WASHINGTON
LEGISLATIVE OFFICE

July 11, 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

KARIN JOHANSON
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

First Amendment Defense Act (H.R. 2802) is Unconstitutional, Taxpayer-Funded, Anti-LGBT Discrimination

Dear Chairman Chaffetz and Ranking Member Cummings:

The American Civil Liberties Union is providing this statement on the so-called "First Amendment Defense Act" (H.R. 2802) in advance of Tuesday's hearing in the Committee on Oversight and Government Reform.

As introduced, this legislation opens the door to unprecedented, taxpayer-funded discrimination against LGBT people, single mothers, and unmarried couples. The definition of "discriminatory action" is extraordinarily and dangerously broad. It is designed to allow anyone – including government employees, contractors, and for-profit businesses – to act with impunity based on a religious belief or "moral conviction" objection to marriage for same-sex couples, or to sexual relationships outside of a heterosexual marriage.

The proposed definition of discriminatory action in this legislation would, ironically, significantly undermine the ability of federal agencies tasked with enforcing our nation's civil rights laws, such as the EEOC, to protect LGBT people and women from discrimination in education, employment, or housing.

This kind of sweeping discrimination flies in the face of the Supreme Court's landmark ruling in 2015 that extended the freedom to marry to same-sex couples across the country. In addition, proponents of this legislation claim it is necessary to protect the religious liberty of churches, clergy, and others who

oppose marriage equality. In reality, the First Amendment is already very clear on this point. Since the founding of our country, no church or member of the clergy has been forced to marry a couple in violation of their faith. That has not changed since same-sex couples gained the freedom to marry.

Among this legislation's many potential harms, it could give rise to claims seeking a right to:

- permit government employees to discriminate against married same-sex couples and their families by refusing to process tax returns, visa applications, or Social Security checks for all married same-sex couples;
- allow commercial landlords to violate longstanding fair housing laws by refusing housing to a single mother based on the moral conviction that sexual relationships are properly reserved to a marriage; and
- allow any individual, business, or group who believes they may somehow be required by the federal government to do something that implicitly condones marriage for same-sex couples or sexual relationships outside of a heterosexual marriage to file a lawsuit.

This legislation is intended to enable discrimination without consequence specifically against LGBT people. This is not only wrong, but unconstitutional as well.

The "First Amendment Defense Act" is unconstitutional.

As a Mississippi federal court recently held in blocking a state law similar to this legislation from taking effect, the Establishment Clause, the Due Process Clause, and the Equal Protection Clause in the U.S. Constitution prohibit the government from offering special protection to particular religious beliefs.[1]

This legislation, as introduced, violates the Establishment Clause because it provides special favor to a particular set of religious beliefs, while offering no protection to people who hold contrary beliefs, and because its dispensations come at other citizens' expense. Under the Establishment Clause, a state "may not aid, foster, or promote one religion or religious theory against another."[2] "When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[3] By putting a thumb on the scale in favor of a particular set of religious beliefs – that marriage is the union between a man and a woman, and that sexual relations are only proper within such a marriage – the government tells "nonadherents that they are outsiders, not full members of the community, and . . . adherents that they are insiders, favored members of the political

[1] *See* Barber v. Bryant, No. 3:16-cv-417, Mem Opinion & Order (S.D. Miss. June 30, 2016).
[2] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
[3] McCreary Cnty., Kentucky v. ACLU of Kentucky, 545 U.S. 844, 860 (2005) (citation omitted).

community."[4] Further, this legislation violates the Establishment Clause by affording religious exemptions that impose significant harm on same-sex couples and people involved in sexual relationships outside of a heterosexual marriage.[5]

This legislation, as introduced, also violates the Due Process and Equal Protection Clauses by authorizing arbitrary discrimination against lesbian, gay, bisexual, and unmarried persons.[6] As the Supreme Court made clear in *Romer v. Evans*, which struck down a Colorado constitutional amendment that preempted local anti-discrimination protections for lesbians, gay men, and bisexual people: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[7] Such laws also interfere with same-sex couples' right to access marriage "on the same terms and conditions as accorded to" different-sex couples, including the "symbolic recognition and material benefits to protect and nourish the union."[8] Like the unconstitutional "Defense of Marriage Act," struck down in *United States v. Windsor*, this legislation identifies the marriages of same-sex couples as a "subset of state-sanctioned marriages and makes them unequal" to all other types of legal marriages.[9]

When "sincere, personal opposition [to the marriage of a same-sex couple] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[10] That is precisely what this legislation would do. "It is not within our constitutional tradition to enact laws of this sort."[11]

FADA 2.0 and FADA 3.0

While the focus of this hearing is on H.R. 2802, as introduced, we understand that the lead sponsors of this legislation in both the House and Senate have drafted at least two revised versions of the bill.[12] Neither version has been formally introduced in either chamber of

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[4] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (internal quotation marks and citation omitted).
[5] *See* Estate of of Thornton v. Caldor, 472 U.S. 703, 709–10 (1985) (holding that the Establishment Clause prohibited a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath," because the statute took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"); *see also* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (stating that the Establishment Clause requires courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries").
[6] Although the Fourteenth Amendment's Equal Protection Clause applies only the states, its protections apply to the federal government as well under the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).
[7] Romer v. Evans, 517 U.S. 625, 633 (1996).
[8] Obergefell v. Hodges, 135 S. Ct. 2584, 2601, 2604 (2015).
[9] U.S. v. Windsor, 133 S. Ct. 2675, 2694 (2013).
[10] *Obergefell*, 135 S. Ct. at 2602.
[11] *Romer*, 517 U.S. at 633.
[12] Press Release, Senator Mike Lee, Lee Releases Finalized First Amendment Defense Act (Sep. 15, 2015), http://www.lee.senate.gov/public/index.cfm/press-releases?ID=8E6FC9C9-730F-49A6-AD32-82E486F6E5BB.

Congress. While not as sweeping, the revised versions continue to present a dangerous threat to LGBT people, single mothers, and unmarried couples. Potential harms that could occur under "FADA 2.0" and/or "FADA 3.0" include:

- allowing social service programs that receive federal grants to provide emergency services to turn away anyone who has a sexual relationship outside of marriage, including single mothers and unmarried couples; or
- allowing privately owned businesses to discriminate by refusing to let a gay or lesbian employee care for their sick spouse, in violation of federal family and medical leave laws.

Indeed, the fact that the sponsors have repeatedly had to go back to try and scale back the discrimination and harm that would result from this legislation demonstrates why it should be so resoundingly opposed. The inclusion of married same-sex couples in Sec. 3(a)(1)(B) in the latest iteration from Representative Labrador is simply an effort to mask the anti-LGBT animus that lies at the very center of this legislation.

Conclusion

Whether in its original version or in the rumored revisions that have not been introduced, this legislation represents a sweeping legislative attack on the basic dignity and equality of LGBT people. The First Amendment does not need "defending" through a bill that discriminates against same-sex couples or single parents. The ACLU is strongly opposed to the misnamed "First Amendment Defense Act."

Sincerely,

Karin Johanson
Director, Washington Legislative Office

Ian Thompson
Legislative Representative

Cc: Members of the Committee on Oversight and Government Reform