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House Of Representatives
Committee On Oversight And Government Reform
Hearing on H.R. 2802, the First Amendment Defense Act (FADA)

Testimony of Professor Katherine Franke[1]
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Mr. Chairman, Ranking Member Cummings, and Members of the Committee, thank you for inviting me to testify on these important questions of religious freedom law.

I am the Sulzbacher Professor of Law at Columbia Law School in New York City, where I am also the Faculty Director of the Public Rights/Private Conscience Project, a think tank in which we bring legal academic expertise to bear on the multiple contexts in which religious liberty rights are in tension with other fundamental rights to equality and liberty.

Introduction:

My testimony today is delivered on behalf of twenty leading legal scholars who have joined me in providing an in depth analysis of the meaning and likely effects of the First Amendment Defense Act (FADA),[2] were it to become law. We feel particularly compelled to provide testimony to this Committee because the first legislative finding set out in FADA declares that: "Leading legal scholars concur that conflicts between same-sex marriage and religious liberty are real and should be addressed through legislation."[3] As leading legal scholars we must correct this statement: we do not concur that conflicts between same-sex marriage and religious liberty are real, nor do we hold the view that any such conflict should be addressed through legislation. On the contrary, we maintain that religious liberty rights are already well protected in the U.S. Constitution and in existing federal and state legislation, rendering FADA both unnecessary and harmful.[4]

Rather, FADA establishes vague and overly broad religious accommodations that would seriously harm other Americans' legal rights and protections. Instead of protecting the First Amendment, the First Amendment Defense Act likely violates the First Amendment's

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[2] The version currently before the committee, *AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2802*, was introduced by Rep. Raúl Labrador (H.R. 2802) on July 7, 2016. References in this testimony will be to the July 7, 2016 version of the legislation.
[3] FADA, Sec 2 (1).
[4] *See*, *e.g.*, U.S. CONST. amend. I; 42 U.S.C. § 2000bb–1; 42 U.S.C. § 2000cc; 42 U.S.C. § 2000cc–1.

Establishment Clause. The Act purports to protect free exercise of religion and prevent discrimination, yet in fact it risks unsettling a well-considered constitutional balance between religious liberty, the prohibition on government endorsement of or entanglement with religion, and other equally fundamental rights.[5]

As legal scholars with expertise in matters of religious freedom, civil rights, and constitutional law, we offer this legal analysis to call attention to provisions of the bill that we believe raise serious conflicts with the First Amendment of the U.S. Constitution.

The proposed FADA aims to immunize a wide range of "persons" from federal penalties and law enforcement 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.[6] A broad reading of 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 government from taking enforcement action against an employer that refuses to provide mandated health insurance coverage to the dependents of same-sex or unmarried parents;
- Prevent the government from taking enforcement action against a retirement plan that refuses to provide annuity benefits to same-sex spouses of plan beneficiaries;
- Eliminate the federal government's ability to prohibit discrimination by recipients of federal grants and contracts. For instance, a clinic could refuse to provide contraceptives to unmarried women or men yet remain eligible for a Title X grant to provide family planning services;
- Prevent the federal government's ability to enforce 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

[5] While not the focus of this memo, we also note that we have significant concerns about FADA's constitutionality under other provisions of the U.S. Constitution, including the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. FADA singles out for special protection only a person who believes, speaks, or acts 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. *See* FADA § 3(a)(1). By providing special rights and benefits for a narrow type of speech, the bill violates the Free Speech Clause requirement that government regulations of private speech be viewpoint-neutral. *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."). As a law that substantially involves the state in public and private discrimination, we believe FADA conflicts with Supreme Court precedent including *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *Hunter v. Erickson*, 393 U.S. 385 (1969).

[6] FADA, § 3(a)(1).

employees who are married to a same-sex partner or who have extramarital relations/sex.

- 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.[7]
- Prevent the federal government from denying Title X funding to a health clinic that provides family planning care only to those patients that provide a marriage license in order to qualify for such services.
- Prevent the federal government 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.
- Require that the federal government provide preferred tax status to nonprofits that discriminate or otherwise violate the tax code. For instance, charitable hospitals could refuse to apply a mandated financial assistance policy to patients who are married to someone of the same sex and still maintain their tax-exempt status.
- 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*[8] 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;
- Deny some 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.[9]

These are merely a few salient examples of the kinds of safe harbors that FADA would create, thus imposing significant harms on third parties otherwise protected by federal laws. A longer, more detailed list is discussed below.[10]

In essence, FADA would incapacitate the federal government from enforcing a wide range of laws, policies, and regulations that secure and further fundamental rights to equality and liberty. For this reason, FADA does not defend the First Amendment; rather it creates and then defends a new right for non-governmental actors to discriminate in the name of religion. Even worse, FADA's language may conscript the federal government as a partner in those very acts of discrimination.

I. By Implying An Absolute Right to Religious Liberty, FADA Does Not "Defend" First Amendment Principles But Rather Violates Them

As a preliminary matter, we note that the First Amendment Defense Act's title is a misnomer. The purpose and effect of the bill is to exempt all persons—defined very broadly—

[7] 42 U.S. Code § 3604 (a)-(c).

[8] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[9] At first glance, FADA appears to apply only to suits against the federal government or initiated by the federal government rather than between private parties. However the Religious Freedom Restoration Act, which contains similar language, has been interpreted by some courts to be applicable as a defense even in private civil suits. *See infra*, fn. 54-59 and accompanying text.

[10] See *infra* pp. 7-18.

from otherwise neutral laws of general applicability that conflict with their religious beliefs. This absolute right to disobey the law because of one's personal religious preferences or moral convictions, regardless of the consequence on others, is emphatically not required or sanctioned by First Amendment doctrine.

For well over a century, the Supreme Court has held that religious freedom does not provide an unconditional right to act in accordance with one's beliefs, religious, moral, or otherwise. In 1990 in *Employment Division v. Smith*, Justice Scalia, writing for the Court, summed up this longstanding principle, stating that the Supreme Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[11] The Court first clearly articulated this principle in 1878 in *Reynolds v. U.S.*, when it upheld a criminal charge of polygamy against a Mormon man, a practice that he considered a religious duty. The Court held that while laws "cannot interfere with mere religious belief and opinions, they may with practices,"[12] and further noted that allowing a religious exemption from the law in such circumstances "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[13] To be sure, the Constitution requires the provision of religious exemptions in some circumstances, but that right is not absolute. Even in the pre-*Smith* case *most* favorable to religious exemptions, *Wisconsin v. Yoder*, the Court clearly stated that the "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."[14] Thus, rather than "defending" the First Amendment, FADA in fact contradicts a basic tenet of the First Amendment's Free Exercise Clause: while religious *belief* is absolutely protected, religiously-motivated *actions* are not, as any claim to exemption under the Free Exercise clause must be weighed against other important interests.

In fact, the Supreme Court has twice considered and rejected the right of an institution to discriminate in the name of religious liberty. In *Newman* v. *Piggie Park*, a restaurant argued that enforcement of the 1964 Civil Rights Act constituted an "interference with the 'free exercise of the Defendant's religion'"—a claim the Supreme Court dismissed and deemed "patently frivolous."[15] In *Bob Jones University v. U.S.*, the Court took a religious university's Free Exercise claim far more seriously, but ultimately concluded that the federal government could withhold tax-exempt status from schools that engage in racial discrimination. The Court explained that the government had a "fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[16] Thus

[11] *Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990).
[12] *Reynolds v. U.S.*, 98 U.S. 145, 166 (1878).
[13] *Id.* at 167.
[14] *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).
[15] *Newman v. Piggie Park*, 390 U.S. 400, 402 fn 5 (1968).
[16] *Bob Jones University v. U.S.*, 461 U.S. 574, 604 (1983).

FADA's premise, that the First Amendment entails an absolute right to discriminate, runs contrary to well-established Free Exercise principles.[17]

II. The Establishment Clause of the First Amendment Prohibits Religious Accommodations That Seriously Harm Third Parties

a. The General Legal Principle of Third Party Harms Creating A Violation Of The Establishment Clause

The religion clauses of the First Amendment state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[18] Read together, these two clauses are understood to protect individual religious belief and practice through the Free Exercise Clause, while through the Establishment Clause, constraining the state from expressing favor or disfavor towards any particular religion or religion in general.[19] In interpreting the bounds of the First Amendment, the Supreme Court has consistently held that religious accommodations that cause a meaningful harm to other private citizens violate the Establishment Clause.[20] In *Estate of Thorton v. Caldor*, the Court held that a Connecticut statute giving workers the right to a Sabbath day of rest impermissibly advanced religion by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee."[21] Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court found that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to "become indirect and vicarious donors" to religious entities.[22] While the Court upheld a religious exemption law in *Cutter v. Wilkinson*, it nevertheless noted that accommodations need not be granted where they "impose unjustified burdens" on third parties or the State.[23] Two years ago, when the Supreme Court upheld a religious accommodation under the Religious Freedom Restoration Act in *Burwell v.*

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[17] The Supreme Court has read a "ministerial exception" into the First Amendment, thus preventing "government interference with an internal church decision that affects the faith and mission of the church itself." *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 707 (2012). *See also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (*cert. denied*, 409 U.S. 896 (1972)). As a corollary, the Court has also held that Congress may choose to exempt religious institutions from some antidiscrimination laws without violating the Establishment Clause. *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). *Amos*, however, merely held that the Establishment Clause *permitted* Congress to exclude religious corporations from a provision of Title VII banning religious discrimination, not that the Free Exercise Clause *compelled* it to do so.

[18] U.S. CONST. amend. I.

[19] *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion…favoring neither one religion over others nor religious adherents collectively over nonadherents") (internal quotation marks omitted).

[20] *See Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985). *See also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion,* 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 725 ("There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment.") (Kennedy, J., concurring).

[21] *Caldor*, 472 U.S. at 709.

[22] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (internal quotations omitted).

[23] *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005).

Hobby Lobby, Justice Alito repeatedly emphasized the fact that the accommodation requested under RFRA would have "exactly zero" negative impact on others' rights and interests.[24] And most compellingly, a federal court recently found that language very similar to the federal FADA, Mississippi's HB 1523, improperly harms the rights of others in violation of the Establishment Clause. In a decision ordering that a state law be enjoined, the court found that the law "violates the First Amendment because its broad religious exemption comes at the expense of other citizens."[25]

FADA conflicts with the above constitutional principles in violation of the Establishment Clause. It provides accommodations that require private citizens to bear the cost of others' religious faith.

b. FADA Will Impose Material And Identifiable Third Party Harms

FADA, in the name of religious diversity, disrupts the careful balance set forth in the U.S. Constitution between private religious practice, non-endorsement of religion by the state, and other fundamental rights such as rights to equality and liberty. It substantially oversteps the limits of the Establishment Clause by immunizing religious believers from compliance with laws that are generally applicable to all other American citizens. These laws include not only federal antidiscrimination protections, but a remarkably broad set of federal laws and regulations that provide important rights, benefits, or protections to all private citizens regardless of their marital status or sexual identity. In exempting religious believers from an obligation to respect the equality and liberty rights of all Americans, FADA sacrifices the rights of many in order to accommodate the religious preferences of a few.

i. FADA Strips Americans of Numerous Legal Rights and Protections In Order to Satisfy Certain Religious and Moral Preferences

Under FADA, the federal government may not take any negative action (termed "discriminatory action" in the bill) against a person because they act in accordance with a 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 that extramarital relations are improper. "Discriminatory action" is defined broadly to include enforcement of neutral laws and regulations of general applicability, such as those that prohibit discrimination by recipients of government grants or provide protections and benefits to employees, patients, students, and other private citizens. "Person" is defined to mean both individuals[26] and corporations, including secular, for-profit companies.[27] Organizations that choose to discriminate against same-sex couples, different-sex couples, unmarried parents, or others on the basis of their beliefs are given

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[24] *See Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

[25] *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 55 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction).

[26] Excepting federal employees acting within the scope of their employment. FADA § 6(3)(A).

[27] Unless a federal contractor acting within the scope of a federal contract FADA § 6(3)(B).

blanket immunity under FADA from administrative, and perhaps even judicial, enforcement of the law.

In exempting religious and moral objectors from federal laws and regulations, FADA would harm third parties in numerous ways. The bill defines "discriminatory action" by the government to include, among other things, "any action" taken by the federal government to "alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against" a person.[28] Currently, numerous federal laws create tax benefits and penalties in order to advance important public interests. FADA would substantially interfere with these laws, eliminating or reducing protections for many Americans, especially, but not only, lesbian and gay married couples and people who have "extramarital relations" – a particularly imprecise term that is most likely constitutionally infirm on account of its vagueness. The rights and interests of single parents and pregnant women will likely be most negatively effected by the immunity the law proposes to grant to those who regard "extramarital relations" as improper.

Specifically, FADA would allow discrimination in the provision of the following mandated health and financial benefits:

- **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.
    - Group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) would be 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;[29] 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;[30] 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.[31] Covered health plans could also violate provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA) without being

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[28] FADA § 3(b)(1).

[29] This would violate provisions of the Newborns' and Mothers' Health Protection Act. *See* 26 U.S.C. § 2811. Note that this provision only applies to plans that have elected to cover childbirth.

[30] This would violate provisions of the tax code that prohibit health plans from excluding coverage for pre-existing conditions. *See* 26 U.S.C. § 9815.1; 45 U.S.C. § 300gg-3. Note, however, that while covered plans could not impose a pre-existing condition exclusion, they could decide not to provide coverage for a particular benefit for all enrollees, regardless of whether the condition is pre-existing.

[31] This would violate provisions of the Patient Protection and Affordable Care Act (ACA), as incorporated into the tax code. 26 U.S.C. § 9815.1. Under the ACA, health plans must provide preventive health services without cost sharing. *See* 42 U.S.C. § 300gg–13. Preventive health services includes coverage for testing and counseling for certain sexually transmitted infections, contraception, and domestic and interpersonal violence screening and counseling for women. *See* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *Preventive Services Covered Under the Affordable Care Act* (last rev'd Sept. 27, 2012) http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/preventive-services-covered-under-aca/index.html.

subject to a tax— for example by refusing to consider a divorce a "qualifying event" for same-sex couples.[32]

- FADA states that health care institutions would not be protected if they refused "to provide medical treatment necessary to cure an illness or injury" because of their religious or moral beliefs.[33] However hospitals would still be protected if they discriminated by refusing to provide financial assistance for such care, or by refusing to provide preventative care that is not "necessary to cure an illness or injury."
- FADA could also 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.[34]
- Nonprofit religious hospitals could violate provisions of the Patient Protection and Affordable Care Act (ACA) that impose certain obligations on charitable hospitals yet maintain their tax-exempt status.[35] 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.[36]

- **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.[37]

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[32] 26 U.S.C. § 4980B.

[33] FADA § 6(3)(C).

[34] 26 U.S.C. § 4980H (imposing penalties for any applicable large employer that "fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan.").

[35] *See* 26 U.S.C. § 501(r); 26 U.S.C. § 4959.

[36] Under the revised FADA, health care institutions would not be protected if they refused "to provide medical treatment necessary to cure an illness or injury" because of their religious or moral beliefs. FADA § 6(3)(D). However hospitals would still be protected if they discriminated by refusing to provide financial assistance for such care, or by refusing to provide preventative care that is not "necessary to cure an illness or injury." Further, the introduced FADA contains no exemption whatsoever related to the provision of medical care. H.R. 2802, 114th Cong. (2015).

[37] For more detailed information on spousal rights related to qualified retirement plans, *see* INTERNAL REVENUE SERVICE, *Application of the Windsor Decision and Rev. Rul. 2013-17 to Qualified Retirement Plans Notice 2014-19* (2014) *available at* https://www.irs.gov/pub/irs-drop/n-14-19.pdf. While FADA would limit federal enforcement of these provisions, they are also incorporated in ERISA; therefore a plan participant or beneficiary could enforce the requirements under ERISA section 502, 29 USC § 1132. Nevertheless, federal enforcement is an important protection for those who are unable to access or afford an attorney. Further, an increase in the adoption of class action prohibitions within benefit plan documents will make federal enforcement even more essential to employees.

Other important rights and benefits that are not enforced through tax penalties would also be thwarted by FADA. The bill does not merely restrict the regulation of tax benefits and fees, but bans "any action" taken by the federal government to cause any "penalty, or payment to be assessed against" a person. While it's possible that this language was *intended* to refer only to tax penalties, such a narrow interpretation of the bill is belied the text and by the fact that the bill has gone through several revisions and this language has not been corrected.[38] If discriminatory action is therefore 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). For example, under this clause, religious or moral beliefs about marriage and sexuality could immunize a person from any enforcement action brought by the federal government in connection with otherwise illegal conduct in the following circumstances:

- The Civil Rights Act,[39] Pregnancy Discrimination Act,[40] Americans with Disabilities Act,[41] Fair Housing Act,[42] and Equal Credit Opportunity Act[43] all prohibit some forms of discrimination against customers, employees, renters, or creditors who are in same-sex relationships,[44] are unmarried and pregnant or parenting,[45] or who have a disability (such

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See James P. Baker, *A Sea Change for ERISA Litigation: Using Contractual Bars to Avoid Class Action Claims* Feb. 2014) *available at* http://www.bakermckenzie.com/ALNAASeaChangeDec13/.

[38] Similar language also appears in the federal FADA's state corollaries. See, eg: Georgia HB 757, Mississippi HB 1523, Iowa Assembly Bill 2207, Wyoming HB 0098.

[39] 42 U.S.C. §§2000a *et seq*; §§2000e *et seq*.

[40] 42 U.S.C. § 2000e(k).

[41] 42 U.S.C. § 12101 *et seq*.

[42] 42 U.S.C. §§ 3601, *et seq.*

[43] 15 U.S.C. § 1691.

[44] The Civil Rights Act's ban on employment discrimination on the basis of sex has been interpreted to protect employees who are LGBT or challenge gender norms and expectations. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("""[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Los Angeles Dept. of Water & Power v. Manhart*, 435 U. S. 702, 435 U. S. 707, n. 13 (1978), *quoting Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971)"). *See also E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013) (holding prohibition of sexual harassment in Title VII protected a male employee whose male co-workers called him "kind of gay" and a "faggot."); *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (finding that Title VII of the Civil Rights Act prohibits discrimination based on gender identity); *Fabian v. Hosp. of Centr. Conn.*, 2016 WL 1089178 (D. Conn. 2016); *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015) (finding that Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation); U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, http://www.eeoc.gov/eeoc/newsroom/wysk/lgbtexamplesdecisions.cfm (last visited Mar. 16, 2016). LGBT persons and families also have some protections under the sex and familial status discrimination provisions of the Fair Housing Act. *See* HUD.GOV, *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families: Enriching and Strengthening Our Nation*, http://portal.hud.gov/hudportal/HUD?src=/programoffices/fairhousingequalopp/LGBTHousingDiscrimination (last visited Mar. 16, 2016) ("a lesbian, gay, bisexual, or transgender (LGBT) person's experience with sexual orientation or gender identity housing discrimination may still be covered by the Fair Housing Act"); *Thomas v. Osegueda et al*,

as HIV/AIDS) that may be linked to non-marital sex.[46] 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.

- The Family and Medical Leave Act (FMLA)[47] 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.[48]
- Title I of ERISA[49] 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. Under FADA, the DOL Employee Benefits Security Administration would be unable to take any

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No. 2:2015cv00042 - Document 11 (N.D. Ala. 2015) *available at* http://law.justia.com/cases/federal/district-courts/alabama/alndce/2:2015cv00042/154020/11/. In addition, a lawsuit recently filed by Lambda Legal has the potential to expand LGBT protections under the Fair Housing Act. *See* Chris Johnson, *New Lawsuit Asserts Anti-LGBT Bias Illegal in Housing*, WASHINGTON BLADE (Jan 16, 2016), http://www.washingtonblade.com/2016/01/16/new-lawsuit-could-extend-lgbt-success-to-housing-discrimination/. Note, however, that there are no protections from sex discrimination—and therefore sex stereotyping, sexual orientation, or gender identity discrimination—within federal public accommodations law. *See* 42 U.S.C. § 2000a.

[45] Title VII's sex and pregnancy discrimination provisions in some cases protect workers from discrimination on the basis of marital status, including discrimination against unmarried pregnant or parenting workers. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Pre-Employment Inquiries and Marital Status or Number of Children* (last visited May 17, 2016) https://www.eeoc.gov/laws/practices/inquiriesmaritalstatus.cfm; *Hamilton v. Southland Christian School*, 680 F.3d 1316 (11th Cir. 2012) (reversing a trial court's grant of summary judgement to a religious school that fired a teacher who conceived while unmarried, and finding that "Title VII does not protect any right to engage in premarital sex, but as amended by the Pregnancy Discrimination Act of 1978, Title VII does protect the right to get pregnant."); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2001) ("[t]he central question in this case, therefore, is whether [a religious school's] nonrenewal of Cline's contract constituted discrimination based on her pregnancy as opposed to a gender-neutral enforcement of the school's premarital sex policy. While the former violates Title VII, the latter does not."; *Ganzy v. Allen Christian School*, 995 F.Supp. 340 (E.D.N.Y. 1998) (holding that the First Amendment does not exempt religious schools from compliance with the Pregnancy Discrimination Act, and therefore firing a pregnant teacher could violate the law unless the school demonstrated she was fired because of violation of a moral code applied equally to male and female employees); *Vigars v. Valley Christian Ctr. of Dublin, Cal*., 805 F. Supp. 802, 808 (N.D. Cal. 1992) ([t]he fact that defendants' dislike of pregnancy outside of marriage stems from a religious belief… does not automatically exempt the termination decision from Title VII scrutiny"); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980). The Fair Housing Act prohibits discrimination in housing based on "familial status," which covers persons who are pregnant or live with a child under 18, regardless of their marital status. *See* 42 U.S.C. §§ 3601, *et seq.* The Equal Credit Opportunity Act forbids discrimination on the basis of marital status in lending, and applies regardless of sexual orientation or whether someone is an unmarried parent. 15 U.S.C. § 1691. Similar provisions are imposed on foreign banks and cooperative banks. *See* 12 U.S.C.A. § 3106a; 12 U.S.C. § 3015(a)(4).

[46] HIV/AIDS meets the definition of "disability" under the ADA. *See* ADA.GOV, *Fighting Discrimination Against People with HIV/AIDS* (last visited May 18, 2016) http://www.ada.gov/aids/.

[47] 29 U.S.C. §§2601 *et seq*.

[48] An employee who is wrongfully denied leave could attempt to bring a civil suit to enforce FMLA rights. 29 U.S.C. § 2617. However as will be discussed below, FADA may in some cases be used as a defense within a private suit. *See infra*, fn. 54-59 and accompanying text. Further, federal enforcement is an important protection for employees who face other barriers to filing a private suit.

[49] 29 U.S.C. §§1001 *et. seq*.

enforcement action against employers who refused to provide mandated health benefits to LGBTQ and unmarried pregnant or parenting employees and their families.[50]

- 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.[51] 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.[52] FADA would restrict HHS's ability to enforce Title I.
- FADA is written so broadly that it could even be interpreted to prevent the DOJ from investigating or enforcing the Shepard Byrd Hate Crimes Prevention Act,[53] 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.

There are certainly additional otherwise-illegal acts that would be protected by FADA; the list above is merely illustrative of the bill's reach. This overly broad bill threatens federal enforcement of nearly any law, regulation, or policy that protects American citizens without regard to their marital status or sexual practices. Americans who fail to conform to "traditional," religiously-based sex and gender norms will of course face the greatest harm. They may find themselves suddenly vulnerable to a range of health, housing, labor, and other violations of their rights and liberties, and cut off from any federal assistance in mitigating these harms. While couching itself as a narrow religious freedom bill, FADA in fact creates sweeping protections for religious and moral objectors to violate a broad range of federal laws.

ii. FADA Threatens Federal Judicial Enforcement of Civil Laws

FADA may not only limit the ability of federal agencies to enforce the law; it may also prevent the judiciary from enforcing federal law in suits between private parties. At first glance,

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[50] ERISA also creates a private right of action, and under FADA it may remain possible for plan participants and beneficiaries to sue the employers or unions that sponsor those group health plans if they violate these protections. *See* 29 U.S.C § 1132. As with the FMLA, however, FADA is still significant in that it may be used as a defense even in private suits, and because federal enforcement provides important additional protections against ERISA violations. Additionally, it's worth noting that church plans are not subject to ERISA, but only to IRS enforcement. Thus under FADA, they would have even greater leeway to discriminate without consequence.

[51] *See*, *e.g.*, 42 U.S.C. §§ 300gg *et seq*.; 18031(c).

[52] In most states, the state insurance exchange or state insurance regulator also has enforcement authority; state insurance regulators are the principal enforcers of these requirements against health insurance issuers. The introduction of FADA-like bills in many states, however, may create opportunities for states to decline to take action against noncompliant health insurance issuers. *See*, *e.g.*, H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016) (signed into law by Governor Phil Bryant). *See also* H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 284, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 2181, 28th Leg., Reg. Sess. (Haw. 2016); H.B. 2532, 28th Leg., Reg. Sess. (Haw. 2016); S.B. 2164, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); H.B. 2207, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.B. 2211, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.J.R. 96, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.J.R. 97, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.B. 1107, 91st Gen. Assemb., Reg. Sess. (S.D. 2016); H.B. 773, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); S.B. 41, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.B. 2631, 64th Gen. Assemb., Reg. Sess. (Wash. 2016); H.B. 2752, 64th Gen. Assemb., Reg. Sess. (Wash. 2016).

[53] 18 U.S.C. § 249.

such a reading seems overbroad. FADA defines "discriminatory action" as actions taken "by the Federal Government."[54] Further, the bill states that a religious or moral believer "may assert an actual or threatened violation of [FADA] as a claim or defense in a judicial or administrative proceeding … *against the Federal Government*" (emphasis added).[55] However four circuit courts have held that a federal law with very similar language to FADA may be used as a claim or defense in suits between private parties. Like FADA, the Religious Freedom Restoration Act (RFRA) appears to constrain only governmental actions. The law states that the "Government shall not substantially burden a person's exercise of religion."[56] Under a provision titled "Judicial Relief," it states that a person "whose religious exercise has been burdened in violation of [RFRA] may assert that violation as a claim or defense in a judicial proceeding … *against a government*" (emphasis added).[57] While RFRA is most commonly used in suits where the federal government is a party, several courts have held that RFRA may be used as a claim or defense in some suits between private parties.[58] The Supreme Court has not addressed this issue.[59]

Considering the similarity between the basic structure and the "judicial relief" provisions of FADA and RFRA, it seems likely that at least some federal courts will apply FADA to limit judicial enforcement of federal laws even in private lawsuits. If this were the case, not only would federal agencies be unable to enforce the laws discussed in the previous section, but private citizens would also be unable to enforce their rights through civil litigation. To give just one of many possible examples, it would mean that if an employer violated the FMLA by refusing to provide leave to an employee to care for his same-sex spouse or an unmarried mother to care for her newborn child, not only would the DOL be unable to bring a claim to enforce these employees' unambiguous FMLA rights—the employer could also claim FADA as a defense in a civil suit brought directly by the employee against their employer. Such an interpretation of FADA would even further restrict the rights and liberties of American citizens, especially LGBTQ persons and single parents, and would impose serious harms on many rights-holders in the name of respecting religious or moral diversity.

iii. FADA Prohibits the Government From Denying Taxpayer Funds and Contracts to Organizations That Discriminate

[54] FADA § 3(a).
[55] FADA § 4(a).
[56] 42 U.S.C. § 2000bb–1.
[57] *Id.*
[58] *See* Sara Lunsford Kohen, *Relgious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43 (2011); *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006) (holding that, at a minimum, RFRA should apply in suits brought by private parties where a government agency also could have sued). The *Hankins* court found that "permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party [] involves a convoluted drawing of a hardly inevitable negative implication." *Hankins*, 441 F.3d at 103. *See also In re Young*, 141 F.3d 854 (8th Cir. 1998) (allowing RFRA to be used as a defense within a private suit involving bankruptcy law); *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (applying RFRA equally to Title VII claims brought by EEOC *and* by a private plaintiff). The Ninth Circuit has taken a middle-of-the-road approach, holding that RFRA applies to private parties acting "under color of law" as that term is defined in 42 U.S.C. § 1983. *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999).
[59] *See McGill v. General Conference Corporation of Seventh-day Adventists*, 563 U.S. 936, (2011) (denying writ of certiorari to a 6th Circuit case that held RFRA could not be used as a defense between private parties); *Christians v. Crystal Evangelical Free Church*, 525 U.S. 811 (1998) (denying writ of certiorari to an 8th Circuit case that upheld the use of RFRA in a suit involving private parties).

FADA would additionally prevent the federal government from taking any steps to "withhold, reduce, exclude, terminate, or otherwise make unavailable or deny any Federal grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, license, certification, accreditation, employment, or other similar position or status" from a person or organization based on their religiously or morally-motivated speech or acts regarding marriage and/or extramarital relations/sex.[60] In other words, the federal government may not disqualify a person or entity from receiving taxpayer money, or administering an important state-created or -funded program, because they discriminate based on their religious beliefs or moral convictions.[61]

Numerous provisions of federal law and policy currently impose nondiscrimination requirements on non-profit[62] recipients of federal grants and contracts including social service providers, hospitals, and universities.[63] Many of these laws prohibit sex (and pregnancy) discrimination, which, as noted previously, have been interpreted by administrative agencies and courts to include discrimination based on sexual orientation or marital status.[64] Other laws explicitly prohibit sexual orientation discrimination by grantees.[65] At least one law explicitly discourages marital status discrimination.[66]

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[60] *See* FADA § 3(b)(3).

[61] Similar provisions of FADA additionally ban the federal government from withholding any "entitlement or benefit under a Federal benefit program, including admission to, equal treatment in, or eligibility for a degree from an educational program" or from withholding or denying access to "Federal property, facilities, educational institutions, speech fora (including traditional, limited, and nonpublic fora), or charitable fundraising campaigns from or to such person" based on the person's religiously-motivated acts. *See* FADA §§ 3(b)(4) - (b)(6). These provisions, along with FADA's prohibition on withholding a scholarship based on a person's religious speech and/or acts, may override two important Supreme Court opinions that allow the government to exercise discretion over the use of state resources. *See Locke v. Davey*, 540 U.S. 712 (2004) (holding that a state scholarship program that did not permit students to use the scholarship at an institution where they are pursuing a degree in devotional theology did not violate the Free Exercise Clause); *Christian Legal Soc. v. Martinez*, 561 U.S. 661 (2010) (holding that a nondiscrimination requirement that student groups at a public university adopt open membership policies in order to receive official recognition did not violate the right to free exercise or speech.).

[62] For-profit contractors acting within the scope of a federal contract are not deemed "persons" in FADA. See § 6(3)(B).

[63] *See, e.g.* 42 U.S.C. § 18116 ("[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance…"); 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"); 42 U.S.C. § 5672 (applying antidiscrimination requirements to grants funded by the Office of Justice Programs).

[64] *See supra* fns. 44-45 and accompanying text.

[65] 42 U.S.C. § 13925(b)(13) ("No person in the United States shall, on the basis of actual or perceived … sex, gender identity (as defined in paragraph 249(c)(4) of title 18), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994"); 42 U.S.C. § 294e-1 ("To be eligible for a grant under this section [Mental and behavioral health education and training grants], an institution shall demonstrate—(1) participation in the institutions' programs of individuals and groups from … genders and sexual orientations."). Sexual orientation discrimination by federal contractors is also prohibited by executive order. *See* Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014). FADA would additionally weaken an executive order that requires some government contractors, as a condition of eligibility, to disclose their

FADA would prevent the federal government, including the DOL's Office of Federal Contract Compliance Programs, from enforcing these antidiscrimination provisions against non-profit organizations that hold religious beliefs or moral convictions 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. It would also take away federal agencies' discretionary power to deny taxpayer money to non-profit organizations that discriminate on the basis of sexual orientation, even where not mandated by federal law or policy. In practice, this would allow organizations to apply for a grant or contract to provide particular services, and then refuse to perform those same services on the basis of a religious or moral belief regarding sex or marriage. For example, a health clinic could receive a Title X grant to provide family planning care, and then require that patients provide a marriage license in order to qualify for such services. Another health clinic could receive a Ryan White grant to provide services to people with HIV/AIDS and then decline to work with same-sex married couples. A domestic violence shelter funded by a Violence Against Women Act grant could require all residents to attest their opposition to marriage equality before securing housing. Placing these types of religious and/or moral conditions and restrictions on the use of public monies would clearly harm the intended beneficiaries of those funds.

This provision of FADA would have especially significant effects in the context of government contracts to provide essential services such as healthcare. For example, the federal government contracts with private companies to provide Medicare Advantage Plans to seniors and people with disabilities.[67] Even if a company had already signed a contract with the federal government to provide particular services to Medicare enrollees, these companies might 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.

FADA may also limit the ability of the federal government to prevent discrimination by state employees. While FADA does exempt federal employees acting "within the scope of their employment"[68] from the bill's protections, it does not exempt state employees. Thus the DOJ and other federal agencies would be unable to take any action to ensure that state actors comply with federal law, including the Supreme Court's decision in *Obergefell v. Hodges*. This limitation is especially significant since several states have passed or attempted to pass laws that provide religious exemptions to state workers who are opposed to marriage equality.[69] If FADA were

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compliance with labor laws, including antidiscrimination laws. Fair Pay and Safe Workplaces Exec. Order No. 13, 673, 79 FR 45,309 (Aug. 5, 2014).

[66] *See* 42 U.S.C, § 12639 (providing that programs that receive federal financial assistance under the National Service Trust Program are evaluated to determine their effectiveness in "recruiting and enrolling diverse participants in such programs… based on …marital status.").

[67] *See* Social Security Act § 1857, 42 U.S.C. § 1395w-27.

[68] FADA § 6(3)(A).

[69] *See* H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016) (vetoed by Governor Nathan Deal); S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016) (voted down in committee); H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016). Mississippi's extremely broad religious exemption law was signed into law by Governor Phil Bryant. For an analysis of the law, *see* Memorandum from the Public Rights/Private Conscience Project to Interested Parties, Mississippi H.B. 1523 & the Establishment Clause (Apr. 5, 2015) *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/memoregardingmshb1523.pdf. *See*

enacted, government workers in Mississippi or Kentucky, for example, would be allowed to refuse to issue marriage licenses to, or to marry, same-sex couples under both state and federal law. This would make same-sex couples' constitutional right to marry contingent on their finding a willing government employee, and subject these couples to discrimination and stigma by state actors.

iv. FADA Imposes Dignitary Harms on LGBTQ and Other Citizens

Finally, by specifically singling out for special protections only religiously-motivated discrimination based on sexual orientation and non-marital relations/sex, FADA will produce significant third party harms by increasing the likelihood that LGBTQ people and single parents will face bias and pejorative treatment, including by government-funded actors. In *Obergefell*, Justice Kennedy explained,

> "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises... But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[70]

Like bans on same-sex marriage, FADA would lend the color of law to discrimination, and therefore would demean and stigmatize a class of persons whose relationships have only recently been formally recognized by the state.[71] This stigma is even more acute when it occurs in programs regulated and funded by the state, or by state actors.

The fact that the most recent version of the bill has added an immunity for sincerely held religious belief or moral conviction that marriage is or should be recognized as "two individuals of the same sex" does not mitigate the likelihood that the bill's overall effect will be to induce stigma against same-sex couples. As a matter of fact, the bill's central purpose (as indicated, *inter alia*, in the Committee's Memo noticing the hearing on FADA), is to address the interests of "organizations and individuals that maintain a traditional view of marriage [and] have raised concerns that the government will use the Supreme Court decision in *Obergefell v. Hodges* as a legal basis to discriminate against them for holding such a view of marriage, potentially

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also H.B. 130, 2016 Leg., Reg. Sess. (Ala. 2016); H.B. 236/ S.B. 120, 29th Leg., Reg. Sess., (Alaska 2016); H.B. 401, 2016 Leg., Reg. Sess. (Fla. 2015); H.B. 14, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 17, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 31, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 28, 2016 Leg., Reg. Sess. (Ky. 2016); S.F. 2158, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 2462, 89th Leg., Reg. Sess. (Minn. 2016); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 478, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 1328, 55th Leg., Reg. Sess. (Okla. 2016); S.B. 116, 2016 Gen. Assemb., 121st Sess. (S.C. 2015); H.B. 3150, 2016 Gen. Assemb., 121st Sess. (S.C. 2015); S.B. 40, 2016 Gen. Assemb., Reg. Sess. (Va. 2016). Two states even introduced bills to *punish* government workers who recognize same-sex marriage, ban the use of funds to enforce court orders requiring recognition of same-sex marriage, and instruct state courts to dismiss any legal challenges to the bills. *See* H.B. 1599, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 805, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 973, 55th Leg., Reg. Sess. (Okla. 2016); H.B. 3022, 2016 Gen. Assemb., 121st Sess. (S.C. 2016).

[70] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

[71] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

jeopardizing a tax-exempt status or other relationships they may have with the government …"[72] It is implausible that any party might marshal a credible claim that they are entitled to an exemption from federal law under FADA on account of their religious or moral conviction that marriage is or should be recognized as "two individuals of the same sex."

All of the aforementioned religious accommodations violate the Establishment Clause by shifting a material burden from religious actors to other private citizens. As an overly broad religious accommodation that will harm third parties, FADA violates the First Amendment's Establishment Clause.

c. FADA Violates the Establishment Clause By Endorsing Particular Religious Beliefs

Finally, the government may violate the Establishment Clause if its actions tend to express support for a particular religious faith or belief.[73] FADA runs the risk of violating the Establishment Clause by "establish[ing] an official preference for certain religious beliefs over others"[74] and improperly endorsing, or seeming to endorse, particular religious beliefs. In the Mississippi opinion mentioned above, the court found that HB 1523 violated non-endorsement principles since "the State has put its thumb on the scale to favor some religious beliefs over others."[75] The non-endorsement principle is best articulated in several Supreme Court cases that involve expressive actions which may be attributed to the state, such as those taken by government employees, on government property, or during government-sponsored activities.[76] The applicable test in these cases is whether, in light of the context and history of the relevant

[72] Memorandum from House of Representatives Committee on Government Oversight and Reform, noticing: Full Committee hearing: "Religious Liberty and H.R. 2802, the First Amendment Defense Act (FADA)", dated July 8, 2016.

[73] *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community") (O'Connor, J., concurring); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 305 (2000) ("Contrary to the District's repeated assertions that it has adopted a 'hands-off' approach …the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion."); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) ("the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally"); *U.S. v. Lee*, 455 U.S. 252, 263 fn. 2 (1982) (Stevens, J., concurring) ("The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

[74] *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 47 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction). In evaluating a law very similair to FADA, the Mississipi district court found that "On its face, [the bill] constitutes an official preference for certain religious tenets. If … specific beliefs are 'protected by this act,' it follows that every other religious belief a citizen holds is not protected by the act." *Id.* at 48.

[75] *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 2 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction).

[76] *See Santa Fe Independent School District*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Backmun, J., concurring) ("Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion"); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). *See also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring) ("[G]overnment speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.").

law or action, a reasonable observer would perceive a state endorsement of religion.[77] If so, such law or action amounts to a violation of the Establishment Clause. For example, if a mail carrier explicitly refused to deliver invitations for a same-sex couple's wedding because of his religious beliefs—a belief that is specifically protected by the introduced version of FADA—this could cause a reasonable person to think that the government has endorsed the religious grounds for such opposition.[78]

What is more, providing public funds to an organization that places religious restrictions on the use of those funds creates the perception that the government has endorsed the organization's religious beliefs.[79] For example, awarding a grant to an organization that, for religious or moral reasons, explicitly refuses to provide services to same-sex couples and unmarried mothers could cause a reasonable observer to believe that the government supports the religious judgement that these populations are sinful or unworthy of assistance. This violates the Establishment Clause, which forbids the government from supporting organizations that "impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endors[ing] the religious beliefs of" that organization.[80]

Conclusion:

In summary FADA creates overly broad religious accommodations that will impose manifold harms on private Americans and enable and encourage discrimination. As such, despite its name, it conflicts with the law and spirit of the Establishment Clause of the First Amendment.

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[77] *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) ("To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."); *Santa Fe Independent School Dist. v. Doe*, 30 U.S. 290, 308 (2005) ("In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools") (internal citations omitted).

[78] *See generally*, Memorandum from the Public Rights/Private Conscience Project to Interested Parties, Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages (June 30, 2015) *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriageexemptionsmemojune30.pdf. The fact that the discrimination is permissive rather than mandatory is not dispositive; like the students' religious speech in *Santa Fe Independent School District v. Doe*, the decision of the state to permit such religiously-motivated conduct by government employees on government property in the provision of government services is "clearly a choice attributable to the State." *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 311 (2000).

[79] Of course, the Supreme Court has held that not every grant given to a religious organization or group violates the Establishment Clause. The Court has typically upheld grants where secular services are provided to religious and secular institutions on a neutral basis. *See*, *e.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000). Permitting religious grant recipients to discriminate, however, is *not* a matter of merely providing funds for the same services in a neutral way. Rather, by permitting grant recipients to refuse to provide funded services to certain populations based on a religious belief, the government allows the grant recipients to redefine state programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients.

[80] *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds). *See also*
Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss. 1989) ("The [government] grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion…would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.").

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William F. Harvey Professor of Law and
Chancellor's Professor
Indiana University Robert H. McKinney School of Law

Gregory Magarian
Professor of Law

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* Titles and institutions are for identification purposes only.

Washington University in St. Louis

Caroline Mala Corbin
Professor of Law
University of Miami School of Law

Nomi Stolzenberg
Nathan and Lilly Shapell Chair in Law
USC Gould School of Law

Carlos A. Ball
Distinguished Professor of Law
Rutgers University

Ari Ezra Waldman, J.D., Ph.D.
Associate Professor of Law
Founder & Director, Tyler Clementi Institute for CyberSafety
New York Law School

Aziza Ahmed
Associate Professor of Law
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Dr. Jennifer A. Drobac
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Deborah Widiss
Professor of Law
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J. Stephen Clark
Professor of Law
Albany Law School

Arthur S. Leonard
Professor of Law
New York Law School

Martha M. Ertman
Carole & Hanan Sibel Research Professor
University of Maryland Carey Law School

Katherine Franke is the Sulzbacher Professor of Law at Columbia Law School, where she also directs the Center for Gender & Sexuality Law and is the faculty director of the Public Rights/Private Conscience Project. She is among the nation's leading scholars writing on law, religion and rights, drawing from feminist, queer, and critical race theory. Her most recent book, Wedlocked: The Perils of Marriage Equality (NYU Press 2015), considers the costs of winning marriage rights for same sex couples today and for African Americans at the end of the Civil War. Wedlocked anticipated a virulent, if not deadly, backlash against same-sex couples winning marriage rights. Professor Franke was awarded a Guggenheim Fellowship in 2011 to undertake research for Wedlocked. She also chairs the Board of Directors of the Center for Constitutional Rights, based in New York City.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Professor Katherine Franke

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1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

None

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2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

I am testifying on behalf of the Public Rights/Private Conscience Project at Columbia Law School, upon the invitation of the Committee on Oversight and Government Reform. I am the Faculty Director of the Public Rights/Private Conscience Project, and a Professor of Law at Columbia Law School.

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3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

I certify that the above information is true and correct.
Signature: Date: July 11, 2016