests against religious claims, while FADA stops federal government discrimination against persons who believe marriage should be between one man and one woman. In *Perkins v. Lukens Steel Co.*, the Supreme Court held that "the Government enjoys the unrestricted power ... to determine those with whom it will deal..." It is only bound by those regulations the federal government (Congress particularly) sets. Therefore, it is important for Congress to ensure that government agencies do not discriminate against people, non-profits, and family-owned business because of their religious and moral convictions about marriage.

FADA is very similar to conscience exemptions in the abortion context; for years, we have determined that the government cannot compel people to perform or participate in abortion against their conscience, whether on moral or religious grounds. FADA does the same thing, just in the marriage context, by preventing the government from using federal tax benefits, grants, contracts, loans, licenses, accreditations, or other programs and benefits to strong-arm people and businesses into changing their positions on marriage. RFRA is extremely important, but the protections FADA can provide are also necessary.

## **Isn't this bill really about using "religious liberty" to protect people who just want to discriminate against gays?**

**No.**

FADA regulates the relationship between the federal government and persons. Distinct from recent state initiatives, such as part of the Indiana RFRA, FADA does not govern the relationship between individuals or between individuals and businesses or their employers, except in so far as private individuals rely on federal law to discriminate against individuals. This bill simply ensures the federal government respects the rights of all citizens to speak and act on a religious belief or moral conviction on one man one woman marriage without fear of federal government discrimination in the provision of benefits, grants, contracts, employment, tax treatment, and other programs.

While thousands of business and the vast majority (88 percent) of Fortune 500 corporations have already voluntarily adopted policies that prevent discrimination on the basis of sexual orientation, people and entities have the right to operate in a manner consistent with their beliefs and should be protected from government discrimination. Polls show that a vast majority of Americans (no matter their views on same-sex marriage) agree that the government should not penalize someone because they hold to a view of marriage as between one man and one woman, a view that even President Obama shared up until 2012.

## **Should FADA protect those who have a “moral conviction” about natural marriage?**

**Yes.**

The marriage issue is not the first to prompt protections based on conscientious objections. In fact, for decades, protections for conscientious objectors have included protections based on both moral and religious bases. This is true in regard to protections regarding a variety of moral issues, from abortion to engaging in combat. In fact, on July 21, 2015, President Obama’s U.S. Citizen and Immigration Services office affirmed that those who do not wish to recite the portion of the Oath of Renunciation and Allegiance for naturalization (that declares a new citizen “willing to bear arms on behalf of the United States and to perform noncombat service in the U.S. armed forces when required by law”) are eligible for a modification of the oath “based on religious training and belief, or conscientious objection arising from a deeply held moral or ethical code.”

In addition, the Church Amendments of the 1970’s prohibited discrimination of physicians who refused to perform abortions when their refusal was “contrary to [their] religious beliefs or moral convictions, or because of [their] religious beliefs or moral convictions respecting sterilization procedures or abortions.” Even the Equal Employment Opportunity Commission has advised, “religious beliefs include ... ‘moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.’”

## **Should FADA’s protections focus just on natural marriage?**

**Yes.**

First, the purpose of FADA is to protect people who have religious and moral convictions about natural marriage because of recent federal government decisions and actions seemingly favoring alternative definitions of marriage – the Judicial Branch of the federal government effectively redefined marriage for the country and the Executive Branch of the federal government issued an executive order conforming government action to a definition of marriage that includes same-sex marriage. Thus, in response to those actions, it is important for the Legislative Branch to protect those who agree with natural marriage based on their religious and moral convictions. FADA is a bill about the freedom to believe.

In addition, if FADA were broadened to protect all beliefs regarding marriage, FADA would include protections for those who agree with marriages between adults and children, between siblings, between more than two individuals, and other unions that are currently illegal. In order to avoid protecting and condoning persons who agree with those types of unions, it is important for the legislature to limit the scope of FADA to those who believe that marriage is the union of one man and one woman.

## **Should FADA’s protections include reserving sexual relationships to natural marriages?**

**Yes.**

In accordance with their religious and moral views regarding natural marriage, some schools, businesses, and organizations have standards of conduct for their employees, which encourage

employees to reserve sexual conduct for a marriage between a man and a woman. These entities should not be discriminated against because of those views and standards regarding sexuality and marriage.

In addition, non-profit abstinence educators, housing providers, and even schools and universities, may have policies regarding cohabiting individuals, based on their view of marriage being the union of one man and one woman. This provision, regarding reserving sexual relationships for natural marriage, provides necessary protections from discrimination for these entities.

### **Wouldn't this bill allow the federal government to refuse to process tax returns, visa applications, or social security checks, or to otherwise deny benefits from same-sex couples?**

**No.**

FADA does not eliminate any benefits, and in fact, states: "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." This bill simply protects individuals and organizations from being forced by the federal government to violate their religious or moral beliefs about marriage.

FADA prevents the government from penalizing individuals and groups the government works with and provides benefits to because of their views on natural marriage and sexuality being reserved for such a marriage. Federal laws after *Windsor* are already recognizing same-sex marriage, and federal government agencies are still required to provide benefits to same-sex couples who are legally married, even after the passage of FADA.

After FADA passes, people will be eligible for every benefit they were legally eligible for and entitled to prior to FADA's passage. Thus, if a person is eligible for tax breaks, visas, or social security prior to the passage of FADA, he remains eligible after FADA's passage, despite his sexual orientation or position on same-sex marriage, particularly because federal employees' actions within the scope of employment is not covered by FADA.

### **Wouldn't this bill allow private parties to discriminate by allowing a company to fire a woman because she is pregnant?**

**No.**

Under FADA, it will still be illegal to fire a woman simply because she is pregnant, as doing so would violate the Pregnancy Discrimination Act. FADA does not authorize employers to violate laws like the Pregnancy Discrimination Act or the Civil Rights Act of 1964, nor does it protect them. It would protect against government punishment of people and entities who have an ethical standard for employment related to marriage or sexual relations outside of marriage. For instance, if a Christian school requires its teachers to act in accordance with a specific standard of conduct, and a teacher violates that standard, the teacher may be dismissed on that basis after FADA passes, just as she was subject to termination prior to FADA's passage. FADA does not change how or whether employers may create and enforce codes of conduct, but it does prevent the government from discriminating against the employer because of that enforcement.

## **Wouldn't FADA allow an organization to refuse to provide a male, who is transitioning into a female, female housing?**

FADA only prevents discrimination by the federal government. The federal government cannot rely on FADA in denying housing benefits to individuals who are otherwise eligible. In addition, if a private organization discriminates against a person in the provision of housing on the basis of sexual orientation or gender identity, that private organization is subject to local ordinances and state laws that govern housing. FADA provides people and entities with protections that allow them to be free to believe. It protects employers and organizations from losing their tax-exempt status, federal grants, contracts, or other government benefits based on their religious beliefs or actions.

Similarly, FADA cannot legitimately be used to defend actions that are not directly related to a person or organization's view of natural marriage. FADA only provides protection 1) from discriminatory action, and 2) on the basis of a person's beliefs and actions in accordance with those beliefs or moral convictions. Thus, if a person creates a hostile work environment, assaults a co-worker, or embezzles funds and defends himself by arguing he was merely acting in accordance with his religious belief that marriage is the union of one man and one woman, his claim of religious discrimination will likely be dismissed. FADA does not provide protections for deplorable conduct with an attenuated, at best, connection to natural marriage.

## **Does FADA allow private parties to discriminate, for example, by refusing to serve same-sex couples at restaurants?**

**No.**

FADA stops federal government discrimination; it does not affect state or local laws regarding public accommodations, or strip patrons of their legal recourse where they are denied goods or services. Where there are local ordinances and state laws that prohibit discrimination based on sexual orientation and gender identity, after FADA, those laws will stand. Thus, if a same-sex couple is refused service at a place of public accommodation, FADA does not prevent that couple from suing the place of public accommodation for discrimination. FADA only governs relationships between the federal government and persons, as defined by the statute.

## **Aren't churches already adequately protected?**

**No.**

During Supreme Court oral arguments in the *Obergefell* case, Justice Alito asked the Obama administration lawyer whether a university's tax exempt status could be denied based on its view of natural marriage, to which the lawyer replied, "...it's certainly going to be an issue. I—I don't deny that." Based on this ambiguity, it is reasonable to conclude that no non-profit, church, or faith-based institution is adequately protected without FADA.

While one group opposed FADA stating, "...no church has been forced to marry any couple in violation of its religious doctrine..." it has only been since June of 2015 that states have been forced to issue marriage licenses to, and acknowledge marriages of, same-sex couples. In addition, it is not only pastors who need protection. Rather, those who sit in pastors' pews and share the convictions of their pastors and priests should also be protected from discrimination based on their views on marriage. The Supreme

Court has affirmed that religious beliefs naturally inform our work. After all, a religious person does not cease to hold the tenants of his faith when he exits that chapel, synagogue, mosque, or other hall of worship.

## **Does FADA cover non-profit and for-profit companies?**

**Yes.**

FADA applies federal non-discrimination provisions to both non-profit and for-profit companies. However, companies are not protected when acting within the scope of a government contract, and publically-traded, for-profit companies are not provided general protections. "Profit-making" should not imply a business does not have a conscience regarding issues ranging from the environment to marriage. While some would prefer to limit FADA's application to churches and religious groups, organizations and closely-held businesses should also not be penalized for their positions on marriage and sexuality.

The Supreme Court has affirmed religious beliefs naturally inform our work – whether this work is for profit or not, and we should agree that this is both respectful of others' beliefs as well as simple common sense. Thus, businesses should have the right to operate in a manner that is consistent with their beliefs without the federal government burdening their freedom; indeed, that's what FADA narrowly affirms. Whether a non-profit entity working with the government to aid the poor and distressed overseas, or a for-profit, closely-held community business, in either case the federal government should not discriminate in the provision of grants and loans, among other things.

## **Wouldn't this bill allow numerous lawsuits just because a person believes the government wants him to agree with same-sex marriage?**

**No.**

In order to claim protection under FADA, a person must 1) have been discriminated against or must have been threatened with discrimination, 2) by the federal government, and 3) based on his or her moral convictions or religious beliefs regarding natural marriage. In that sense, FADA is far more limited than many LGBT special rights laws, which also allow for lawsuits based on perceived discrimination. Thus, FADA will not lead to a litany of frivolous litigation and does not provide a cause of action on the broad issue of government action on same-sex marriage. Rather, FADA focuses on discriminatory conduct by the federal government based on a person's views regarding natural marriage.

## **Examples of who would be protected by FADA:**

**This bill would protect education institutions.**

Private colleges are at risk, such as Gordon College in Massachusetts, which had been placed under review by its federally recognized private accrediting body simply because the school adheres to the historic Christian commitment to abstinence and natural marriage. While Gordon may be safe for now, its accreditation and that of other schools may be re-examined in the future. If Gordon or other schools lose their accredited status because of their beliefs regarding marriage, FADA would protect their students from losing their federal financial student aid.

The First Amendment Defense Act would also protect the roughly 29,000 religiously affiliated preschools, elementary schools, and high schools in the United States as well as the 1,700 religiously affiliated colleges and universities in our country. The majority of these faith-informed universities like Brigham Young University, Catholic University of America, and Baylor University hold to religious traditions that discourage sexual intimacy outside of marriage between one man and one woman. FADA would protect their tax-exempt status and ensure they can continue competing for federal research contracts and education grants without being penalized for their marriage beliefs.

**This bill protects adoption agencies.**

The First Amendment Defense Act ensures faith-based adoption and foster care providers are federally protected from the types of actions taken in Illinois, Massachusetts, D.C., and San Francisco to force faith-based providers to halt services simply because of their belief that kids do best with a mom and a dad. FADA does not stop state action, but would stop federal action like this. The Child Welfare Provider Inclusion Act of 2015 (H.R. 1299, S. 667) would stop federal and state discrimination against welfare providers, such as what occurred in those states.

**This bill protects faith-based charities.**

It also would assure relief and development service providers like The Salvation Army, Adventist Development and Relief Agency, and Samaritans Purse which have a history of receiving funding from agencies like USAID can continue providing relief services free from the fear of having these funding streams pulled because of a belief about marriage.

**This bill protects other faith-based entities.**

Abstinence education providers which receive federal grants and teach sexual risk avoidance education to thousands of middle and high school students nationwide are protected because of their belief that sexual relations are best reserved for marriage between one man and one woman.

Military religious program contractors who provide youth programming and state Baptist conventions who have partnered with the military to deliver marriage enrichment programming are protected.

**This bill protects closely-held, for-profit businesses.**

Closely-held businesses that seek corporate tax breaks and incentives, and those seeking grants, loans, and other benefits the federal government offers are protected from federal government discrimination.