

# CREATING A LICENSE TO DISCRIMINATE: FIRST AMENDMENT DEFENSE ACT

*Legislation Introduced in Congress Opens Doors to Discrimination*

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## INTRODUCTION

The freedom of religion is one of our nation's most fundamental values. That is why it is protected in the First Amendment to the U.S. Constitution. Americans also believe in treating others the way they want to be treated, and while religious freedom is one of our country's fundamental values, that freedom doesn't give any person or any company the right to harm, discriminate against, or impose their beliefs on others.

Contrary to these shared values, the so-called First Amendment Defense Act (FADA), recently introduced in Congress,<sup>1</sup> would permit discrimination by individuals, privately owned companies, and nonprofits against their employees, customers, and clients based on the belief that marriage should be between a man and a woman or that sex outside of marriage is improper. Oddly, FADA also states the federal government will not take adverse action against those who believe in marriage as currently defined under federal law. While this clause may provide the veneer of supporting different viewpoints about marriage, the real intent behind FADA is to allow discrimination by those who oppose marriage for same-sex couples and/or who oppose sex outside of marriage.

## HOW DOES FADA WORK?

The First Amendment Defense Act, as introduced in March 2018, by Senator Mike Lee,<sup>2</sup> would prevent the federal government from taking action against certain individuals or organizations who "speaks or acts in accordance with a sincerely held religious belief or moral conviction that marriage is a union of one man and one woman; or two individuals as recognized under Federal law; or sexual relations outside of marriage are improper." Among the actions it would prohibit the federal government from taking are: revocation of tax-exempt status; prohibition of receipt of federal grants, contracts, or loans; and exclusion from federal programs. This undermines the government's ability to enforce civil rights law and protect people from discrimination.

## THREE REASONS FADA IS DANGEROUS

- 1. FADA Supports Discrimination Against and Stigmatizes Millions of Americans.** FADA takes aim at millions of LGBT people and their families and, more specifically, hundreds of thousands of same-sex couples. However, LGBT people aren't the only people who will suffer if FADA is passed. The bill's language supporting a narrow belief about sexual relations and marriage could also be applied to discriminate against millions of single parents and their children, millions of unmarried women who become pregnant, millions of cohabitating unmarried couples, and millions of unmarried adults who are sexually active.
- 2. FADA Permits Government Grantees and Contractors to Use Taxpayer Dollars to Discriminate.** The legislation would allow individuals and nonprofits who receive federal funds and administer vital programs to discriminate against the people they are supposed to be serving. And FADA would permit them to discriminate even if the particular granting agency had a clear nondiscrimination policy and if federal law requires that married couples to be treated the same regardless of whether they are same-sex or opposite-sex couples. Examples of harms this could result in include:
  - Nonprofit child welfare services providers could receive taxpayer money but opt to keep children in foster homes rather than allow them to be adopted by a loving lesbian couple.
  - A nonprofit homeless shelter could continue to receive federal funding while refusing to house single pregnant women or unmarried couples.
  - A nonprofit housing agency could refuse to provide Department of Housing and Urban Development (HUD) program assistance to an unmarried couple or a single parent.

**3. FADA Protects Government Grantees and Contractors Who Discriminate Against Their Own Employees.** Currently a federal executive order prohibits discrimination on the basis of sexual orientation and gender identity by federal contractors, which applies to approximately 30 million workers or one-fifth of the U.S. workforce. However, FADA would restrict the government's ability to withhold a federal contract from an employer who makes hiring, firing, or other employment decisions based on their "sincerely held religious or moral belief" about marriage. Note that the employee would still be able to file a discrimination claim under Title VII of the Civil Rights Act or under state law (if the state has a nondiscrimination law), but the contractor would continue to be eligible for taxpayer funding. This means that:

- A nonprofit federal contractor could continue refuse to hire qualified gay man or fire a woman after finding out she is pregnant and living with her boyfriend. The contractor would be exempt from the nondiscrimination requirements of the contract.

## WHO COULD BE IMPACTED BY THE PASSAGE OF FADA?

FADA impacts many types of people.

First, by privileging and exempting those who oppose marriage for same-sex couples, FADA puts at risk LGBT people and those in same-sex relationships as well as their children:



**10 million LGBT people and 1.5 million individuals in same-sex couples.** First, FADA seeks to explicitly undermine the dignity and legal and social recognition of the estimated 1.5 million people in same-sex marriages.<sup>3</sup> It also puts at risk the 10 million lesbian, gay, bisexual, and transgender people (4.1% of adults in the United States) who are, or may be perceived to be, in a same-sex relationship or marriage. People of color are more likely to identify as LGBT than white people, meaning the impact of FADA would be felt disproportionately by people of color who already feel the impact of discrimination based on race, color, ethnicity, and national origin.



**Six million children raised by LGBT people and same-sex couples.** Recent surveys show that nearly one-third (29%) of LGBT adults in the United States are raising children.<sup>4</sup> There could be as many as 6 million children being raised by LGBT people and same-sex couples,<sup>5</sup> and these children are at risk for discrimination simply because of who their parents are.

Second, FADA's support of the view that sexual relationships should be restricted to married couples endorses discrimination against broad swaths of Americans: anyone who is pregnant or has a child and is not currently married; anyone who is, or is perceived to be, engaged in a sexual relationship and is not currently married; and the children and family of such individuals. Specifically:



**1.8 million unmarried couples raising an estimated 3.0 million children.** The Census Bureau estimates that there are 1.8 million unmarried couples raising three million children under the age of 18.<sup>6</sup> Because FADA would legally protect the belief that sexual relations should be restricted only to married opposite-sex couples, these families and the children they are raising are at risk for discrimination. More than half (54%) of these couples raising children are headed by a person of color, again increasing the likelihood that families of color would be impacted disproportionately by FADA's license to discriminate.



**11.8 million parents raising children on their own and the 20 million children they are raising.** Data from the 2016 Current Population Survey finds 11.8 million parents are raising children under the age of 18 on their own.<sup>7</sup> Of all children in the United States, 27% (20 million children) live with just one parent.<sup>8</sup> Of these parents, 28% are black and 23% are Hispanic/Latino.



**Approximately 1.6 million pregnant women each year who aren't married.** The National Vital Statistics System reports that 40% of births in 2015 were to unmarried people, a total of 1.6 million births.<sup>9</sup> Again, there is likely to be a disproportionate impact on families of color; seventy percent of black women giving birth were unmarried as were 66% of American Indian or Alaska Native women.



**14.1 million people who are living together as unmarried partners.**<sup>10</sup>



**The 128.5 million people in the United States who are not currently married who could be discriminated against if they are, or are perceived to be, having sex.**<sup>11</sup>

## CONCLUSION

If nonprofits, individuals, and educational institutions receiving federal funds are allowed to decide whom to hire, fire, and serve based on their religious or moral beliefs, not only is this akin to government-sanctioned discrimination against its own citizens, but the possibilities for abuse and unintended consequences abound. Federal contractors from food banks to homeless shelters, funded with taxpayer dollars, could exclude certain groups of citizens at will from their services. The bill sends a message to grantees and contractors that discrimination is condoned and encouraged by the federal government—and that the government is creating special protections for certain religious beliefs over others, undermining true religious liberty—even as businesses and the public are sending a message that they do not support discriminatory laws.

Religious freedom is a bedrock American value, but that freedom should not give citizens or companies the right to discriminate or impose their beliefs on others. The government has a commitment to treat all of its citizens equally and many government employees swear an oath to do just that. The government should keep its oath to its citizens and not enable tax-payer funded government contractors to pick and choose who to serve and which citizens to help. By granting a license-to-discriminate to those who oppose marriage for same-sex couples and sex outside of marriage, FADA gives those beliefs, and those who hold them, preferential treatment under the law.

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## ENDNOTES

- <sup>1</sup> Press Releases: Sen. Lee Introduces First Amendment Defense Act,” March 8, 2018, <https://www.lee.senate.gov/public/index.cfm/2018/3/sen-lee-introduces-first-amendment-defense-act> (accessed March 12, 2018).
- <sup>2</sup> *Ibid.*
- <sup>3</sup> U.S. Census Bureau. “Measuring Same-Sex Couples, Sexual Orientation, and Gender Identity on Census Bureau and Federal Surveys.” September 15, 2016. <http://www.census.gov/hhes/samesex/files/Final-Presentation.pdf> (accessed February 13, 2017).
- <sup>4</sup> The Williams Institute. “Same-sex Couple and LGBT Demographic Data Interactive.” May 2016. <http://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&compare=percentage#comparison> (accessed February 13, 2017).
- <sup>5</sup> Applying the parenting rate (29%) to the estimates of the adult LGBT population, and assuming that families have, on average, two children each.
- <sup>6</sup> U.S. Census Bureau. “Current Population Survey, 2016 Annual Social and Economic Supplement: Table FG10. Family Groups: 2016.” November 2016. <http://www.census.gov/hhes/families/files/cps2016/tabFG10-all.xls> (accessed February 13, 2017).
- <sup>7</sup> U.S. Census Bureau. “Current Population Survey, 2016 Annual Social and Economic Supplement: Table FG10. Family Groups: 2016.” November 2016. <http://www.census.gov/hhes/families/files/cps2016/tabFG10-all.xls> (accessed February 13, 2017).
- <sup>8</sup> U.S. Census Bureau. “Current Population Survey, 2016 Annual Social and Economic Supplement: C3. Living Arrangements of Children Under 18 Years1 and Marital Status of Parents, by Age, Sex, Race, and Hispanic Origin2 and Selected Characteristics of the Child for All Children: 2016.” November 2016. <http://www.census.gov/hhes/families/files/cps2016/tabC3-all.xls> (accessed February 13, 2017).
- <sup>9</sup> Martin JA, Hamilton BE, Osterman MJ, et al. Births: Final data for 2015. National vital statistics report; Vol 66, No 1. Hyattsville, MD: National Center for Health Statistics. 2017. [https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66\\_01.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_01.pdf) (accessed February 13, 2017).
- <sup>10</sup> U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Unmarried-Partner Households by Sex of Partner. [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_13\\_5YR\\_B11009&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B11009&prodType=table) (accessed February 14, 2017).
- <sup>11</sup> America’s Families and Living Arrangements: 2014: Table A1. Marital Status Of People 15 Years And Over, By Age, Sex, Personal Earnings, Race, And Hispanic Origin: 2014. <http://www.census.gov/hhes/families/data/cps2014A.html> (accessed February 14, 2017).