

CREATING A LICENSE TO DISCRIMINATE: FIRST AMENDMENT DEFENSE ACT

Legislation Introduced in Congress Opens Doors to Discrimination

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movement advancement project ▶



INTRODUCTION

The freedom of religion is one of our nation's most fundamental values. That is why it is protected in the First Amendment of 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 anyone or any company the right to harm, discriminate against, or impose their beliefs on others.

Contrary to these values, the so-called First Amendment Defense Act (FADA), first introduced in Congress in 2015, would permit people, companies, nonprofit organizations, and even federal government workers to discriminate against their employees, customers, and clients—but only as long as that discrimination is based on one or both of two would-be federally-endorsed beliefs about marriage and sexual relations. In short, with FADA, the federal government would endorse a single religious viewpoint held by a minority of Americans and then would provide a widespread, national license to discriminate based on that viewpoint.

NOTE: THIS BRIEF IS BASED ON AN ANALYSIS OF FADA AS INTRODUCED IN 2015

At time of publication, Congress has not yet introduced the 2017 version of FADA, though they have announced their intention to do so. Because the text of the 2017 bill is not yet available, throughout this brief we are only referring to the First Amendment Defense Act (H.B 2802) as introduced by Representative Raul Labrador (R-ID) in 2015. It is likely that the 2017 bill will be largely or wholly similar to the 2015 bill. You can view the text of the 2015 bill online at <https://www.congress.gov/bill/114th-congress/house-bill/2802>. When the 2017 bill is released, the Movement Advancement Project will release an updated policy brief examining the specifics of the new bill.

How does FADA work? This legislation, as drafted and introduced in 2015 (*see note*), would prevent the federal government from taking action against certain individuals or organizations who “believe or act in accordance with a religious belief or moral conviction that marriage is a union of one man and one woman, or that sexual relations are properly reserved to such a marriage.” 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; termination of a federal worker's employment; and exclusion from federal programs. See page 4 for the text of the 2015 legislation with commentary.

FADA takes aim at millions of LGBT people and their families and, more specifically, same-sex couples. However, LGBT people aren't the only people who will suffer if FADA is passed. The bill's exemption supporting a singular belief about marriage could also be applied to discriminate against millions of single parents, millions of unmarried women who become pregnant, millions of cohabitating unmarried couples, and millions of unmarried adults who are sexually active.

The 2015 bill is especially harmful because it applies to federal government workers, federal government agencies, and organizations administering vital programs like adoption and foster care services, help for the homeless, and health clinics. Under FADA, federal contractors and companies administering federal programs could fire an employee who is bisexual or an unmarried worker who becomes pregnant. Social 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, and health clinics receiving federal funding could deny unmarried adults contraception and other reproductive health services. Individual federal employees could exclude certain groups of citizens at will from crucial federal benefits, for example, by refusing to process a Social Security claim for a same-sex couple.

FADA PERMITS DISCRIMINATION



IN PARTNERSHIP WITH
Center for American Progress

AGAINST MILLIONS OF AMERICANS

10 MILLION LGBT
PEOPLE AND THEIR
KIDS

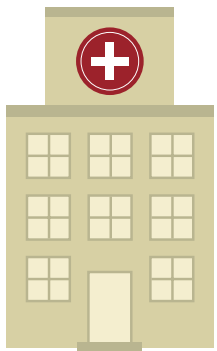
11.6 MILLION
SINGLE PARENTS
AND THEIR KIDS

750,000
SAME-SEX
COUPLES

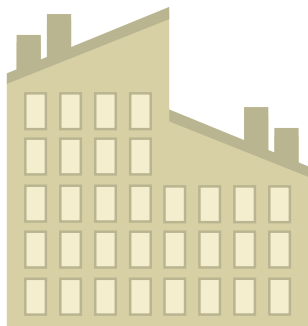
14.1 MILLION
UNMARRIED
COUPLES

1.6 MILLION
UNMARRIED
PREGNANT WOMEN

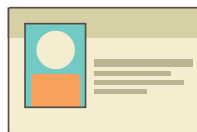
 **BY INDIVIDUALS, BUSINESSES, AND NONPROFITS** 



FEDERALLY-FUNDED
HOSPITALS



PRIVATE FOR-PROFIT
COMPANIES



FEDERAL
EMPLOYEES



CHILD-WELFARE
ORGANIZATIONS



NON-PROFIT
ORGANIZATIONS

FADA opens the doors to discrimination by a wide number of actors, and opens the floodgates to costly lawsuits as the courts are tasked with defining where and how FADA can be applied, as well as how FADA stacks up against Constitutional challenges and federal and state laws prohibiting discrimination. Despite the serious consequences of FADA, President Donald Trump has vowed to sign the legislation if it were to be passed by Congress.

HOW DOES FADA WORK?

The federal government cannot simply pass a law permitting individuals and companies to discriminate based on specific beliefs or characteristics. The U.S. Constitution prohibits these kinds of laws through two specific clauses: Equal Protection and Due Process. The Equal Protection clause ensures that all Americans get equal treatment under the law. And the Due Process clause means that no one can be deprived of life, liberty, or property without due process, that is, an explanation and a fair chance to defend themselves. These two legal foundations have been used to protect fundamental human and civil rights across American history.

So, if the federal government relies on the principles of Due Process and Equal Protection to prohibit discrimination, how does the First Amendment Defense Act operate? The 2015 FADA twists these fundamental principles into knots by claiming that when the government acts to prevent discrimination, the government is discriminating against those who hold the discriminatory beliefs.

The law reaches as far as it possibly can: **hamstringing federal agencies from taking any action to prevent people and organizations from refusing to serve same-sex couples, unmarried couples, and others impacted by the law.** So the law does not exactly *enact* discrimination. Instead, it *condones* it by removing existing penalties for discriminating. Also note that only individuals and organizations holding the two beliefs outlined above receive preferential government treatment—those with different religious beliefs about marriage receive no protection under this law. Thus FADA violates the Establishment Clause of the Constitution, which prevents the government from favoring some religious views above others.

Despite the clear Constitutional violation, the 2015 FADA has several key provisions favoring people and organizations seeking to engage in discrimination based on government-approved beliefs about marriage. See the next page for the text of the 2015 legislation.

1. The IRS may not remove such a non-profit or church's tax-exempt status.

2. The IRS may also not disallow a tax-exempt donation to such a non-profit or church.
3. Federal agencies who contract with, grant to, loan to, certify, accredit, or have a cooperating agreement with any organization or business holding and/or acting on the two approved beliefs may not rescind or deny any of those agreements.
4. No federal agencies can fire or not hire anyone who acts on the approved beliefs, or deny them any federal benefit.
5. Finally, FADA prohibits agencies from "otherwise discriminat[ing]" against a person or business who acts on these beliefs, opening an unpredictable can of worms as to the circumstances in which that clause could be used.

FADA Permits Discrimination By Entities With Ties to the Federal Government

The first four provisions have broad implications for the individuals and families who interact with or work for the people and organizations receiving these preferential protections under the law. Under FADA, people and organizations with ties to the federal government would be permitted to discriminate both in their hiring and firing practices, and in provision of services, and still retain their federal contract or grant, their federal employment, or their non-profit tax-exempt status. These include: federal employees like Social Security clerks, non-profit organizations like adoption agencies and homeless shelters, corporations like hospitals and defense contractors, and many more entities.

Importantly, as FADA is written, it could allow people, businesses, and organizations to use the law as a defense in court. For example, two mothers who take their son to a federally-funded hospital for a broken arm could get turned away. The family could sue under their state's nondiscrimination law only to have the hospital defend themselves in court using FADA. Not only would the federal government not be able to rescind the hospital's funding or accreditation, the state court might have to determine if FADA was constitutional. This explosion in litigation would likely cause a patchwork of interpretations across the states, as judges in states across the country with differing levels of protection figure out how FADA interacts with state law.

It is crucial to remember that FADA would not prohibit any state from enforcing existing state nondiscrimination laws against an individual, business, or organization who discriminated based on the religious views singled out for unconstitutionally preferential treatment under FADA.

H.R.2802 - First Amendment Defense Act

114th Congress (2015-2016)

As written, this legislation singles out two specific narrow religious beliefs (that marriage is between a man and a woman and that sexual relations should be confined to such marriages). This violates a most basic principle of the U.S. Constitution, the Establishment Clause, which prohibits the promotion of one religion over another.

While this text says “person,” the legislation defines this to include individual people, for-profit corporations, nonprofits, and other entities.

This clause provides exemptions to those who are opposed to marriage between two people of the same-sex.

And this clause provides exemptions to those who oppose single parents, unmarried couples who live together, people who are unmarried but not celibate, unmarried pregnant women, and more.

Typically, nonprofits in the United States are exempt from taxation. They are not, however, allowed to engage in extensive lobbying or to endorse or oppose candidates and retain their nonprofit status.

This clause means that federal granting agencies couldn't require recipients of federal grants, contracts, subcontracts, loans, licenses, etc., to certify that they will meet the nondiscrimination requirements that currently exist as a condition of such funding. Additionally, it means that a granting agency could not terminate a grant if a recipient engaged in prohibited discrimination. This clause also prohibits a federal agency from firing or refusing to hire a federal employee who acts on these two beliefs by, for example, refusing to process the Social Security claims of a same-sex couple.

This clause is vague. It is unclear whether “otherwise discriminate” means that federal agencies tasked with enforcing federal nondiscrimination laws would be able to continue to enforce them if the discrimination or harmful action was taken by a person or organization protected under FADA. For example, this could be read to mean that an agency like the Equal Employment Opportunity Commission would be unable to investigate a complaint filed by an employee of a federal grant recipient who was fired for becoming pregnant while unmarried.

This clause could mean that, even if licensing or certification standards require that organizations or individuals adhere to a nondiscrimination provision, for example, the government might not be able to refuse to certify or license an individual or entity or withdraw such certification if the individual discriminated under the justification of one or both of these beliefs.

For example, the Centers for Medicare and Medicaid Services might not be able to deny certification as a Medicare and/or Medicaid provider based on a hospital's refusal to allow married same-sex couples to have equal visitation or medical decision-making rights as other married couples.

This clause could mean that a person, business, or nonprofit could bring up FADA as a defense in state (or federal) court if sued for violating existing nondiscrimination laws. This clause also permits individuals, businesses, and nonprofits to preemptively sue the federal government for an exemption to nondiscrimination protections or grant provisions.

What is the First Amendment Defense Act?

The First Amendment Defense Act (FADA) is federal legislation under consideration by Congress. Below is an excerpt of the legislation with key components highlighted.

SEC. 3. PROTECTION OF THE FREE EXERCISE OF RELIGIOUS BELIEFS AND MORAL CONVICTIONS.

a. In General—Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

b. Discriminatory Action Defined—As used in subsection (a), a discriminatory action means any action taken by the Federal Government to—

1. alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986 of, any person referred to in subsection (a);
2. disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person;
3. withhold, reduce, exclude, terminate, or otherwise deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person;
4. withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit program from or to such person; or
5. otherwise discriminate against such person.

c. Accreditation; Licensure; Certification.—The Federal Government shall consider accredited, licensed, or certified for purposes of Federal law any person that would be accredited, licensed, or certified, respectively, for such purposes but for a determination against such person wholly or partially on the basis that the person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

SEC. 4. JUDICIAL RELIEF

a. Cause of action.—A person may assert an actual or threatened violation of this Act as a claim or defense in a judicial or administrative proceeding and obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief against the Federal Government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

As noted on page 3, the couple who was denied service at a hospital that receives federal funding may still sue under a state law that prohibits discrimination in places of public accommodation (although the hospital will raise FADA as a defense in court, as described above). A state court may even find the hospital guilty of discrimination and assess damages, but the hospital would still be permitted to receive federal funding and receive accreditation under FADA.

Nondiscrimination protections for LGBT people, however, are available in less than half of states. In states with no nondiscrimination protections, or with laws that explicitly permit, for example, child welfare agencies to turn away eligible loving families, LGBT and unmarried people will be left with no protection from discrimination by these businesses, organizations, and individuals.

The Last Provision of FADA is Vague and Could Result in Substantial Implications for Many Americans

The fifth and last provision of FADA is vague. As discussed below, it is unclear what this clause may mean for the enforcement of existing nondiscrimination provisions in federal law. (See annotated text of the 2015 legislation on the previous page.)

What is not clear, given the vague last provision of FADA, is whether federal agencies tasked with enforcing other federal nondiscrimination laws would be able to continue to enforce them if the discrimination or harmful action was taken by a person or organization protected by FADA. What does this mean? Consider that currently, there are protections for same-sex couples, unmarried people, pregnant women, and others across many areas of law. For example:

- Section 1557 of the **Affordable Care Act** prohibits discrimination in health care on the basis of sex, including sex stereotyping and gender identity.¹
- The Equal Employment Opportunity Commission currently interprets **Title VII's** prohibition of sex discrimination in the workplace to also protect against discrimination on the bases of sexual orientation and gender identity.² Title VII also prohibits discrimination against pregnant women.³
- **Title IX** protects all students from discrimination, including transgender students and pregnant students.⁴
- The Department of Housing and Urban Development's (HUD) **Equal Access Rule** prohibits discrimination in HUD-funded housing on the basis of family status, sexual orientation, and gender identity.⁵

- The **Fair Housing Act** prohibits discrimination on the basis of sex, which the Department of Housing and Urban Development explicitly interprets to include pregnancy and gender identity.⁶
- The federal **Violence Against Women Act (VAWA)** prohibits discrimination in VAWA-funded programs on the basis of sexual orientation and gender identity.⁷

Those protections would still exist. But it remains a question whether the agencies tasked with enforcing those protections would be able to investigate claims of discrimination brought under these specific statutes—or if the last vague provision of FADA would remove their ability to pursue enforcement actions. In all likelihood, this question would be decided via a wave of lawsuits, but it illustrates how far-reaching the consequences of FADA could be—as well as the expensive lawsuits this legislation would generate.

And regardless of how FADA ultimately hamstring (or not) federal agencies' enforcement of their own laws, it would definitively permit a recipient of federal funding to continue to receive taxpayer dollars while discriminating against their staff and customers.

IS FADA CONSTITUTIONAL?

The 2015 First Amendment Defense Act appears to violate several fundamental provisions of the U.S. Constitution. It violates the Equal Protection Clause by permitting people, organizations, and business to deny service to same-sex couples and people who have sex outside of a different-sex marriage. It violates the Due Process clause by allowing these people to be denied services without notice or the ability to defend themselves. And finally, as discussed above, FADA violates a one of the most fundamental clauses of the Constitution, the Establishment Clause of the First Amendment, which prevents the government from favoring some religious views above others. Rather, FADA provides special treatment for those who hold two specific religious and moral beliefs, elevating those beliefs above all others.

In 2016, Mississippi passed a law enshrining narrow religious and moral exemptions into multiple areas of state law.⁸ The legislation prohibited the state government from taking action against people, businesses, and organizations that acted under similarly narrow, minority-held beliefs as those in the 2015 FADA. In July, 2016, a federal judge struck down this law as in blatant violation of the U.S. Constitution: both of the Establishment Clause and the Equal Protection Clause.⁹

WHO COULD BE IMPACTED BY THE PASSAGE OF FADA?

FADA impacts several populations.

First, by elevating and exempting only one narrow religious belief about marriage, the 2015 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.¹⁰ 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.¹¹ There could be as many as 6 million children being raised by LGBT people and same-sex couples,¹² and these children are at risk for discrimination simply because of who their parents are.

FADA's support of the view that sexual relationships should be restricted only to marriages between a man and a woman 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 18.¹³ Because FADA would legally codify the religious 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.¹⁴ Of all children in the United States, 27% (20 million children) live with just one parent.¹⁵ 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.¹⁶ 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.¹⁷



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, engaged in sexual relations.¹⁸

IN WHAT SITUATIONS COULD THEY BE IMPACTED?

FADA has a number of provisions that could impact how government services—offered through organizations receiving taxpayer dollars through federal contracts and grants—are administered. LGBT people, unmarried people, single parents, and others could all find themselves turned away from government services offered by these organizations. For example:

- **Social services agencies** like homeless shelters and health clinics that receive federal funding could continue to receive that taxpayer funding even if they refuse to offer services to LGBT people, unmarried parents, or the children of such parents. This could mean turning families away from emergency shelters or refusing to provide emergency medical care.
- **Adoption or foster care agencies** receiving federal funds could deny unmarried couples, single people, LGBT people, or same-sex couples the opportunity to adopt or foster. They could choose to leave a child in a government group home rather than allow her to be adopted by an otherwise qualified person or couple.
- **State and local housing agencies** that administer programs like housing vouchers, loans to assist with

purchasing a home, and more could refuse to offer those services to same-sex couples, unmarried couples, or single parents.

- **Hospitals** that receive federal funding, and are currently required to allow visitation by same-sex partners and spouses, could refuse to allow such visitation and continue to receive taxpayer funding.

As discussed earlier, there is concern that the last provision of FADA could mean that any person or entity, regardless of whether they receive federal contracts or grants, could use FADA to shield themselves from federal government action to enforce existing laws.¹⁹ This has potentially staggering consequences, including:²⁰

- Employers could be able to make employment decisions, including **firing or refusing to hire** LGBT individuals, unmarried people, single parents, or single pregnant women and would a) not lose their federal grants and b) could be immune from enforcement actions by agencies like the EEOC or under Title VII.
- Employers could **refuse to provide health insurance coverage and other benefits** required under federal law, including reproductive health coverage, equal access to retirement benefits, or other employment benefits to unmarried employees or to same-sex spouses or partners.
- Employers could **deny federal Family and Medical Leave Act (FMLA)** leave to an unmarried employee who is caring for a new child or to an employee seeking leave to care for a same-sex spouse, and the Department of Labor, which enforces the provisions of FMLA, may be unable to compel the employer to adhere to the law.
- Landlords and home sellers could **refuse to rent to** or sell to unmarried couples, single parents, or LGBT people in violation of federal law and the Department of Housing and Urban Development may not be able to take enforcement action.

FADA IS UNNECESSARY AND UNPOPULAR

Not only is FADA unconstitutional—and unnecessary given the existing protections enshrined in the U.S. Constitution for the freedom of religion and religious expression—the public doesn't support the notion of endorsing two narrow religious views held by a minority of Americans and permitting discrimination under the guise of religion.

Americans believe in treating people fairly and equally. There is broad bipartisan support for nondiscrimination

protections for LGBT people in the workplace. An August 2016 survey by the Public Religion Research Institute found that 72% of Americans support laws that protect LGBT people from this discrimination in employment, housing, and public accommodation. This includes six in ten (62%) Republicans and 78% of Democrats.²¹ The same poll found that 63% opposed and only 30% favored allowing a small business owner to refuse to provide products or services to gay or lesbian people, if doing so violates their religious beliefs. A 2015 poll by Small Business Majority found that 66% of small businesses say that business owners shouldn't be able to turn away LGBT customers based on the owner's religious beliefs.²²

Another survey by the Public Religion Research Institute found that only 37% of Americans are opposed to marriage equality.²³ Additionally, the vast majority of Americans support adoption by LGBT people. A Gallup poll in 2014 found that 63% of Americans think that gay and lesbian people should be able to adopt.²⁴

In places where legislators have tried to roll back protections to allow businesses to discriminate against LGBT people, the public, the business community, and politicians on both sides of the aisle have strongly condemned these actions. In November 2016, the governor of North Carolina lost his reelection bid after supporting legislation that gutted nondiscrimination protections for LGBT people. When Indiana passed sweeping religious exemptions that, among other things, would have legalized discrimination against LGBT people, the governor and legislators faced strong backlash. Businesses widely condemned these legislative actions and many canceled plans to invest in or host meetings and conferences in these states, costing the states millions of dollars and thousands of jobs.

CONCLUSION

If government employees, organizations and businesses are allowed to decide whom to hire, fire, and serve based on their religious 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 to health clinics, funded with taxpayer dollars, could exclude certain groups of citizens at will from their services. The bill sends a message to companies and agencies that discrimination is condoned and encouraged by the federal government—even as businesses and the public are sending a message to government 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 pick and choose who to serve and which citizens to help. By creating and endorsing a narrow set of federally-sanctioned religious belief, in violation of the Constitution, FADA gives those beliefs, and those who hold them, preferential treatment under the law.

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