Testimony of

Maggie Garrett

Legislative Director of
Americans United for Separation of Church and State

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***Written Testimony* for the Hearing Record on**

"Religious Liberty and H.R. 2802, the First Amendment Defense Act (FADA)"

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On behalf of Americans United for Separation of Church and State, I submit this written testimony for the hearing titled "Religious Liberty and H.R. 2802, the First Amendment Defense Act (FADA)." We strongly oppose FADA because it would sanction discrimination under the guise of religious freedom—harming couples and families, and violating the U.S. Constitution. When state legislatures across the country considered similar measures, faith communities, businesses, civil rights organizations, legal scholars, and the public strongly voiced the same objections. It was no surprise, therefore, that the U.S. District Court for the Southern District of Mississippi just struck down a nearly identical law in Mississippi as unconstitutional, concluding that FADA "violates both the guarantee of religious neutrality and the promise of equal protection of the laws."[1]

Freedom of religion is a fundamental American value that is protected by the First Amendment. It allows all of us the freedom to believe or not as we see fit, but it does not allow us to use religion as an excuse to deny couples the legal rights and benefits of marriage. The right to believe is fundamental; the right to discriminate—especially with taxpayer dollars—is not. Accordingly, we oppose this bill.

FADA Is a Sweeping Bill That Would Allow Discrimination By Many Against Many.

FADA allows those who hold the religious belief that marriage is between "one man and one woman, or that sexual relations are properly reserved to such a marriage," to ignore laws that conflict with that belief. Individuals, businesses, healthcare providers, government employees, and taxpayer-funded entities would all be entitled to use FADA to get around nondiscrimination protections. The result: same-sex couples, unmarried couples, couples in which one person had been married before, single mothers, and anyone who has had sex outside of marriage could face discrimination. Even the children of parents who fall within any of these categories could lose nondiscrimination protections they would otherwise have.

A few of the many troubling claims we could see if FADA were enacted include:

- An employee at the IRS could refuse to process the joint tax return of a same-sex couple, or an employee at the Federal Emergency Management Agency (FEMA) could refuse to help an unmarried couple who lost their home in a natural disaster.
- A homeless shelter or food bank that receives federal money could refuse to serve a same-sex couple, a single mother in need, or their children.
- A landlord could refuse to rent to an unmarried couple or an unwed mother.
- A business could deny gay and lesbian employees family and medical leave to care for a sick spouse.

Such discrimination cannot be justified.

[1] *Barber v. Bryant*, No. 3:16-cv-417-CWR-LRA, 2016 WL 3562647, at *1 (S.D. Miss. June 30, 2016).

FADA Would Violate Rather than Protect the First Amendment of the U.S. Constitution.
Ironically, the First Amendment Defense Act violates both the Establishment and Free Speech Clauses of the First Amendment.

FADA Favors Certain Religious Viewpoints Over Others.
"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[2] A law that gives a stamp of approval to one particular religious viewpoint "must be treated as 'suspect'" and, thus, "must be justified by a compelling governmental interest," and "closely fitted to further that interest."[3] FADA cannot meet this standard.

FADA gives preference to the religious beliefs that marriage should be between "one man and one woman" and "that sexual relations are properly reserved to such a marriage" by allowing adherents to ignore certain laws. As explained in *Barber v. Bryant*, which held the Mississippi FADA unconstitutional, the law "put its thumb on the scale to favor some religious beliefs over others."[4] Yet, the government lacks a compelling interest to do so.[5]

Although some claim that FADA accommodates free exercise, there are not "any actual, concrete problem of free exercise violations" that this bill would address.[6] FADA would grant nearly any person or entity a blanket exemption from any law that conflicts with their beliefs about marriage and sex, even if they cannot demonstrate their religion has been burdened. There is, however, no compelling interest in granting an exemption that does not lift a religious burden.[7] Even if one were to argue the law serves a compelling interest, the exemption is sweeping in scope and not narrowly tailored.

FADA Would Harm Others.
Although the state may offer religious exemptions even where it is not required to do so by the Free Exercise Clause of the U.S. Constitution,[8] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion"[9] that violates the Establishment Clause of the U.S. Constitution. Thus, a religious exemption "must be measured so that it does not override other significant interests" and may not "impose unjustified burdens on other[s]."[10] In *Estate of Thornton v. Caldor, Inc.*,[11] for

[2] *Larson v. Valente*, 456 U.S. 228, 244 (1982).
[3] *Barber*, 2016 WL 3562647, at *30 (citing *Larson*, 456 U.S. at 246-47).
[4] *Id*. at *1.
[5] *Id*. at *30.
[6] *Id.*
[7] "Of course, in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring).
[8] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[9] *Corp. of the Presiding Bishop*, 483 U.S. at 334-35 (internal quotation marks omitted).
[10] *Cutter v. Wilkinson,* 544 U.S. 709, 722, 725 (2005); *see also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989).
[11] 472 U.S. 703, 704 (1985).

example, the Supreme Court struck down a blanket exemption for Sabbatarians because it "unyielding[ly] weight[ed]" the religious interest "over all other interests," including the those of co-workers.

FADA fails to take into account any of the sweeping harms it would cause to others. It empowers those with certain religious views to deny people—most obviously, but not only, same-sex couples—the rights and benefits of marriage, access to public accommodations, protections from nondiscrimination laws, and access to healthcare. The bill provides "an absolute right to refuse service to LGBT [and other] citizens without regard for the impact on their employer, coworkers, or those being denied service."[12] Under this bill, for example, a taxpayer-funded homeless shelter could refuse a single mother and her child a bed or a taxpayer-funded domestic violence shelter could refuse to provide a woman safety because she is living with a man who is not her husband. The clear result is an "unjustified burden" on and harm to others. That is impermissible under the Establishment Clause.[13]

FADA Would Give Religious Organizations Discretionary Government Powers.
In accordance with FADA, nonprofit organizations could take state, local, and federal funds to provide services to the public and then use a religious litmus test to determine whom they will and will not serve. This is not just unfair, but unconstitutional. In *Larkin v. Grendel's Den*,[14] for example, the Supreme Court overturned a law that allowed churches to veto applications for liquor licenses in their neighborhoods. The Court explained that that the Establishment Clause prohibits the government from delegating or sharing "important, discretionary governmental powers" with religious institutions.[15] FADA, however, would delegate government authority to religious organizations and specifically allow them to use religious criteria to determine who gets and who is denied public services.

FADA Constitutes Content-Based Discrimination.
Laws that target speech based on content, or subject matter, are subject to "strict scrutiny" and are "presumptively unconstitutional."[16] In *Reed v. Town of Gilbert*,[17] a church successfully challenged a sign ordinance that treated political signs more favorably than the church's meeting signs. Justice Clarence Thomas, writing for the Court, explained that a law that "singles out [a] specific subject matter for differential treatment, even it if does not target viewpoints within that subject matter" is "a paradigmatic example of content-based discrimination."[18] FADA falls into the same trap: On its face, it treats speech and activities "related to marriage between two people, including the belief that marriage should only be between a man and a woman or that sexual relations are properly reserved to such a union," differently than all other

[12] *Barber*, 2016 WL 3562647, at *31.
[13] *Id. at* *31-32 (explaining that the Mississippi FADA violates "this 'do no harm' principle.").
[14] 459 U.S. 116, 127 (1982).
[15] *Id.*
[16] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[17] *Id.*
[18] *Id.* at 2223.

speech on other subject matters. This differential treatment cuts across a host of topics spelled out under the bill, including taxes and government benefits.

FADA Constitutes Viewpoint Discrimination.
As also explained in *Reed, "*government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'"[19] Indeed, "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[20] In *Rosenberger v. Rector & Visitors of the University of Virginia*,[21] the U.S. Supreme Court explained that a state university newspaper could not treat "student journalistic efforts with religious editorial viewpoints" differently. FADA runs afoul of this rule because it treats religious viewpoints on marriage differently.

FADA Would Violate the Equal Protection Clause of the U.S. Constitution.
FADA would affect many people—unmarried couples, couples in which one person had been married before, single mothers, anyone who has had sex outside of marriage, and the children of people whose relationships are disfavored. Yet, it is clear that the main target of FADA is LGBT couples. This violates the most basic principles of Equal Protection: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[22]

For example, when the state of Colorado adopted a constitutional amendment to overturn all state and local nondiscrimination protections for LGB Coloradans and to prohibit state and local governments from instituting new nondiscrimination protections, the justification for the law was that it would protect those "who have personal or religious objections to homosexuality."[23] The Supreme Court, however, rejected these justifications and determined that the law was unconstitutional because its intent was to make LGB Coloradans "unequal to everyone else."[24]

FADA has the same insufficient and unconstitutional justification because it is explicitly aimed at treating LGBT Americans differently than all others. FADA grants "special rights," to those who do not want to serve LGBT Americans.[25] LGBT Americans, on the other hand, "are 'put in a solitary class with respect to transactions and relations in both the private and governmental spheres' to symbolize their second-class status."[26] In short, FADA "would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal

[19] *Id.* at 2230 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).
[20] *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46 (1983)).
[21] 515 U.S. at 831.
[22] *Romer v. Evans*, 517 U.S. 620, 633 (1996).
[23] *Id.* at 635.
[24] *Id.*
[25] *Barber*, 2016 WL 3562647, at *20.
[26] *Id.* (citing *Romer*, 517 U.S. at 627).

treatment under the law."[27] As explained in *Barber*: "The deprivation of equal protection of the laws is [FADA's] very essence."[28]

Congress Cannot Fix FADA.

Although no member of Congress has formally introduced a substitute version of FADA, some have proposed that FADA can be fixed if amended to prohibit government employees, publicly traded businesses, and federal contractors from using it.[29] Even with this amendment, however, individuals, closely held corporations,[30] and entities that accept taxpayer-funded grants could still use FADA to discriminate. For example, a taxpayer-funded mental health facility could still turn away a teenager because his parents are a same-sex couple. And Hobby Lobby, a company with an estimated $3.3 billion revenue and 23,000 employees,[31] could still disregard nondiscrimination laws that protect their employees and customers.

The underlying goal behind FADA is to allow discrimination. There is no way to fix a bill that maintains that goal. Thus, there is unlikely to be any version of FADA that would not harm others and could survive constitutional scrutiny. Rather than tinkering around the edges, Congress should simply reject this bill.

[27] *Id.* at *21.
[28] *Id.* at *23.
[29] Press Release, Sen. Mike Lee, *Lee Releases Finalized First Amendment Defense Act* (Sept. 14, 2015), *available* at http://www.lee.senate.gov/public/index.cfm/press-releases?ID=8e6fc9c9-730f-49a6-ad32-82e486f6e5bb.
[30] The 2012 U.S. Census found that there are 2.9 million closely-held S corporations employing more than 29 million Americans. Drew Desilver, *What is a 'Closely Held Corporation,' Anyway, and How Many Are There, Pew Research Center*, http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there.
[31] *Id.*