



SCHOOL of LAW

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Hon. Susan Collins
Hon. Tammy Baldwin
United States Senate

Dear Senators Collins and Baldwin:

We are constitutional law scholars who have studied, taught, and written about the law of religious liberty for decades. All of us have persistently argued for religious liberty in legislatures and in the courts, including liberty for believers and institutions with objections to facilitating same-sex marriages.

We believe that H.R. 8404, the Respect for Marriage Act (RMA), with the additional religious freedom protections you have proposed, is a good and important step for the liberty of believers to follow their traditional views of marriage. Its protections for religious liberty, while not comprehensive, are important, especially in the context in which RMA arises.¹

A. The Religious Liberty Protections are Important.

For several reasons, we believe the religious-liberty protections in RMA are meaningful and important even if not comprehensive.

1. First, RMA includes an explicit statement by Congress that “[d]iverse beliefs about the role of gender in marriage”—including the belief that marriage is between a man and woman rather than between persons of the same sex—“are held by reasonable and sincere people based on decent and honorable philosophical premises” and that such beliefs “are due proper respect.” Section 2(2). This statement of respect for the belief in male-female marriage plainly distinguishes it from beliefs opposing interracial marriage, which receive no such affirmation (even as the statute protects interracial marriages).

The distinction is important for religious-freedom claims. The Supreme Court in *Bob Jones University v. United States*, 461 U.S. 574 (1983), upheld stripping tax exemptions from racially discriminatory private schools, including religious schools, on the basis of the “firm and unyielding” national policy against racial discrimination. Opponents of traditional beliefs about marriage regularly

¹ We of course speak in our individual capacities; our institutions take no position on this legislation.

analogize those beliefs to racist beliefs for the purpose of resisting religious freedom claims by traditional believers and institutions.

Explicit congressional affirmation that the traditional male-female definition of marriage is “reasonable” and “honorable” would counter the analogy to racism and weaken the ground for relying on *Bob Jones* to justify rejecting traditionalist believers’ religious-freedom claims. *Obergefell v. Hodges* included a similar statement of respect for traditional views, but it was dictum, and some commentators have questioned the Court’s power to declare it. A congressional statement would be a legitimate, and powerful, statement of national policy—one favoring respect for (among other things) religious organizations that adhere to traditional views of marriage.

2. RMA includes specific protections for religious liberty. Most notable is the categorical exemption for “nonprofit religious organizations”—comprehensively defined to include “social agencies” and “educational organizations,” and “nondenominational” and “interdenominational” organizations as well as houses of worship—from having to provide “services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage.” Section 6(b).² The provision, although not a comprehensive protection for acts by religious nonprofits, guarantees that they can refuse to participate in the category of activities most relevant to RMA’s coverage: “solemnization or celebration of a marriage.” The provision bars “any civil claim or cause of action” based on such a refusal: it sets no limitation on the nature or source of the claim or cause of action barred. Although courts might provide such protection under the First Amendment, this provision makes the right more secure and avoids lengthy constitutional litigation. The protection is categorical; unlike a claim of constitutional right, it cannot be overridden by a judicial finding of a “compelling governmental interest.”

RMA also explicitly provides that it does not “deny or alter” any tax exemption, funding, license, accreditation, or “any benefit, status, or right of an otherwise eligible entity or person”—including, plainly, of a religious organization. Section 7(a). Those who claim that the bill would be used as a ground for denying tax-exempt status to organizations adhering to male-female marriage, by analogy to *Bob Jones*, are disregarding the statutory text.

3. Finally, RMA both reflects and teaches that if proponents of LGBTQ rights want any advances or legislative protections for those rights, they must attend also to corresponding religious-liberty concerns. LGBTQ-rights proponents have failed to secure their goals in Congress through the Equality Act, or in many state legislatures, because they have been unwilling to make provision for religious liberty. The lesson applies to conservatives as well. Efforts like the First Amendment Defense Act (FADA) have likewise failed repeatedly because they made no provision for recognizing LGBTQ rights even in an incremental way. Religious liberty has been caught in the crossfire of warring groups unwilling to accept the smallest gain for the other side. And religious liberty has suffered as

² Some statements of opposition to H.R. 8404 claim that its religious-liberty provision protects only churches and congregations. That is simply false.

a result, both in its concrete scope and in its status as a fundamental civil right that all Americans should embrace enthusiastically.

This bill offers a chance to counter those trends and to enact religious-liberty protections in a bipartisan measure.³ RMA does not provide all the protection that traditionalist believers seek or that they should receive. But the protections it offers are important.

B. The Religious-Liberty Protections Are Important in Light of the Context in Which RMA Arises.

Moreover, the religious-liberty protections that RMA provides must be considered in the context in which RMA arises. Three features of RMA's context reinforce that its religious-liberty protections are significant.

1. RMA poses little or no new risk to religious liberty beyond those that already exist from nondiscrimination laws combined with same-sex marriage rights under *Obergefell v. Hodges*. Those rules are currently in force, without RMA (and without the statutory religious-liberty protections it would provide).

RMA creates no new cause of action against any private religious entity, even one receiving funding from the state. Only a person acting “under color of state law” can violate the Act. Contrary to the claims of some RMA opponents, Supreme Court precedent is clear that entities do not act under color of state law—to use an equivalent term, they are not rendered “state actors”—simply because they contract with the state, receive funding from the state (even the lion's share of their funding), or are heavily regulated by the state. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). *Blum*, for example, held that a privately owned skilled nursing facility was not a state actor even though it was heavily regulated, received 90 percent of its income from Medicaid payments, received state subsidies for its capital costs, and was doing something the government required it to do—but what was challenged was a particular means of doing that thing, and the government did not require the means. “[C]onstitutional standards are invoked only when it can be said that the State is *responsible for the specific conduct* of which the plaintiff complains.” *Blum*, 457 U.S. at 1004 (second emphasis added). The state had not directed the specific conduct complained of in *Blum*. Nor, obviously, can the government be said to have directed a religious nonprofit's specific decision to disfavor same-sex relationships.⁴

2. If RMA creates no new liability, then the only way it could make traditional believers' religious liberty less secure is if the Supreme Court were ready to overrule *Obergefell*, ending the constitutional right to same-sex marriage, and RMA then preserved a small portion of that right by statute.⁵ But the chances of

³ We have defended such bipartisan protections previously in academic writing and engagement.

⁴ See also *Rendell-Baker*, 457 U.S. 830 (rejecting state-action claim even though private school in question was heavily state-regulated and received nearly all its income from tuition payments made by nearby public school districts).

⁵ RMA does not enact *Obergefell* by statute, requiring states to recognize same-sex marriages in general. It requires them to give “full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage”—that is, to a marriage “valid in the

overturning *Obergefell* are small. Justice Thomas’s call to overturn it, made in his concurrence in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), attracted no other votes. Rather, the *Dobbs* majority opinion emphasized, in three different places, that the overruling of constitutional abortion rights did not cast doubt on other substantive due process precedents, because abortion is a “unique act” involving termination of a “life or potential life.” 142 S. Ct. at 2277; *id.* at 2258, 2280. Justice Kavanaugh reiterated the point in his concurrence. *Id.* at 2309. Conservatives have generally urged taking these assurances from the *Dobbs* majority as genuine and reliable.

As constitutional scholars and observers, we agree. To overrule *Obergefell*, the Court would have to undo thousands of same-sex marriages entered into in reliance on that decision or else create a two-tier system in which some same-sex couples will be validly married for fifty or sixty years because they married during a window of opportunity while all future couples are barred in many states. We very much doubt that a majority will take that step.

3. Finally, as we have already emphasized, religious-liberty protections, however defensible and warranted, have repeatedly failed when embodied in legislation that provides no benefits (however incremental) to LGBTQ rights. The question is not whether this bill provides all the protections that traditional believers and institutions will need in all contexts. The question is whether the bill provides protections that are significant when compared with new risks to religious liberty that the legislation creates. Because we conclude that the bill’s protections are important and that any new risks it creates are quite limited, we see it as an advance for religious liberty.

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