The Heritage Foundation

214 Massachusetts Avenue, NE
Washington, DC 20002

(202) 546-4400
heritage.org

Answering the Critics of the Critics of the Respect for Marriage Act (RFMA)

By Roger Severino, Vice President for Domestic Policy

How did Senate liberals convince 12 Republicans to break ranks and endorse a same-sex marriage bill that puts a giant target on people of faith? It took help from (some) people and organizations of faith, such as the LDS Church and the National Association of Evangelicals, which gave defecting Senators enough political cover to vote against the interests of the people who put them in office. Additionally, a subset of these advocates, including law professors I respect, raise sophisticated legal arguments purporting to show that the bill actually *improves* the state of religious liberty in America. This piece demonstrates why they are grossly wrong.

As I and others have argued for years, marriage is the exclusive, lifelong, conjugal union between one man and one woman and any departure from that design hurts the indispensable goal of having every child raised in a stable home by the mom and dad who conceived them. I won't speculate as to why some of the faith voices who were once staunchly opposed to same-sex marriage recognition have flipped on the issue. But flipped they have. Seeking to entrench *Obergefell* and beyond in national law—while declining to press the sociological, Biblical, and biological arguments favoring conjugal marriage—suggests these advocates believe that further recognizing same-sex marriage in law is a positive social good. If so, they should own up to in candor and out of respect to those they seek to influence.

But whatever the motivation, the arguments raised must ultimately be judged on their own merits and they demand a thoughtful and serious response.

Claim: Because the bill's findings characterize beliefs in man-woman marriage as being worthy of respect, it provides religious institutions legally significant protections against being treated by government as the equivalent of bigots.

Response: False. First, the issue is not the ability to *believe* in man-woman marriage, but the ability to *live out* those beliefs in meaningfully in society and not be labelled a bigot by the government for doing so. Respect for mere beliefs in man-woman marriage gets people of faith little in this context. But more fundamentally, the bill doesn't even go that far. It reads:

"Diverse beliefs about the role of gender in marriage are held by reasonable and sincere people based on decent and honorable religious or philosophical premises. Therefore, Congress affirms that such people and their diverse beliefs are due proper respect."

Here is an accurate translation: "Diverse but wholly unspecified beliefs about the role of gender in marriage (whatever that means) are held by acceptable people based on acceptable premises. Therefore, such acceptable people who hold acceptable beliefs about marriage are due an acceptable level of respect."

It is hard to imagine crafting a more legally meaningless statement than that. The bill's sponsors took great pains to avoid saying precisely what the bill's defenders erroneously claim. Nowhere in the bill does conjugal marriage, traditional marriage, biological marriage, Biblical marriage, natural marriage, historical marriage, husband-wife marriage, man-woman marriage, or any possible variation appear in the bill. Yet the bill does say some things quite clearly and explicitly—namely, "same-sex couples . . . . deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children." Now a statement like *that* does some real legal work, but in precisely the opposite direction.

Claim: The bill cannot be used a basis for the IRS to deny the tax-exempt status of religious organizations that adhere to and act upon their beliefs in man-woman marriage.

Response: False. While the bill clarifies through a rule of construction that it does not, by its own operation, revoke tax-exempt status for dissenting religious organizations, it gives ample grounds for the IRS and any other tax authority to do the actual dirty work. When Congress passed the Civil Rights Act of 1964, no one argued that it automatically revoked tax-exempt status for religious schools that engaged in racial discrimination. But the IRS did exactly that six years later and the Supreme Court affirmed the action In the *Bob Jones* case by relying on the fact that Congress established a "national" or "fundamental" policy against race discrimination through the Civil Rights Act following the *Brown v. Board* decision. Congress could have added the exact same rule of construction in the RFMA to the Civil Rights Act of 1964 and it would not have prevented the IRS's tax-revocation because the governmental interest in eradicating racial discrimination would have been deemed to be just as compelling.

Even President Obama's top lawyer at the Department of Justice admitted to the Supreme Court during the Obergefell argument that tax-revocation of religious organizations that hold fast to man-woman marriage was "going to be an issue." No rule of construction under the bill will make this issue go away, but an affirmative defense, such as under Senator Lee's First Amendment Defense Act, would. The bill's sponsors can easily add a clause saying: "No federal, state, or local taxing authority shall revoke any tax-exempt status or tax benefit of any non-profit organization because it believes or acts on the belief that marriage is the union of one man and one woman." This simple protection would take the tax issue entirely off the table, which is precisely why the bill's sponsors steadfastly refuse to adopt it.

Claim: The bill cannot be used as a basis for the government bureaucrats to deny grants, licenses, accreditation, or contracts to religious organizations that adhere to and act upon their beliefs in man-woman marriage.

Response: False. Identical to the question of tax status, while the bill does not, by its own operation, revoke licenses, grants, accreditation, or other benefits for religious organizations that hold fast to man-woman marriage, the bill similarly likewise fails to provide any affirmative defense to prevent bureaucrats from using the bill as a basis for the revocations. Indeed, religious adoption agencies in particular have already been successfully excluded from adoption programs

by multiple government agencies simply because they follow the belief that every child has a right to both a mother and a father.

Claim: Because the RFMA explicitly preserves application of the Religious Freedom Restoration Act (RFRA), this concession and existing court precedents, are enough to address any potential religious liberty harm.

Response: False. While it is some consolation that the sponsors did not explicitly strip RFRA protection from the bill, it will be cold comfort. Neither RFRA nor the Supreme Court's decisions in the *Fulton* and *Masterpiece Cakeshop* will prevent targeting of faith-based organizations, including schools and adoption agencies, along the lines discussed because the bill sets the stage for courts finding a compelling national governmental interest in eliminating same-sex marriage "discrimination." So long as government actors enact anti-discrimination policies regarding same-sex marriage without exceptions (and avoid showing explicit animus to people of faith on the record), religious institutions will face these risks, which underscores the need for explicit affirmative defenses.

Claim: Because the RFMA applies to private parties only when acting "under color of state law," the risk is minimal that religious organizations will be deemed government actors. But even if they are deemed state actors, they would already be bound by *Obergefell* in *the exact same way* as under the RFMA.

Response: Partly true, partly false. Yes, the risk that an average religious institution will be deemed a state actor is rather low, however, the question is fact intensive. Religious non-profit contractors that provide, for example, supervised housing for immigrant families detained on behalf of DHS, adoption services on behalf of government agencies, or prisoner rehabilitation services mandated by a criminal court might be deemed sufficiently governmental to limit a religious organization's freedom on marriage questions that may arise in each of those settings.

The contention that *Obergefell* already applies fully to all potential religious state actor examples is premised on the idea that the civil rights law known as Section 1983 already provides private rights of action regarding same-sex marriage that are identical to those under the RFMA. If true, it certainly begs the question—why do the RFMA's sponsors doggedly insist on a private right of action that is 100% unnecessary?

In actuality, the RFMA should make it easier to sue religious organizations deemed state actors on marriage because the RFMA calls out same-sex marriage by name while Section 1983 (which was adopted in 1871) does not. Section 1983 protects against a "deprivation" of constitutional rights, privileges, and immunities and allows suits by "the party injured." By contrast, the RFMA prevents the "denial" of any "claim arising from" a same-sex marriage specifically and allows suits by any person "harmed" as a result. These textual differences may seem nuanced from a lay perspective, they are the stuff of an enterprising lawyer's dreams. But a more common-sense point applies. When Congress creates an explicit right to sue on a particular issue, it prompts more lawsuits on that issue regardless of background law.

Claim: RFMA provides additional protections for explicitly religious organizations to decline to participate in same-sex marriage celebrations and bars activist lawsuits on this question.

Response: True but largely irrelevant. If the First Amendment means anything, it means that government is barred from ordering a house of worship to solemnize or celebrate a same-sex marriage within their chapel, church, synagogue, or mosque. Such lawsuits would readily lose and any subsequent attempts to relitigate the question would eventually lead to sanctioning of lawyers for filing frivolous lawsuits. While the bill may provide some explicitly religious non-profits additional clarity outside of the house of worship context, few if any religious social service organizations would benefit, including adoption agencies and marriage counseling organizations, because they do not have anything at all to do with wedding solemnization itself (which is the only thing ostensibly protected by the bill). This explains why controversies and lawsuits over same-sex marriage celebrations have centered around bakers, photographers, web designers, printers, meeting halls, bed and breakfasts, and florists—with decidedly mixed success for people of faith. These documented and repeated examples of people of faith being harassed and driven out of business *today* over forced same-sex marriage celebrations get no protected at all under the bill.

Claim: The RFMA, as amended, would not recognize polygamous marriages.

Response: True and False. The latest version of the RFMA would not grant federal recognition "of marriages between more than 2 individuals," which would cover unions where three or more persons are married to each other as one family unit. But it leaves open the possibility that one person can be in multiple two-person marriages *at the same time*, which would trigger federal recognition under the bill if a state were to legally recognize such consensual bigamous unions as separate family units.

Claim: The RFMA will on balance provide increased protections for religious believers and institutions on the question of marriage. Most everyone will be better off, and the world will be a better place.

Response: Pants on fire. Of all the mistaken claims of the RFMA's defenders, this one is the most pernicious. Tolerance and mutual understanding are not achieved by putting people who believe in man-woman marriage on the same plane as people who reject interracial marriage—which is precisely what the RFMA does, despite no appreciable risk of same-sex couples losing *any* legal status or benefits. This is a gratuitous swipe that cannot be recast as doing a favor for people of faith.

Conclusion:

Christians, Muslims, and Jews with sincere, historic, reasonable (and true!) beliefs about human sexual morality and identity have been under accelerated attack by activists and government post

Obergefell, despite scolding assurances by same-sex marriage advocates that a "live and let live" world would follow that decision. The RFMA would supercharge these attacks and the gestures towards religious liberty in the most recent version of the bill do not change this fact. Under the present circumstances, one can't blame people of faith for calling a wolf, a wolf, no matter how much wool clothing it wears.