

## THE RESPECT FOR MARRIAGE ACT FAQ

The Respect for Marriage ACT (RFMA), **H.R. 8404**, is a new federal law primarily designed to preserve those marriages conducted pursuant to *Obergefell v. Hodges* from dissolution by future judicial action. It creates a new risk of “lawfare” by authorizing private citizens and the federal government to file lawsuits against people of faith and religious institutions who work for or partner with a state government and reject a state’s preferred definition of marriage. However, despite the threat this law poses to the religious liberty of millions of Americans, all the laws guarding religious liberty provide a complete defense to the enforcement of RFMA against religious conduct.

### WHO DOES THE LAW APPLY TO?

- Persons acting “under color of State law.” (§ 4(a).)
  - > Does not apply to private entities or individuals.
  - > Does not apply to federal employees – § 5 defines State to mean States, DC, and territories.
  - > Color of law analysis will likely mirror Section 1983 analysis because the language is almost identical.

### WHO CAN BRING A CLAIM?

- The US Attorney General and/or private individuals harmed by a violation of RFMA. (§ 4(b)-(c).)

### WHAT KIND OF RELIEF IS AVAILABLE?

- Declaratory or injunctive relief only. (§ 5(b)-(c).)
- RFMA makes no provision for the recovery of damages or attorneys’ fees.

### WHAT ARE THE NECESSARY ELEMENTS OF A CLAIM?

- A person acting under color of state law. (§ 4(a).)
- Denies “full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex . . . of those individuals.” (§ 4(a)(1).)
  - > This goes to recognizing things like out of state marriage licenses and judicial decrees related to an out of state marriage.

#### OR

- Denies a “right or claim arising from such a marriage **on the basis that such marriage would not be recognized under the law of that State** on the basis of the sex . . . of those individuals.” (§ 4(a)(2).)
  - > Bolded language limits this element to actions based on a state not recognizing a marriage rather than religious belief.
  - > **Importantly:** Even if a person (1) acts under color of state law and (2b) denies a right or claim arising under a marriage, the claim must fail *if* that conduct is motivated by a **religious** belief rather than a state’s recognition of marriage.

### DOES RFMA REDEFINE MARRIAGE?

- Yes but not in a manner that explicitly endorses same-sex marriage. The Act defers to states to define marriage by stating a marriage includes any marriage between 2 individuals that is “valid in the State where the marriage was entered into” at the time the marriage was entered into. (§ 7(a).)
- Does not explicitly include language to encompass same sex marriage but rather leaves that determination to the States.

## WHAT RELIGIOUS LIBERTY PROTECTIONS ARE BUILT INTO RFMA?

- Section 6(a) states the Act does not diminish any religious liberty protection available under the Constitution or federal law.
  - > RFRA and all other 1st Amendment defenses are unaffected.
- Section 6(b) protects nonprofit religious organizations from being required “to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage” and states no civil action may be brought against them.
  - > Lists several categories of protected religious entities: (1) churches/mosques/ synagogues; (2) religious/ missionary organizations, (3) faith-based social agencies (i.e. religious foster and adoption agencies, pregnancy resource centers), (4) religious educational institutions, and (5) broad category that includes nonprofit entities whose principal purpose is the study, practice, or advancement of religion. (Note: list of protected entities is not exclusive but rather illustrative.)

## CAN RFMA'S NEW CAUSE OF ACTION BE USED TO PUNISH RELIGIOUS BELIEFS REGARDING MARRIAGE?

- No. It's possible such lawsuits may be filed, but they are unlikely to survive a motion to dismiss. The Act only regulates conduct based on state law, not private religious beliefs.
- There are two ways a claim under the Act may be brought:
  - > 1) When a state actor declines to give full faith and credit to another state's law or judicial decree regarding a marriage.
    - This is unlikely to implicate religious conduct because any action giving rise to such a claim would be based on the application of a state's law, not religious beliefs.
  - > 2) When a state actor denies a right or claim arising from a marriage on the bases that such a marriage is invalid in that actor's state.
    - This provision would present a threat but for its limitation on causation to acts taken on the basis that a marriage is not valid under a state's law. Because of this limitation, religious conduct falls outside the claim's scope.

## WHO ARE POTENTIAL CLIENTS EFFECTED BY RFMA?

- State government employees who might be required to participate in a same sex wedding in some capacity (i.e. state court judges, county clerks, possibly chaplains).
- Religious organizations partnering with a state in a way that would make them a state actor.
- NOTE: Religiously motivated conduct is not encompassed by RFMA's new cause of action. These claims instead focus on conduct treating a marriage as invalid under a State's law.

## CAN RFMA'S CONSTITUTIONALITY BE CHALLENGED?

- Congress relies upon the Full Faith and Credit Clause, Section 5 of the 14th Amendment, and the Necessary and Proper Clause to enact RFMA.
  - > Because of Congress's plenary power to regulate the manner in which states give full faith and credit to each other's laws and decrees, there is no apparent mechanism for mounting a pre-enforcement challenge of the statute as a whole.
- Religious institutions, employees, and/or individuals who are accused of acting under color of state law concerning marriage and base their actions upon their religious beliefs about marriage are likely defendants to RFMA challenges.

Statute could potentially be used to present a challenge to *Obergefell* if defendant argues a state's law correctly rejects same sex marriage because there is no constitutional right to same sex marriage.