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Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act

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WHY CONSERVATIVE RELIGIOUS ORGANIZATIONS
AND BELIEVERS SHOULD SUPPORT
THE FAIRNESS FOR ALL ACT

*Rep. Chris Stewart and Gene Schaerr**

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INTRODUCTION

In his last two opinions on LGBTQ-related issues, Justice Anthony Kennedy underscored the potential for conflict between recognizing new LGBTQ rights and religious liberty—especially for those who adhere to a traditional Abrahamic religious view of human sexuality and family life. In his 2018 opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,¹ which invalidated (by a vote of 7-2) government action against an evangelical Christian cakeshop owner who declined to create a cake for a same-sex union ceremony, Justice Kennedy observed:

“This case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment.”²

Similarly, in *Obergefell v. Hodges*,³ which held (5-4) that same-sex couples have a right to marry on the same terms as opposite-sex couples, Justice Kennedy anticipated the same conflict by noting that the view that “[m]arriage . . . is by its nature a gender-differentiated union of man and woman . . . long has been held—and continues to be held—in good faith by reasonable and sincere people. . . .”⁴ And the Court’s recent decision interpreting Title VII to extend to sexual orientation and gender identity discrimination, *Bostock v. Clayton County*, written by Justice Kennedy’s former law clerk, Justice Gorsuch, noted the same basic conflict between LGBTQ non-discrimination rights and religious beliefs about sexuality.⁵

In both of his opinions, Justice Kennedy articulated what might be characterized as a philosophy of “live and let live”: Believers in traditional Abrahamic faiths—conservative Christianity, Judaism and Islam—should (and under his view of the law) must respect certain rights enjoyed by members of the LGBTQ community.⁶ Equally important, members of that community should and sometimes must respect

¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n.*, 138 S. Ct. 1719 (2018).

² *Id.* at 1723.

³ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴ *Id.* at 2594.

⁵ *Bostock v. Clayton County*, No. 17-1618, slip op. at 32 (June 15, 2020).

⁶ See *Masterpiece Cakeshop*, 138 S. Ct. at 1727; *Obergefell*, 135 S. Ct. at 2608. Of course, one may legitimately question whether *Obergefell*’s articulation of a constitutional right to same-sex marriage was really grounded in personal liberty, as Justice Kennedy claimed at some points in his opinion, see, e.g., *Obergefell*, 135 S. Ct. at 2599, or was instead grounded in a desire for equal governmental *recognition* of same-sex relationships. See *id.* at 2602. What’s important, however, is that Justice Kennedy viewed same-sex marriage as an issue of personal liberty, analogous to the personal liberty interest of Jack Phillips, the owner of *Masterpiece Cakeshop*, in being able to choose when he would and would not use his creative talents to celebrate a conjugal union.

the religious beliefs (and certain religiously motivated actions) of those who adhere to the traditional Abrahamic view of marriage and human sexuality.⁷

A little more than a year after Justice Kennedy issued his opinion in *Masterpiece*, on December 6, 2019, one of us proposed legislation that is based largely on the “live-and-let-live” principle articulated in Justice Kennedy’s latest LGBTQ-related opinions. The bill was dubbed H.B. 5331, the Fairness for All Act of 2019 (“FFA,” “FFA Act,” or “the Act”). Like the Equality Act introduced in May 2019, FFA would make explicit in the statute what the Court in *Bostock* has now held: It would amend the 1964 Civil Rights Act to add sexual orientation and gender identity (“SOGI”) to the list of classes protected under federal civil rights law. Unlike the Equality Act, however, and in keeping with Justice Kennedy’s “live-and-let-live” approach, FFA would also expressly protect important religious interests.

The bill’s author and co-sponsors hope it will bring an end to the perpetual conflict between religious liberty and LGBTQ rights. It is the product of years of negotiations between conservative religious groups and LGBTQ rights groups and represents a good-faith compromise—an alternative to the winner-take-all approaches of pure religious liberty bills on the one hand and pure LGBTQ rights bills on the other. If the FFA bill passes, neither side will get everything it wants but both sides will get vital protections for their core interests and reasonable accommodations in other important areas. FFA will not be perfect, but it will be good enough to bring a measure of peace to a white-hot conflict. A “live-and-let-live” law like FFA has worked for Utah, and it could work for the nation.

Once it was announced, FFA was immediately denounced. Progressive LGBTQ groups condemned FFA as a “license to discriminate” and suggested it was racist. Conservative advocacy groups condemned it for “selling out” religious liberty and enshrining radical gender theories into the law. Both sides are deeply invested—ideologically and institutionally—in this conflict.

Each side, moreover, thinks it can eventually defeat the other and impose peace on its own terms. LGBTQ rights groups like Human Rights Campaign (“HRC”) and the American Civil Liberties Union (“ACLU”) believe victory is at hand amidst a culture and legal regime that has swung dramatically on LGBTQ rights following *Obergefell*. Even beyond *Obergefell* and *Bostock*, they have reason to be optimistic. Virtually every elite institution in the United States favors expansive LGBTQ rights: major media and entertainment, social media, major corporations, academia, the professions, and public education. Naturally, polls consistently show steady increases in support for LGBTQ rights.⁸ In response, many LGBTQ advocacy groups have abandoned as inadequate their decades-long effort to pass the more modest Employment Nondiscrimination Act (“ENDA”), which sought to amend Title VII of the Civil Rights Act to prohibit SOGI discrimination in employment while broadly exempting religious organizations. ENDA was for a different time, they say. They now see the sweeping Equality Act, which recently passed the

⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *Obergefell*, 135 S. Ct. at 2602.

⁸ *Gay and Lesbian Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Feb. 20, 2020).

House of Representatives without any exemptions for religious liberty, as essential and within reach.

Yet the LGBTQ community also faces risks. The Senate could remain a major obstacle to the Equality Act for years to come, perhaps indefinitely, and a more conservative Supreme Court has ample authority under the First Amendment and the sweeping federal Religious Freedom Restoration Act to expand religious freedom in unpredictable ways. Moreover, an LGBTQ movement originally built on appeals to fairness and equality—the very “live-and-let-live” philosophy embraced by Justice Kennedy—risks being viewed as the aggressor, as well-funded LGBTQ advocates bring lawsuits against small business owners and other sympathetic dissenters. Such a perception could well erode public support for LGBTQ rights. Nor will the movement likely benefit from a perpetual war with tens of millions of religious traditionalists, who will not simply abandon their faith and adopt progressive views about marriage, family, gender, and sexuality. Moreover, most Americans will not, in the end, support the perpetual marginalization, condemnation, and suppression of the beliefs, speech, and freedoms of millions of their fellow citizens who hold conservative religious views. They too will have sympathetic and compelling stories. The aggressive, winner-take-all approach of some on the LGBTQ left creates significant risks of tarnishing the LGBTQ rights brand—and even of backlash.

But the risks of perpetual conflict for religious conservatives and their core institutions are also enormous. Combined with deep suspicion toward religious institutions among millennials and constant media focus on clergy abuse, the cultural turn in favor of LGBTQ rights has fueled increasing hostility toward religion. The legitimate scope of the free exercise of religion—once broadly understood as including the right to be free of unnecessary governmental burdens on a person’s religious exercise throughout society—is rapidly being reconceived as the right merely to privately believe and worship within family and religious spaces. Venerable religious beliefs regarding marriage, family, gender, and sexuality are routinely denounced as ignorance and even dangerous bigotry. Social media ruthlessly punishes the expression of those beliefs. More ominously, some advocates simply denounce religious exemptions from LGBTQ rights laws as nothing more than a license to discriminate, ignoring centuries of respect in the law for the unique place of religious institutions and the existential need of believers to freely gather and to define themselves through religious organizations, standards, and membership criteria. Religious organizations are ill-equipped to wage perpetual political war against LGBTQ rights laws. In any event, a single “wave election” could ensure passage of the Equality Act, with disastrous consequences for religious traditionalists and the institutions that support them.

The threat of the Equality Act to religious organizations and schools with traditional sexual ethics cannot be overstated. It would immediately result in challenges to religious employment standards at religious organizations and religious educational institutions. Religious spaces open to the public, including churches themselves, could become places of public accommodation. Religious schools and colleges that accept federal funds—meaning nearly all of them—would

likely have to abandon religious standards governing student admission, conduct, and housing to the extent they embody traditional beliefs about gender and sexuality. And the entire might of the federal civil rights enforcement apparatus, which was primarily designed to extirpate racism in key areas of American life, would eventually be turned against religious institutions and persons with traditional religious beliefs and practices regarding SOGI. With so much at stake, the notion that religious conservatives should oppose any compromise with the LGBTQ community, on the hope they can hold out forever against progressive social and political forces, is very risky. It is a recipe for perpetual and bitter conflict followed by likely defeat.

This article explains why FFA is a reasonable and morally defensible way forward for conservative believers and institutions. In Part I, we show that ending the current war over religious freedom and LGBTQ rights has become a moral and practical imperative for conservative faith communities, much as ending former conflicts over legal protection for religion itself was and remains a moral and practical imperative. Having resolved the latter conflict despite centuries of bitterness and profound theological differences, America can certainly find ways to resolve the conflict between religious and LGBTQ rights. We further show that, at least in the American legal and political tradition, support for rights that allow people to act in ways that others disagree with does not imply endorsement or support for such actions or for the contested beliefs, moralities, ethics, or ideologies that might motivate them. We then summarize Utah's attempt to harmonize religious freedom and LGBTQ rights through a 2015 law addressing employment and housing. That law, by any measure, has been a success.

Part II addresses the Fairness for All Act of 2019. We set forth and explain its key provisions, then provide detailed responses to specific concerns conservative opponents have expressed. We conclude with some final thoughts on why religious persons and institutions with conservative theologies *should* support the bill. At a minimum, as Jonathan Rauch and Peter Wehner recently argued in a recent *New York Times* op-ed, the Act "deserves a closer look" by all sides, especially in the wake of *Bostock*.⁹

PART I. THE CONSERVATIVE RELIGIOUS CASE FOR FFA-TYPE LEGISLATION

A. THE CULTURE WAR BETWEEN RELIGIOUS FREEDOM AND LGBTQ RIGHTS IS CORROSIVE OF RELIGIOUS FREEDOM, AMERICAN VALUES OF PLURALISM, AND ULTIMATELY UNWINNABLE

The conservative faith groups that support FFA have not done so because of theological drift or capitulation. None has even hinted that its traditional teachings about marriage, family, gender, or sexuality are changing. They all still believe and

⁹ Jonathan Rauch & Peter Wehner, *We Can Find Common Ground on Gay Rights and Religious Liberty*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/opinion/gay-rights-religious-liberty.html#:~:text=We%20Can%20Find%20Common%20Ground%20on%20Gay%20Rights,fellow%20at%20the%20Ethics%20and%20Public%20Policy%20Center.>

teach their scriptural view: that God created humankind as male and female, that God ordained marriage as the union of man and woman, and that sexual relations are divinely approved only within that union. Many of these groups have long been skeptical of LGBTQ rights, fearing they could not be reconciled with religious freedom. The FFA project is thus driven not by doctrinal changes or theological lassitude but by three inescapable realities discussed below.

I. Religious Organizations Are Inherently Oriented Toward Faith and Reconciliation, Not Continuous Cultural or Political Conflict

First, conservative religious believers and organizations are ill-equipped to engage in perpetual legal and political conflicts over LGBTQ rights. Such conflicts are extremely divisive, internally and externally.

Consider the 2008 fight over Proposition 8 in California, which sought to enshrine the traditional man-woman definition of marriage in California's constitution. Many conservative faith groups sought to participate in the democratic debate. Consistent with their religious views about what is best for marriage, families, children, and society, religious leaders encouraged their flocks to get involved and support the measure.¹⁰ Many also urged their members to be civil and respectful of others as they explained and advocated for their own views.¹¹

What followed was anything but a civil debate over a weighty issue of public policy. Despite being urged to desist, some religious proponents of Proposition 8 resorted to inaccurate and bigoted stereotypes of gays and lesbians.¹² More liberal members of the faith community, including within conservative religious organizations, objected to such rhetoric or supported same-sex marriage outright, leading to divisions and disaffection within those faith communities.¹³ Religious families were often divided. The gay community and their supporters understandably saw same-sex marriage not as a policy issue for polite debate but as

¹⁰ See, e.g., Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES (Nov. 14, 2008), <https://www.nytimes.com/2008/11/15/us/politics/15marriage.html> (discussing the Catholic Archdiocese of San Francisco and the Mormon Church leadership's call for members to become involved in the democratic debate). See also Duke Helfand, *Clergy Vocalize Stance on Prop. 8*, L.A. TIMES (Oct. 26, 2008), <https://www.latimes.com/archives/la-xpm-2008-oct-26-me-prop826-story.html> (detailing the efforts of religious groups to spark community support in favor of Proposition 8).

¹¹ See, e.g., Matthai Kuruwila, *S.F. Archbishop Defends Role in Prop. 8 Passage*, SF GATE (Dec. 4, 2008), <https://www.sfgate.com/bayarea/article/S-F-archbishop-defends-role-in-Prop-8-passage-3182424.php> (mentioning the Archbishop of San Francisco's call for religious groups to treat groups on both sides with respect).

¹² See *Historian: Prop. 8 Played on Gay Stereotypes*, THE ASSOCIATED PRESS (Jan. 12, 2020), http://www.nbcnews.com/id/34826642/ns/us_news-life/t/historian-prop-played-gay-stereotypes/#.XrGdgC-ZM_U (discussing the sponsoring effort of Proposition 8 to demonize the gay community); Karen G. Bates, *In Calif., Prop. 8 Debates Test Limits of Tolerance*, NPR (Dec. 6, 2010), <https://www.npr.org/2010/12/06/131792123/in-calif-prop-8-debate-tests-limits-of-tolerance> (discussing the use of name-calling such as "deviant" hurled directed at gay community members).

¹³ See Peggy F. Stack, *Proposition 8 Divided Mormon Faithful*, EAST BAY TIMES (Oct. 24, 2008), <https://www.eastbaytimes.com/2008/10/24/proposition-8-divides-mormon-faithful/> (detailing divisions within Mormon communities over Proposition 8).

a matter of basic dignity and fundamental rights.¹⁴ Most were civil, but some were not. Campaign rhetoric on both sides became intense. Churches and religious people were publicly vilified, with members of specific denominations being singled out.¹⁵ After Proposition 8 passed, donors to the Yes on Proposition 8 campaign were targeted for personal attacks.¹⁶ Some religious supporters lost their jobs while others were forced to resign from prominent community positions.¹⁷ Sacred religious properties were defaced.¹⁸ Some members became alienated, some permanently, from their faith communities. The trauma and bitterness of the fight over Proposition 8 still echoes in California a decade later.¹⁹

Variations of this bitter conflict between religious conservatives and the LGBTQ community over issues of faith and LGBTQ rights would later play out with white-hot intensity in states like Arizona, Indiana, and North Carolina and cities like Houston.²⁰ The precise issues varied but the explosive reactions were similar.

¹⁴ See Dan Glaister & Daniel Nasaw, *Uproar Greet Reversal of Gay Marriage Laws*, THE GUARDIAN (Nov. 6, 2008), <https://www.theguardian.com/world/2008/nov/07/us-elections-2008-gay-rights> (describing backlash in California gay communities and the view in those communities that Proposition 8 was an attack of fundamental rights and dignity).

¹⁵ See, e.g., Sandra Gonzales, *Same-Sex Marriage Debate Grows Ugly in San Jose and Beyond*, MERCURY NEWS (Oct. 21, 2008), <https://www.mercurynews.com/2008/10/21/same-sex-marriage-debate-growing-ugly-in-san-jose-and-beyond/>; Matthai Kuruville, *Mormons Face Flak for Backing Prop. 8*, SF GATE (Oct. 27, 2008), <https://www.sfgate.com/bayarea/article/Mormons-face-flak-for-backing-Prop-8-3264077.php>.

¹⁶ See, e.g., Steve Weinstein, *Are We Being Bullied? Debate Rages Over Boycotts*, EDGE MEDIA NETWORK (Nov. 25, 2008), <https://boston.edgemedianetwork.com/index.php?ch=news&sc=&sc2=news&sc3=&id=83898>.

¹⁷ See, e.g., Michael Jones & Robert Hofler, *Same-Sex Activists Target Sundance*, VARIETY (Nov. 17, 2008), <https://variety.com/2008/scene/markets-festivals/same-sex-activists-target-sundance-1117996044/>; Rachel Abramowitz, *L.A. Film Festival Director Richard Raddon Resigns*, L.A. TIMES (Nov. 11, 2008), <https://www.latimes.com/archives/la-xpm-2008-nov-26-et-raddonresigns26-story.html>; Salvador Rodriguez, *Mozilla CEO Brendan Eich Resigns Under Fire for Supporting Prop. 8*, L.A. TIMES (Apr. 3, 2014), <https://articles.latimes.com/2014/apr/03/business/la-fi-tn-mozilla-ceo-resigns-under-fire-prop-8-20140403>.

¹⁸ See, e.g., Chelsea Phua, *Mormon Church in Orangevale Vandalized in Wake of Prop. 8 Vote*, SACRAMENTO BEE (Nov. 9, 2008), <https://web.archive.org/web/20081112043118/http://www.sacbee.com/101/story/1382472.html>; Meredith May, *Vandals Desecrate Pro-Gay Catholic Church*, DESERET NEWS (Jan. 6, 2009), <https://www.deseret.com/2009/1/6/20377834/vandals-desecrate-pro-gay-catholic-church>; Tim Martin, *Radical Gay Activist Group Plan More Disruptions*, CHI. TRIBUNE (Nov. 20, 2008), <https://web.archive.org/web/20091116125804/http://archives.chicagotribune.com/2008/nov/20/news/chi-ap-mi-gayactivistprotes>; Jennifer Garza, *Feds Investigate Vandalism at Mormon Sites*, SACRAMENTO BEE (Nov. 14, 2008); *Protesters Demonstrate in Front of Latter-day Saint Temple in L.A.*, WIKINEWS (Nov. 13, 2008), https://en.wikinews.org/wiki/Protesters_demonstrate_in_front_of_Latter-day_Saint_temple_in_L.A.

¹⁹ See Peter Hart-Brinson, *Lessons from Proposition 8, 10 Years On*, ADVOCATE (Oct. 22, 2018), <https://www.advocate.com/commentary/2018/10/22/lessons-proposition-8-10-years> (recalling the devastating effect that the initial passing of Proposition 8 had on the LGBTQ community).

²⁰ See Barb Berggoetz, *Lawmakers Pick up Fight Over Same-Sex Marriage Ban*, INDYSTAR.COM (Jan. 9, 2014), <https://www.indystar.com/story/news/politics/2014/01/09/indiana-same-sex-marriage-ban-expected-to-be-filed-today/4388343/> (describing the debate over Indiana's constitutional amendment to ban same-sex marriage as "fiery"); Karen McVeigh, *North Carolina Passes Amendment 1 Banning Same-Sex Unions*, THE GUARDIAN (May 9, 2012), <https://www.theguardian.com/world/2012/may/09/north-carolina-passes-amendment-1> (noting that that people on both sides of the debate were "really angry"); Jesse McKinley, *Same-Sex Marriage on the Ballot in Arizona, a Second Time*, N.Y. TIMES (Oct. 29, 2008), <https://www.nytimes.com/2008/10/30/us/politics/30marriage.html> (detailing the heated debate over Arizona's

These conflicts illuminated an important reality for conservative faith groups. Fighting a culture war over LGBTQ rights requires massive time, resources, and organization. It requires a willingness to endure acrimonious political strife with traumatizing effects externally and internally. It requires a culture-war mentality—a willingness to do whatever it takes to win. While conservative advocacy groups and politicians may embrace and even relish such fights, most conservative faith communities, including conservative Christian denominations, do not. By doctrine and disposition, they are averse to the hard realities of culture war. They are pastoral and inclusive in nature. Their religious missions are based on love of God and neighbor, faith, salvation, and community—not perpetual conflict. Most have ministries that feed and serve the poor and downtrodden, regardless of sexual orientation or gender identity. They run hospitals, homeless shelters, mental health counseling services, and rehabilitation centers. They seek to heal personal and social divisions, not exacerbate them. Like other Americans, they know and associate with LGBTQ people regularly, including within their own families.

That is not to say conservative faith communities take lightly scriptural doctrines and teachings regarding gender and human sexuality, or that they are unwilling to take a stand for good public policy and against infringements of religious rights. Each has its own approach to engage these issues. But these faith communities and their members are generally not equipped for or willing to engage in never-ending and ever more bitter political conflicts over LGBTQ rights.

Nor do they want to. Most conservative religious groups seek peace and reconciliation. They want their LGBTQ children, friends, and neighbors to worship with them. They want friendly relations with their LGBTQ colleagues at work and acquaintances around town. They do not want to be understood as ignorant or intolerant, because they are not. They believe that if Jews, Catholics, Protestants of all stripes, Latter-day Saints, Muslims, Sikhs, Hindus, and people from numerous other faith traditions can live together freely and peacefully as friends in this pluralistic nation despite profound religious differences, then so too can those who have profoundly different beliefs on matters of gender and sexuality. They believe Americans can agree to disagree about some things without abandoning sacred beliefs and practices and, at the same time, without being enemies to those who disagree.

2. The Status Quo Cannot Hold: Religious Freedom-Only Arguments That Deny LGBTQ Rights Are Losing

The second reality is that, like it or not, religious freedom and LGBTQ rights are, as Justice Kennedy recognized, inherently in tension. Indeed, that fact has long

Proposition 102 which sought to bar same-sex marriage); Guillermo Contreras, *Same -Sex Couples Seek Order Barring Texas from Enforcing Ban on Gay Marriage*, HOUSTON CHRONICLE (Feb. 9, 2014), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Same-sex-couples-seek-order-barring-Texas-from-5219802.php> (outlining the controversy over Texas’s attempted ban on same-sex marriage).

been acknowledged by advocates and scholars on all sides.²¹ Twenty years ago, religious conservatives could count on religious freedom arguments to halt or defeat most LGBTQ rights initiatives. No more. Religious freedom and LGBTQ rights have squared off in a series of high-profile legal and political contests over the past few years. LGBTQ rights have mostly won; religious freedom has mostly lost. LGBTQ rights are expanding, including the right to marry, the dramatic expansion of local SOGI nondiscrimination laws, and the promulgation of regulations at all levels of government that accommodate LGBTQ interests. Whatever temporary protections the Trump administration may have introduced into federal regulations and practice, those exist within a broad political and legal climate of expanding LGBTQ rights. Overbroad LGBTQ rights are cause for legitimate concern among those who hold traditional views on marriage, family, gender, and sexuality—especially when those rights are made applicable to religious believers, religious spaces, and religious organizations with very different belief systems.

In response, legislators in numerous states have attempted to pass broad-based protections for religious freedom with no protections for LGBTQ rights. These attempts have failed, and the failure has followed a distinct pattern: the legislation is supported by (most) Republicans but few Democrats; it is painted by activists and influential business groups as creating a “license to discriminate”; the public, wary of change and broadly supportive of LGBTQ rights, turns against the measure; and the cumulative pressure (including national boycott threats) eventually causes the bill to stall, be vetoed, or be heavily modified. This pattern has recently occurred in

²¹ See, e.g., L. Darnell Weedon, *Marriage Equality Laws Are a Threat to Religious Liberty*, 41 S. ILL. L. J. 211, at 229 (2017) (describing recently enacted state legislation protecting religious liberties as consequences of the tension between religious liberty and same-marriage advocates); Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1 (2015) (calling for the recognition and understanding of the tension between religious freedom advocates and same-sex marriage advocates); Richael Faithful, *Religious Exemption or Exceptionalism? Exploring the Tension of First Amendment Religion Protections & Civil Rights Progress within the Employment Non-Discrimination Act*, 3 LEGIS. & POLICY BRIEF 55, at 76 (2011), available at <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1018&context=lpb> (noting that scholars have weighed in on the inherent tension between religious freedom and civil rights, particularly for LGBTQ people).

Kansas,²² Idaho,²³ Tennessee,²⁴ Arizona,²⁵ Indiana,²⁶ Georgia,²⁷ Missouri,²⁸ Mississippi,²⁹ and Virginia.³⁰ In recent years, the only states to pass broad religious freedom protections have been Mississippi³¹ and Arkansas.³²

To date, moreover, only one state, Mississippi, has passed a state version of the proposed federal First Amendment Defense Act (“FADA”).³³ Because of the relatively robust and specific nature of their protections, FADA-like proposals have become a preferred legislative approach of many pro-religious freedom intellectuals and advocacy groups.³⁴ However, their lack of political success to date is no aberration. By design, FADA bills seek broad protections for religious liberty

²² Jonathan Shorman, *Kelly Reinstates Protections for LGBT State Workers in Kansas Eliminated by Brownback*, THE WICHITA EAGLE (Jan. 15, 2019), <https://www.kansas.com/news/politics-government/article224559230.html#adnr=900000>.

²³ *Presentation to the Joint Senate and House State Affairs Committees on Adding Language to the Idaho Human Rights Act before the Idaho J. S. State Affairs Committee and H. State Affairs Committee*, 62d Leg., 1st Reg. Sess., 3 (Idaho 2013) (statement of Pamela Parks, Administrator of the Idaho Human Rights Comm’n) <http://legislature.idaho.gov/sessioninfo/2013/standingcommittees/sstafmin.pdf#page=155>; Bob Bernick, *Poll: Idahoans Think it Should Be Illegal to Discriminate against LGBT Residents*, IDAHO POLITICS WEEKLY (Jan. 4, 2015), <http://idahopoliticsweekly.com/politics/16-poll-idahoans-think-it-should-be-illegal-to-discriminate-against-lgbt-residents>.

²⁴ Jamie McGee, *Business Leaders Warn Anti-LGBT Legislation Will Harm Tennessee’s Economy*, TENNESSEAN (Feb. 5, 2020), <https://www.tennessean.com/story/money/2020/02/06/tennessee-lgbt-discrimination-economic-impact/4658821002/>.

²⁵ Amy-Xiaoshi DePaola, *Arizonans Rally as Court Weighs LGBT, Transgender Workplace Protections*, CRONKITE NEWS (Oct. 8, 2019), <https://cronkitenews.azpbs.org/2019/10/08/arizonans-rally-as-court-weighs-lgbt-transgender-workplace-protections/>.

²⁶ Amanda Holpuch, *Indiana Amends Religious Freedom Bill to Put an End to Discrimination*, THE GUARDIAN (Apr. 2, 2015), <https://www.theguardian.com/us-news/2015/apr/02/indiana-republicans-religious-freedom>.

²⁷ Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay*, WASHINGTON POST (Mar. 28, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/>.

²⁸ German Lopez, *Missouri Democrats Just Filibustered an Anti-Gay bill for 39 Hours. But it was Hopeless.*, VOX (Mar. 9, 2016), <https://www.vox.com/2016/3/9/11185822/missouri-democrats-filibuster-gay-marriage>.

²⁹ Samantha Allen, *Mississippi Is Close to Enacting America’s Most Anti-LGBT Law*, DAILY BEAST (June 27, 2017), <https://www.thedailybeast.com/mississippi-is-close-to-enacting-americas-most-anti-lgbt-law?ref=scroll>.

³⁰ Brad Kutner, *Virginia to Become First Southern State to Ban LGBT Discrimination*, COURTHOUSE NEWS SERVICE (Feb. 26, 2020), <https://www.courthousenews.com/virginia-becomes-first-southern-state-to-ban-lgbt-discrimination/>.

³¹ Religious Freedom Restoration Act, MISS. CODE ANN. § 11-61-1 (West); Camila Domonoske, *Mississippi Governor Signs ‘Religious Freedom’ Bill into Law*, NPR (Apr. 5, 2016), <https://www.npr.org/sections/thetwo-way/2016/04/05/473107959/mississippi-governor-signs-religious-freedom-bill-into-law>.

³² Religious Freedom Restoration Act, ARK. CODE ANN. § 16-123-401 (West); Kevin Trager and Alyse Eady, *Arkansas Governor Signs New ‘Religious Freedom’ Bill*, USA TODAY (Apr. 2, 2015), <https://www.usatoday.com/story/news/politics/2015/04/02/arkansas-religious-freedom-bill/70831330/>.

³³ First Amendment Defense Act, H.R. 2802, 114th Cong. (2015).

³⁴ See e.g., Ryan Anderson, *First Amendment Defense Act Protects Freedom and Pluralism after Marriage Redefinition*, THE HERITAGE FOUNDATION (Nov. 25, 2015), <https://www.heritage.org/civil-society/report/first-amendment-defense-act-protects-freedom-and-pluralism-after-marriage>; *2017 A Banner Year for the First Amendment*, ALLIANCE DEFENDING FREEDOM (Jan. 2, 2018), <http://www.adfmedia.org/News/PRDetail/10437>.

without corresponding protections for LGBTQ rights³⁵—making them an easy target for the politically powerful coalition of opposing interests.

In the foreseeable near-term political environment, when affirmative religious freedom legislation faces off in a zero-sum conflict with LGBTQ rights, religious freedom will almost always lose. In the long term, strategies that focus solely on defeating or delaying further expansion of the emerging LGBTQ rights regime, in the hope that public demand for such laws will eventually diminish, are incredibly risky.

That is because, by all measures, the LGBTQ rights movement continues to become more powerful. As noted, every elite institution in America strongly supports LGBTQ rights and popular opinion has already moved decisively in that direction, with large majorities already supporting LGBTQ rights. A recent Gallup poll found that ninety three percent of Americans believe gays and lesbians should have the same rights as straight Americans in terms of job opportunities.³⁶ Same-sex marriage now commands majority (sixty percent plus) support, and that support is much more pronounced among younger voters³⁷. Polls are of course complex and can be deceptive, but all polling and common experience show the same trend. With growing public support, LGBTQ-rights groups now have significant political and social power, including the power to challenge institutions and individuals who oppose them.

Whether conservative advocates and religious groups are willing to acknowledge it or not, this is a political sea change with profound implications. Legislative efforts to pass broad religious freedom-only bills are likely dead, and efforts to stymie LGBTQ rights bills indefinitely will likely fail. The years-long logjam of stalled SOGI bills will assuredly break, as it did in 2020 in Virginia.³⁸

When it does, the risk to religious believers and organizations with conservative theologies and practices is that new SOGI laws like Virginia's will have few if any accommodations for religious organizations and people. For example, the Equality Act not only lacks *any* religious protections, it would affirmatively revoke the federal Religious Freedom Restoration Act as applied to claims under the Civil Rights Act, leaving religious groups and persons with few if any statutory arguments when SOGI claims impinge on religious rights. Religious organizations, including religious schools and colleges and religious charities, could soon be required to hire or retain employees who do not uphold their religious standards, or be denied federal or state educational funding altogether on account of their human

³⁵ Mary Emily O'Hara, *First Amendment Defense Act Would Be 'Devastating' for LGBTQ Americans*, NBC NEWS (Dec. 20, 2016), <https://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-would-be-devastating-lgbtq-americans-n698416>.

³⁶ See *Gay and Lesbian Rights*, *supra* note 8.

³⁷ See *Majority of Public Favors Same-Sex Marriage, but Divisions Persist*, PEW RESEARCH CENTER (May 14, 2019), <https://www.people-press.org/2019/05/14/majority-of-public-favors-same-sex-marriage-but-divisions-persist/>; Jennifer De Pinto, *50 Years After Stonewall: Most See Progress in Ending LGBTQ Discrimination*, CBS NEWS (June 24, 2019), <https://www.cbsnews.com/news/50-years-after-stonewall-most-see-progress-in-ending-gay-and-lesbian-discrimination/>.

³⁸ Zack Budryk, *Virginia Passes LGBTQ Protections Measure*, THE HILL (Feb. 6, 2020), <https://thehill.com/homenews/state-watch/481891-virginia-passes-lgbtq-protections-measure>.

sexuality codes. In short, the Equality Act—like many LGBTQ rights laws adopted by state and local governments around the country—embraces a winner-take-all rather than the “live-and-let-live” approach embraced by Justice Kennedy and the LGBTQ movement before it achieved such enormous political power.

One thing appears certain. The status quo will not hold, and absent a new strategy the coming change is not likely to favor religious freedom over LGBTQ rights.

3. *The Conflict Over Religious Freedom and LGBTQ Rights Is Damaging Support for Religious Freedom*

The third reality is that the current zero-sum standoff between religious freedom and LGBTQ rights is diminishing elite and popular support for religious liberty generally, and may even be damaging support and tolerance for religion itself—especially for conservative Christianity. It is one thing for society to reject traditional religious notions of gender and sexual morality, much as society rejects religious dietary codes or Sabbath restrictions. It is quite another for society to become affirmatively hostile toward those who hold traditional religious beliefs and their institutions because they are seen as founts of intolerance and opposition to equal rights. The latter risks triggering religious persecution.

Thus, the unwillingness to embrace pluralism as a viable solution to intractable moral disagreements over gender and sexuality is not just a theoretical issue of morality or an abstract question about optimal line-drawing between civil rights protections and religious autonomy. It is increasingly an existential issue for the conservative religious community. Not that Americans are on the verge of wiping out religious conservatives, but rather that the privileged and accommodated existence they have enjoyed for many decades—some for centuries—is now seriously threatened.

Social attitudes toward racial discrimination are instructive. For a host of good reasons, we do not tolerate overt racism or its practitioners: legal and social forces punish racist expressions and practices severely.

But respectable voices increasingly equate conservative beliefs on gender and sexuality with racism. And for that reason, failure to reach a reasonable and fair accommodation with the LGBTQ community risks locking in the view that such beliefs are akin to racism and should be treated accordingly. That approach will mean that such views and related practices should not be accommodated, funded, or even really tolerated. It will mean those beliefs and practices, and ultimately those who hold them, should be formally denounced in public schools, in media and entertainment, in the professions, in public life—everywhere that we now denounce racist beliefs and practices. That approach, in short, risks reducing religious freedom to a defense of bigotry—necessary, perhaps, to maintain a free society, but to be limited to its bare minimum so that equality and justice can have maximum sway.

To be valued and enforced, religious freedom must have some support in the broader society. In democratic societies, that means that the people and their

political, legal, and social institutions must understand religion as a good. Perpetual political and moral opposition to basic LGBTQ civil rights is recasting—or at least runs a high risk of recasting—traditional faiths as benighted, oppressive, and simply bad. As the diminished state of religious freedom in Europe attests, when religion is understood as bad or irrelevant, the scope of religious freedom will soon contract.

B. RELIGIOUS FREEDOM PRIORITIES: THE IMPERATIVE TO PROTECT
RELIGIOUS SPACES ESSENTIAL TO RELIGIOUS GATHERING AND IDENTITY
FORMATION

Concluding that perpetual conflict with the LGBTQ community is unsustainable, contrary to the religious natures of most faith communities, and ultimately destructive does not mean that conservative religious organizations must abandon either their doctrines on sexuality and marriage or the moral and constitutional imperative of robust religious freedom protections. The conservative religious groups that support FFA have done nothing of the sort.

Indeed (as to the first charge), the idea that support for LGBTQ rights necessarily means supporting or at least condoning sexual practices that these groups believe to be wrong as a matter of theology is belied by religious groups' widespread support for *each other's* religious freedom. When, for example, an organization of Southern Baptists or other evangelical Christians supports the right of Jews and Seventh-day Adventists to worship on Saturday, no one seriously thinks they are somehow weakening their own theological commitment to Sunday worship.³⁹ To the contrary, such support—even for religious practices that one might find abhorrent on theological grounds—is simply viewed as a way to support religious freedom as a matter of principle and to further the “live-and-let-live” ethic that generally exists among religious groups today. In the current political and social climate, it is equally unlikely that thoughtful people would perceive a conservative religious group's support for LGBTQ rights as reflecting theological softness.

Moreover, for the conservative religious groups supporting FFA legislation, understanding social and political realities has focused their thinking on which religious freedoms are most essential to the faith community and which are relatively less essential—and thus, more amenable to compromise. The Act reflects hard thinking about what matters most.

One conclusion is that it is vital to protect physical spaces at the heart of religious identity formation—where religious functionaries and individual believers interact in a context oriented toward affirming faith. Churches, synagogues, mosques, dioceses, seminaries, denominational headquarters, and other religious institutions closely tied to worship, ritual, doctrinal development, and religious mission obviously fit into that category, but so do religious primary schools, secondary schools, colleges, and universities. Such spaces, even as they mix

³⁹ Brief of the Church of Jesus Christ of Latter-Day Saints; the Jewish Coalition for Religious Liberty; et al. as Amici Curiae in Support of Petitioner, *Patterson v. Walgreen Co.*, (No. 18-349), 2018 WL 5098486.

religious and secular functions, are crucial to the existence and survival of the faith community because they are centers for the teaching, inculcation, and practice of the faith. While not always thoroughly ecclesiastical, religious schools are, nevertheless, especially important and sensitive because they involve children and youth. Regulations that hinder the teaching and modeling of religious precepts in religious schools threaten the ability of a faith community to pass on its religion to the next generation, and are therefore existential threats to the faith community. Religious schools must have the right to uphold religious standards for teachers, administrators, employees, and students that sustain their religious mission, including standards related to gender and sexuality.

Religious charities and service organizations are also places of faith formation, where believers gather to exercise their religion in service to the disadvantaged. Charitable works are expressions of faith, and the services provided by religious charities are vital to millions and often irreplaceable. To the extent religious charities use their own monies, their claim to freedom to serve in the manner required by their faith is beyond serious dispute. Challenges arguably arise, however, when religious charities accept public money to serve the public. Religious autonomy and pluralism should still be respected—the mere fact of government money is not the end of the analysis—but in some circumstances government may also have legitimate claims to limit certain forms of discrimination that interfere with the purposes for which it funds the programs.

The religious groups supporting FFA recognize that commercial spaces are important to people of faith too. But here, the analysis is more nuanced and confronts the realities of the common marketplace in the modern regulatory state. For most believers, robust protections for religious employees are of greatest importance—including the right not to be discriminated against in the workplace for one's beliefs, or the expression and practice of those beliefs, and the right to reasonable workplace accommodations for things such as religious garb, time off to attend worship services, and excusal from religiously offensive tasks. These protections are increasingly important as corporate America becomes more secular and less tolerant of conservative religious beliefs and practices.

Protecting religious business owners is also important, but by long history and tradition commercial spaces are not regulation-free zones. Laws governing occupational licensing, health and safety, hours and wages, benefits, taxation, environmental issues, zoning, noise, aesthetics, parking, walkways, and so on are ubiquitous and simply part of doing business. In today's society, business is not a libertarian activity. For decades, and for important reasons, the law has regulated discrimination in the commercial sphere too. In a commercial society like America, participation in its commercial life on reasonably equal terms free of unjust discrimination has come to be understood as a right of citizenship, whatever the technicalities of statutory law. Most Americans believe it is already unlawful to

discriminate against LGBTQ persons in employment and public accommodations, even if in half the states it is not.⁴⁰

Religious believers and their beliefs have a place in commerce, of course; nothing in American law or culture supports the canard that the marketplace should be a religion-free zone. Faith can and should be lived and expressed in numerous ways in the commercial sphere, just like other moral, ideological, and political commitments. But there are limits. No one thinks religious beliefs should trump every regulation. How often and in what circumstances religious freedom norms should prevail over nondiscrimination norms presents difficult questions in cases of real religious hardship involving business owners—questions best resolved on a case-by-case basis. Whereas religious institutions properly demand statutory clarity to ensure respect for their religious autonomy and to avoid chilling core religious exercise, for-profit businesses with religious owners have less compelling claims to such clarity.

Understanding that not all claims to religious freedom are created equal and using clear-eyed weighing of which freedoms are most vital to the long-term welfare of America's diverse faith communities have been essential tools to the FFA project from the outset. Such an understanding has helped in discerning where religious freedom protections need to be absolute and where they can appropriately be subject to some compromise. The FFA reflects those judgments.

C. THE 2015 UTAH FAIRNESS FOR ALL STATUTE—EARLY FFA EFFORTS

The FFA drew inspiration from path-breaking legislation passed by the Utah Legislature in 2015. Deeply red Utah was an improbable place for LGBTQ rights legislation. But years of outreach and dialogue between the conservative Latter-day Saint community and the local LGBTQ community laid the groundwork for principled legislation that brought both communities together in a remarkable moment of reconciliation. The Utah legislation garnered national attention pre-*Obergefell* as a possible model for breaking the religious-freedom and LGBTQ-rights logjam that deescalated the culture war.

Efforts to reprise the Utah experience in other states are ongoing, although they often face fierce opposition from the same progressive and conservative advocacy groups that now oppose the FFA. The Utah statute is relevant here because, while more modest in scope, the spirit of goodwill and compromise that led to its enactment served as the inspiration for the negotiations that eventually produced the FFA.

⁴⁰ See RELIGIOUS FREEDOM, LGBTQ RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 405 (William N. Eskridge, Jr. & Robin Fretwell Wilson, eds., 2018) (“[M]ost people see denials of service based on characteristics irrelevant to the service as wrong – demeaning to the person refused, to the LGBT community, and to all of us. Yet the United States is a checkerboard of public accommodation nondiscrimination laws.”).

1. *Background on the Utah FFA*

In 2015, the Utah Legislature enacted the first “fairness for all” law, kicking off a vigorous debate among religious conservatives about how best to secure religious freedom in the context of expanding LGBTQ rights. Utah is among the most religiously conservative and Republican states in the nation. The headquarters of The Church of Jesus Christ of Latter-day Saints, whose doctrine strictly limits marriage to the union of man and woman, Utah seemed an improbable place for LGBTQ rights legislation.

The roots of the 2015 Utah statute lay in the bitter fight over Proposition 8, the 2008 ballot measure that enshrined the traditional definition of marriage into California’s Constitution. The Church of Jesus Christ had encouraged its members to make their views known and actively support Prop 8. Latter-day Saints became some of Prop 8’s most important promoters. When the measure passed, many in the LGBTQ community naturally felt embittered toward the Church and its members.

In Utah, the desire to avoid the bitterness of California’s experience resulted in efforts to build bridges between Latter-day Saint and LGBTQ communities.⁴¹ In 2009, with the support of the Church, the Salt Lake City Council passed an ordinance providing protections against SOGI discrimination in employment and housing while also providing broad protections for religious institutions, resulting in greater trust and goodwill. Further outreach and negotiations among various stakeholders, including the Church and Equality Utah, eventually culminated in legislation that sought to combine LGBTQ rights with religious freedom protections. Some dubbed the law that eventually passed the “Utah Compromise.” But others saw it not primarily as a compromise but as a “statute of principles.” Whatever its technicalities, the 2015 Utah statute broadly represented a way out and a way up for the religious and LGBTQ communities—a fundamental reaffirmation of basic principles of American pluralism.⁴² The legislation and, more importantly, the peacemaking approach to working out deep differences eventually came to be known as “fairness for all.”

2. *Overview of the 2015 Utah Fairness for All Statute and Related Provisions*

The 2015 Utah “compromise” consisted of two closely related statutes.

⁴¹ See generally WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* (2020).

⁴² William Eskridge, Jr., John A. Garver Professor of Jurisprudence, Yale L. Sch., *Finding Common Ground and the Common Good on Religious Liberty and LGBTQ+ Rights at the BYU Law Religious Freedom Annual Review: Religious Freedom and the Common Good* (June 20, 2018) (“I think that idea is at the center of the 2015 Utah statute. I prefer not to call it as many of you all have today the ‘Utah compromise.’ I think it was an example of what Henry Richardson calls a ‘deeply principled statute,’ it’s a complicated statute but that does not make it a compromise. The ability of two groups to come together to produce something does not inevitably require of either group to compromise its principles or its beliefs. I think it does require groups to listen to one another and to accommodate one another and I think that is somewhat different.”).

a. Senate Bill 296.

One statute, Senate Bill 296 (“SB 296”), addressed two critical areas of civil rights protection for LGBTQ persons—employment and housing:⁴³

Employment. The Utah Antidiscrimination Act (“UAA”) was broadly patterned after Title VII. Before the 2015 amendments, UAA prohibited employment discrimination based on race, color, national origin, religion, sex, pregnancy, age (40+), and disability for employers with fifteen or more employees. As with Title VII, small employers are not covered. One important difference with Title VII, however, is that UAA already excluded religious organizations and their wholly owned subsidiaries from the definition of “employer.” Whereas Title VII has a religious exemption allowing religious organizations to hire based on religious criteria, UAA simply exempts religious organizations entirely.

SB 296 added SOGI to UAA’s existing protected classes. Sexual orientation was then defined in standard terms, as “an individual’s actual or perceived orientation as heterosexual, homosexual, or bisexual.” SB 296 defined gender identity as having “the meaning provided in the Diagnostic and Statistical Manual (DSM-5).” This unorthodox definition was intended to provide some measure of objectivity to an increasingly fluid term, although the DSM-5 definition is admittedly broad. A plaintiff asserting discrimination based on gender identity has the burden of establishing gender identity. To help guard against fraudulent assertions of gender identity, SB 296 also provided objective touchpoints:

A person's gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose.

SB 296 also bolstered UAA’s religious exemption, clarifying that it applies to religious educational institutions and affiliates of religious organizations, as well as to Boy Scouts of America (“BSA”) and its “councils, chapters, [and] subsidiaries” in light of BSA’s long and deep connection with Utah’s religious community.⁴⁴

Further, SB 296 affirmed and strengthened rights of free expression and association. In the first of its kind, it included workplace free expression rights, ensuring that employees would not be punished for expressing “religious or moral beliefs and commitments . . . in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression[s] . . . allowed by the employer . . .

⁴³ S.B. 296, 2015 Gen. Sess. (Utah 2015) (enacted as UTAH CODE ANN. § 34A-5-102(o)).

⁴⁴ UTAH CODE ANN. § 34A-5-102(1)(i)(ii). The exemption now reads:

(A) a religious organization, a religious corporation sole, a religious association, a religious society, a religious educational institution, or a religious leader, when that individual is acting in the capacity of a religious leader; (B) any corporation or association constituting an affiliate, a wholly owned subsidiary, or an agency of any religious organization, religious corporation sole, religious association, or religious society; or (C) the Boy Scouts of America or its councils, chapters, or subsidiaries. *Id.*

unless the expression is in direct conflict with the essential business-related interests of the employer.” A similar provision protects employees in their speech *outside* the workplace. Within reasonable bounds, SB 296 sought to protect workers from employers attempting to use their economic power to impose their ideological orthodoxies, whatever those orthodoxies might be.

Unlike commercial enterprises, expressive associations need the freedom to hire employees that support their mission in word and deed. SB 296 did not directly exempt expressive associations from UAA, but it did reaffirm that UAA’s nondiscrimination norm should “not be interpreted to infringe upon the freedom of expressive association or the free exercise of religion protected by the First Amendment” and the “Utah Constitution.”⁴⁵

Utah generally favors a strong business environment where employers are free to govern the workplace. SB 296’s SOGI nondiscrimination rule would limit employer discretion to a degree, but it was not intended to eliminate employers’ freedom to impose reasonable standards in the workplace—even in areas that potentially affect SOGI rights. Thus, SB 296 preserved the right of employers to have “reasonable dress and grooming standards not prohibited by other provisions of federal or state law,” so long as they “afford reasonable accommodations based on gender identity to all employees.”⁴⁶ It also affirmed the right of employers to adopt “reasonable rules and policies” pertaining to “sex-specific facilities,” provided that employers “afford reasonable accommodations based on gender identity to all employees.”⁴⁷

Housing. Likewise, SB 296 added SOGI to the list of protected classes under Utah’s Fair Housing Act (“FHA”). The challenge this posed to religious liberty pertains to housing owned by religious organizations for noncommercial purposes (such as to house their religious workers) and housing owned, operated, or under contract with a religious university. Brigham Young University, for example, has an Honor Code that requires its students to live in “BYU-approved” housing. BYU grants that approval only to housing facilities that maintain certain standards of decency, modesty, and sexual chastity. Such housing is sex-specific, for example.

Utah’s FHA law already made an allowance for sex and familial status distinctions for housing operated by a private educational institution “for reasons of personal modesty or privacy, or in the furtherance of a religious institutions free exercise of religious rights under the First Amendment.”⁴⁸ SB 296 expanded that to include not only housing owned or operated by a religious organization or school but also housing “under contract with” such an institution.⁴⁹ It further clarified that a religious organization or educational institution could give preferences to those of the same religion in its noncommercial housing sales and rentals, although it need not exclusively limit such sales or rentals to coreligionists. Those religious entities, and entities under contract with them, can also give preference to persons of a

⁴⁵ UTAH CODE ANN. § 34A-5-111.

⁴⁶ UTAH CODE ANN. § 34A-5-109.

⁴⁷ UTAH CODE ANN. § 34A-5-110.

⁴⁸ UTAH CODE ANN. § 57-21-3(2)(a).

⁴⁹ UTAH CODE ANN. § 57-21-3(2)(b)(ii).

“particular . . . sex, sexual orientation, or gender identity.”⁵⁰ In short, the limited number of housing units owned or controlled by religious entities for noncommercial purposes have latitude to set housing policies that are consistent with their respective faiths.

Preemption, No Special Classes, and Nonseverability. SB 296 preempted all local laws, so municipalities could not detract from the compromise. It also clarified that it “shall not be construed to create a special or protected class for any purpose other than” the protections in employment and housing.⁵¹ Finally, the bill contained a nonseverability clause, providing that if any part of it were struck down as unconstitutional then all of it would be void.

b. Senate Bill 297.

SB 296 had a companion bill, Senate Bill 297 (“SB 297”), which addressed other important religious liberty issues.⁵² Although SB 297 did not garner the support of Equality Utah, SB 296 likely would not have passed without it.

Marriage solemnization. SB 297 first addressed the issue of county clerks and solemnization of marriages for same-sex couples. In many states, county clerks are the marriage “solemnizers” of last resort. But Utah law had never required county clerks to perform any marriages, to say nothing of marriages to which clerks might object on conscience grounds. That had never been a problem because ministers and other officials had always been willing to solemnize marriages. But with the possible advent of same-sex marriage rights (this was before *Obergefell*), at least the possibility existed that a same-sex couple in a conservative Utah county might not be able to find someone to marry them. On the other hand, there was the challenge of county clerks whose faith forbids them from solemnizing any marriage not between one man and one woman.

SB 297 required county clerks to “establish policies to ensure that the county clerk, or a designee of the county clerk who is willing, is available during business hours to solemnize a legal marriage for which a marriage license has been issued.”⁵³ This ensured both an officiant for all lawful marriages and that no one would be forced to solemnize any marriage against his or her conscience.

Marriage-related protections for religious officials and organizations. Some have feared that the right of same-sex couples to marry would force religious institutions to recognize such marriages or face legal penalties, including loss of the right to solemnize marriages. SB 297 allayed that fear. It stated that no government in Utah could require a “religious official, when acting as such, or religious organization to solemnize or recognize for ecclesiastical purposes a marriage that is contrary to that religious official's or religious organization's religious beliefs.”⁵⁴ It also prevented government from denying a religious official or organization the

⁵⁰ UTAH CODE ANN. § 57-21-3(4)(b)(i)(B).

⁵¹ UTAH CODE ANN. § 34A-5-102.5(2).

⁵² S.B. 297, 2015 Gen. Sess. (Utah 2015) (codified in pertinent part at UTAH CODE ANN. § 17-20-4).

⁵³ UTAH CODE ANN. § 17-20-4(2).

⁵⁴ UTAH CODE ANN. § 63G-20-201(1).

legal authority to solemnize marriages based on the official's or organization's refusal to solemnize a marriage that is contrary to its religious beliefs.⁵⁵ Nor, under SB 297, could government require religious officials or organizations to "promote marriage through religious programs, counseling, courses, or retreats in a way that is contrary to that religious official's or religious organization's religious beliefs."⁵⁶ For example, a religious counseling agency that qualifies as a religious organization or that is an affiliate of one could not be required to provide marriage counseling or programs in violation of its religious beliefs.

Finally, SB 297 prevents an individual from suing a religious official or organization "to provide goods, accommodations, advantages, privileges, services, facilities, or grounds for activities connected with the solemnization or celebration of a marriage that is contrary to that religious official's or religious organization's religious beliefs about marriage, family, or sexuality"⁵⁷ The bill also defined "sexuality" broadly, to include "legal sexual conduct, legal sexual expression, sexual desires, and the status of a person as male or female."⁵⁸

Nonretaliation. SB 297 also bars "government retaliation" against religious officials or organizations "for exercising the protections" just enumerated.⁵⁹ Retaliation includes not only formal penalties, but also discrimination against and denial of benefits, rights, and tax-exempt status.⁶⁰ Thus, the government cannot refuse to contract with a religious organization for exercising such protections.

SB 297 also bars the government from denying, revoking, or suspending professional or business licenses "based on that licensee's beliefs or the licensee's lawful expressions of those beliefs in a nonprofessional setting, including the licensee's religious beliefs regarding marriage, family, or sexuality."⁶¹ Nor may the government engage in other acts of retaliation for holding or expressing such beliefs in such settings.⁶² A therapist, for example, is free to express his or her beliefs about marriage, family, or sexuality in religious and numerous other settings without fear of governmental retaliation. Beliefs about such matters are protected in professional and all other settings, while the expression of such beliefs in professional settings remains subject to professional standards.⁶³

3. *Aftermath of the 2015 Utah Compromise*

At the strong urging of the LGBTQ community and many religious leaders, and especially of the Church of Jesus Christ, the Utah Legislature passed SB 296 and 297 overwhelmingly. The legislative debate was extremely emotional for everyone;

⁵⁵ UTAH CODE ANN. § 63G-20-201(2).

⁵⁶ UTAH CODE ANN. § 63G-20-201(4).

⁵⁷ UTAH CODE ANN. § 63G-20-201(3).

⁵⁸ UTAH CODE ANN. § 63G-20-102(4).

⁵⁹ UTAH CODE ANN. § 63G-20-202.

⁶⁰ UTAH CODE ANN. § 63G-20-102(1)(b)(i).

⁶¹ UTAH CODE ANN. § 63G-20-203(1).

⁶² UTAH CODE ANN. § 63G-20-203(2).

⁶³ *Id.*

some conservative legislators wept as they spoke.⁶⁴ Members of the LGBTQ community embraced in joy, relief, and often disbelief.⁶⁵ Hundreds gathered at the signing ceremony to cheer and witness the moment, excited for a new day in Utah's religious and LGBTQ relations.⁶⁶ By any measure, it was a remarkable catharsis—a rare moment of community reconciliation that transcended the terms of the new law.

Yet privately, many religiously conservative legislators and community members feared that SB 296 would impinge on religious freedom and spark conflicts. Fortunately, in the five years since the law's enactment, that has not occurred. It is impossible to know how often the statute has been invoked to force settlement of conflicts without litigation—by design, litigation is only the tip of the iceberg with civil rights statutes. But lack of litigation is at least relevant, and by that metric Utah's FFA statute has not produced the outcomes religious conservatives feared. To our knowledge, no religious organization has been sued under its terms. Nor, to our knowledge, has it been used to sue any religiously oriented nonprofit or business for SOGI discrimination. And remarkably for a religiously conservative state, there have been few if any SOGI lawsuits against commercial businesses.

SB 296 and 297 changed the law, to be sure, but more importantly the compromise—and the process that led to it—changed the culture. Utah still has profound religious and ideological divides over issues of marriage, family, gender, and sexuality. Those have not gone away and likely will not go away. But resolving those deeper issues was not the point of Utah's FFA legislation. The point was using a model of pluralism to promote peace, respect, and reconciliation. However imperfect, the 2015 Utah compromise modeled respect for both religious autonomy and the basic needs of LGBTQ persons, and that in turn has led to greater peace and reconciliation between once bitterly divided communities.

In other words, the “live-and-let-live” approach embodied in the Utah compromise worked, just as its architects hoped it would.

PART II. THE FAIRNESS FOR ALL ACT OF 2019

Against that extensive background, this section explains the basic elements of the accommodations and compromises struck in the federal FFA. The approach throughout is one of respect for the diversity of religious beliefs and practices. In the effort to strike a fair, workable, and enduring compromise, not every religious interest can be perfectly and expressly protected. The same is true of LGBTQ interests. Perfection is not possible in reconciling profound and—as Justice Kennedy recognized—sometimes conflicting interests. Any bill that protected

⁶⁴ Ben Winslow, *Emotional Hearing for Compromise LGBT Nondiscrimination, Religious Liberties Bill*, FOX 13 SALT LAKE CITY (Mar. 5, 2015), <https://fox13now.com/2015/03/05/emotional-hearing-for-compromise-lgbt-nondiscrimination-religious-liberties-bill/>.

⁶⁵ Ben Winslow, *'Monumental' Gay Rights, Religious Liberties Bills Pass the Utah Stat Legislature*, FOX 13 SALT LAKE CITY (Mar. 12, 2015), <https://localtvkstu.wordpress.com/2015/03/12/monumental-gay-rights-religious-liberties-bills-pass-the-utah-state-legislature/>.

⁶⁶ Jennifer Dobner, *'Milestone': Herbert Signs LGBT Nondiscrimination, Religious Freedom Protections Bill*, SALT LAKE TRIBUNE (Mar. 31, 2015), <https://archive.sltrib.com/article.php?id=2283645&itype=CMSID>.

every religious person or interest from any burden occasioned by LGBTQ rights would largely neuter the bar on SOGI discrimination and never garner support from any corner of the LGBTQ community. Likewise, any bill that prohibited *all* distinctions based on SOGI (or sex) would trench deeply on religious rights, and would have no hope of garnering widespread support from the Abrahamic faith groups committed to traditional scriptural views of family and sexuality.

A. OVERVIEW OF THE PROPOSED LEGISLATION

But while perfection is impossible, an honorable and livable pluralism is not. The FFA seeks to identify and specifically protect the most sensitive and vulnerable zones of religious freedom. FFA’s negotiators repeatedly asked what the religious community—religious institutions *and* individuals—needs to maintain its religious identity and flourish in an increasingly secular society with expanding SOGI equality norms and growing hostility toward traditional religious morality. The FFA reflects deep thinking about religious needs and practical realities.

1. *FFA Preserves the Religious Freedom Restoration Act*

Understanding the Act begins with understanding something FFA does not do. The FFA does not amend or limit the Religious Freedom Restoration Act (“RFRA”). By contrast, the Equality Act would revoke RFRA as a possible defense against SOGI nondiscrimination requirements. Conservative religious groups worried that any gaps in religious-freedom protections under the FFA must be taken into account. Short of an express exemption, RFRA contains the most powerful standard for protecting religious liberty in the U.S. legal canon. Faithfully applied, its “strict scrutiny” balancing test—requiring government to prove both a “compelling governmental interest” justifying the burden on religious exercise and that the burden is being imposed through the “least restrictive means”⁶⁷—is difficult for any government or litigant invoking federal law to satisfy. The Supreme Court has never upheld a law or regulation imposing a religious hardship under RFRA.

That is not to suggest that RFRA is a “get out of jail free” card for any discriminator with a religious belief. Far from it. Lower courts (federal and state, applying state-law variants of RFRA) have rejected RFRA defenses in cases where the religious burden was insubstantial or the government’s interest in protecting against discrimination was not compelling.⁶⁸ RFRA cases are highly fact specific. Nondiscrimination norms are weighty and will likely prevail in most purely

⁶⁷ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, §3(b), 107 Stat. 1488, 1488-89 (1993) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

⁶⁸ See, e.g., *United States v. Christie*, 825 F.3d 1048 (9th Cir. 2015); *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008); *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008); *Korte v. United States HHS*, 912 F. Supp. 2d 735 (S.D. Ill 2012); *United States v. Adeyemo*, 624 F. Supp. 2d 1081 (N.D. Cal 2008); *United States v. Quaintance*, 471 F. Supp. 2d 1153 (D.N.M. 2006); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909 (Cal 1996); *Abdur-Ra’oof v. Dept. of Corrections*, 562 N.W.2d 251 (Mich. App. 1997).

commercial settings. But the weight of those norms is less compelling in religious settings. Difficult cases will arise in the intersection of those two contexts, with RFRA providing a type of strategic ambiguity that militates in favor of flexibility, informal compromise, and practical peacemaking by the parties.

With RFRA intact, the negotiators of the FFA were free to address the most sensitive religious liberty concerns raised by adding SOGI to the Civil Rights Act, confident that any interstitial weakness in the religious exemption structure could be fortified by RFRA's rigorous standard. This is especially important for individual religious freedom claims. As discussed below, FFA provides important protections for individuals, such as employees and small shop owners. Indeed, FFA's strong protections for the autonomy of religious institutions where believers can freely associate and live out their faith in common purpose—"institutional" protections in form—are, in substance, protections for individual believers in some of the most sacred spaces of their religious exercise. In truth, the supposed dichotomy between individual religious protections and institutional religious protections is strained at best. The notion that FFA leaves the religious freedom of individuals unprotected is false.

Nevertheless, it is true that FFA focuses the bulk of its express religious protections on the unique and constitutionally sensitive needs of religious institutions, rather than on the needs of individuals in unique situations or on business owners. We believe RFRA already supplies strong protections for such individuals and for religious business owners, who already operate in a highly regulated sphere that has long been subject to the demands of public policy, including through labor, environmental, health and safety, and nondiscrimination laws and regulations.

2. *FFA Protects the Tax-Exempt Status of Religious Organizations*

Religious organizations—especially colleges and universities—face the threat of losing their federal tax-exempt status because of traditional religious beliefs regarding same-sex marriage and other controversial topics. At oral argument in *Obergefell*, Justice Samuel Alito asked United States Solicitor General Donald Verrilli about how a decision granting same-sex couples a constitutional right to marry would affect the tax-exempt status of religious colleges. Justice Alito raised the example of Bob Jones University, which lost its nonprofit, tax-exempt status because of a religious policy banning interracial marriage and dating. "So would the same apply to a university or college if it opposed same-sex marriage?" General Verrilli responded, "I don't think I can answer that question without knowing more specifics. But it's certainly going to be an issue. I don't deny that. . . . It is going to be an issue."⁶⁹ As Chief Justice Roberts noted in his *Obergefell* dissent, the Solicitor General "candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage."⁷⁰

⁶⁹ Transcript of Oral Argument on Question 1 at 36–38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

⁷⁰ *Obergefell*, 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting).

General Verrilli’s response sent shockwaves through the religious community, raising fears that traditional beliefs or practices concerning marriage, family, and sexuality might be the grounds for loss of tax-exempt status. The Supreme Court in *Bob Jones* held that the IRS could deny non-profit charitable status of the university because of its racist dating and marriage policies.⁷¹ Would a ruling elevating same-sex marriage to a constitutional right have the effect of equating religious beliefs and practices concerning sexual orientation with invidious distinctions based on race, thus calling into question the tax-exempt status of religiously conservative faith groups and schools?

Most scholars think the answer is no, and in the five years since *Obergefell* we are not aware of any serious challenge on this front. But the risk is there. For those who support pluralism, including FFA’s LGBTQ advocates, taking this threat off the table makes perfect sense. Denying tax-exempt status to religious organizations based on their beliefs is most likely unconstitutional and is certainly a recipe for deep social and political strife. In addition, the fear that enacting SOGI protections will hasten that result gives pause to some religious people and institutions that might otherwise be supportive.

Accordingly, FFA removes denial of tax-exempt status as a potential weapon against religious dissenters from whatever political or social disagreement may exist over sexuality. FFA provides that the determination whether a group is entitled to tax-exempt status cannot be made based on “religious beliefs or practices concerning marriage, family, or sexuality,” with exceptions for racial and certain criminal practices.⁷² A major—some would say existential—threat to religious institutions and education would be eliminated.

3. *Defining Sexual Orientation and Gender Identity.*

In defining key terms, the Equality Act conflates sex and SOGI by defining “sex” to include SOGI,⁷³ much like the recent *Bostock* decision.⁷⁴ FFA takes a different approach. The term “sex” has its own political and legal history, which FFA does not disturb. Instead, FFA adopts a straightforward definition of “sexual orientation” as “homosexuality, heterosexuality, or bisexuality.”

⁷¹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983).

⁷² H.R. 5331, 116th Cong. § 8(B)(i) (2019):

For purposes of Federal law, any determination whether an organization is organized or operated exclusively for religious, charitable, scientific, literary, or educational purposes or complies with legal standards of charity shall be made without regard to the organization’s religious beliefs or practices concerning marriage, family, or sexuality, except insofar as such practices pertain to race or criminal sexual offenses punishable under constitutionally valid Federal or State law.

⁷³ *Cf. Altitude Express v. Zarda*, No. 17-1623 (June 15, 2020); *Bostock v. Clayton Cty.*, No. 17-1618 (June 15, 2020); *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Opportunity Emp’t Comm’n*, No. 18-107 (June 15, 2020).

⁷⁴ *Bostock*, slip op. at 9-10.

FFA defines “gender identity” in fairly standard terms⁷⁵ but also includes guidance on how gender identity can be properly established in a lawsuit.⁷⁶ Sometimes, critics allege that protecting gender identity means forced accommodation of people who will switch their gender identity regularly, even daily, in an effort to abuse the protections for nefarious ends. The image they conjure is of teenage boys announcing one day that they are “girls” so they can gawk in the girls’ locker room, returning to their male status when the hijinks are done.

This is a serious risk under both the Equality Act and *Bostock*. But this kind of gamesmanship would go nowhere under the Act. FFA directs courts adjudicating a gender identity claim toward “evidence that the gender identity is sincerely held, part of a person’s core identity, and not being asserted for an improper purpose,” including evidence of “consistent and uniform assertion of the gender identity.”⁷⁷ The teenage boys (who would certainly be punished by their school and perhaps the criminal justice system) would lose because FFA allows courts to reject fraudulent assertions of gender identity or those intended to satisfy prurient desires or to harm others. FFA does not adopt a gender fluidity model of gender identity.

4. *Title VII: FFA and Employment Discrimination Law.*

Like the Equality Act and *Bostock*, FFA would protect LGBTQ persons from employment discrimination. It adds SOGI to the other classes already protected under Title VII of the Civil Rights Act. As a general rule, discrimination based on SOGI would be unlawful for employers with fifteen or more employees.

a. *Protections for religious organizations.*

FFA has a three-tiered approach to protecting the right of a religious organization to hire employees that live and advance its religious mission.

First, it clarifies key definitions under Title VII’s existing religious exemption. That exemption provides that Title VII “shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society

⁷⁵ “The term ‘gender identity’ means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, without regard to the individual’s designated sex at birth.” H.R. 5331, 116th Cong. § 5(c)(q) (2019).

⁷⁶ H.R. 5331, 116th Cong. § 5(c)(q) (2019):

A person’s gender identity can be shown by providing evidence, including medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person’s core identity, and not being asserted for an improper purpose.

⁷⁷ *Id.*

of its activities.”⁷⁸ Title VII defines the term “religion” to “include[] all aspects of religious observance and practice, as well as belief”⁷⁹

FFA ensures that key terms are properly, rather than narrowly, construed. It updates the definitions of “religion” and “religious” to comport with the more precise definitions used in RFRA and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which preclude debates over the weight and centrality of a religious claimant’s religious beliefs: “The terms ‘religion’ and ‘religious’ include all aspects of religious belief, observance, and practice, whether or not compelled by, or central to, a system of religion.”

FFA also clarifies what Title VII’s religious exemption means by “a religious corporation, association, educational institution, or society” that is entitled to hire based on religion.⁸⁰ Thus, the exemption applies not only to traditional houses of worship,⁸¹ but also nonprofit entities that are at least partially “owned, supported, controlled, or managed” by a religious organization,⁸² as well as nonprofit entities that in its public face, official purpose, and operations is “substantially religious.”⁸³

This list does not purport to be exhaustive (“includes”), nor does it address whether for-profit entities could claim the religious exemption—a possibility the Equal Employment Opportunity Commission (“EEOC”) continues to hold out under narrow conditions.⁸⁴ Its purposes are to clarify that the religious exemption covers a very broad swath of religious and religiously oriented organizations. It covers (A) traditional religious organizations and houses of worship, (B) nonprofit institutions with important connections to a religion, denomination, church, or house of worship, and (C) nonprofit institutions that, while not having a close connection with a particular religion, denomination or church, nevertheless are overtly religious in their founding documents and their actual operations. The clarification in (C) will give protection and guidance to numerous religiously oriented nonprofits whose status has been unclear in the law. Those who desire to form independent nonprofit groups to pursue religious ends and have the right to hire based on religious criteria now have a clear statutory pathway for securing that right. A Catholic bookstore, for example, could organize itself into a nonprofit entity overtly dedicated to

⁷⁸ 42 U.S.C. § 2000e-1(a) (2018).

⁷⁹ 42 U.S.C. § 2000e(j) (2018).

⁸⁰ 42 U.S.C. § 2000e-1(a) (2018).

⁸¹ H.R. 5331, 116th Cong. § 7(g)(7)(A) (2019) (“The term ‘religious corporation, association, educational institution, or society’ includes (A) a church, synagogue, mosque, temple, or other house of worship”).

⁸² H.R. 5331, 116th Cong. § 7(g)(7)(B) (2019) (“The term ‘religious corporation, association, educational institution, or society’ includes . . . a nonprofit corporation, association, educational institution, society, or other nonprofit entity that is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular church, denomination, convention, or association of churches or other houses of worship”).

⁸³ H.R. 5331, 116th Cong. § 7(g)(7)(C) (2019) (“The term ‘religious corporation, association, educational institution, or society’ includes . . . a nonprofit corporation, association, educational institution, society, or other nonprofit entity that holds itself out to the public as substantially religious, has as its stated purpose in its organic documents that it is religious, and is substantially religious in its current operations.”).

⁸⁴ U.S. EQUAL EMP. OPPORTUNITY COMM’N, SECTION 12 RELIGIOUS DISCRIMINATION: GUIDANCE (Jul. 22, 2008), available at: <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (stating whether an organization was “for-profit” as a factor in determining if it is religious).

religious ends and, provided it conducted itself as such, hire only adherent Catholics.

Second, certain “core” religious institutions are further protected against claims of SOGI discrimination by a categorical exemption. The Employment Nondiscrimination Act (“ENDA”), which would have made SOGI employment discrimination unlawful, exempted all religious institutions that qualified for the religious exemption under 702(a) or 703(e)(2). FFA is more targeted as to federal law but reaches similar results.

Subparagraph (i) covers traditional churches and similar religious organizations.⁸⁵ It would completely exempt a Catholic diocese, for example. Subparagraph (ii) covers 501(c)(3) and 509(a) religious organizations,⁸⁶ which includes groups like religious hospitals and charities, including, in most instances, Catholic Charities.⁸⁷ Subparagraph (iii) exempts all religious schools—pre-K-12, colleges, universities, seminaries, etc.—allowing them to administer their employment policies according to the dictates of their diverse faiths and without fear of SOGI lawsuits.⁸⁸ And subparagraph (iv) exempts other religiously oriented nonprofits that employ only those of their faith and are reasonably consistent in upholding their religious employment standards—a catch-all category that allows religious nonprofits to create devoutly religious workplaces.⁸⁹

⁸⁵ H.R. 5331, 116th Cong. § 4(b)(2)(B)(i) (2019) (“With respect to claims of employment discrimination because of sexual orientation or gender identity, nothing in this subchapter shall apply to (i) a church or its integrated auxiliaries, a convention or association of churches, or a religious order, as described in section 6033(a)(3)(A)(i) and section 6033(a)(3)(iii) of the Internal Revenue Code of 1986 . . .”).

⁸⁶ H.R. 5331, 116th Cong. § 4(b)(2)(B)(ii) (2019) (exempting from SOGI employment discrimination claims “(ii) a religious organization described in sections 501(c)(3) and 509(a)(1), (2), or (3) that is covered by an Internal Revenue Service group exemption letter issued to a church or a convention or association of churches . . .”).

⁸⁷ Subparagraph (i) covers traditional churches, religious orders, and similar religious organizations. It would completely exempt a Catholic diocese or monastery or convent, for example. It would also exempt a number of closely connected institutions that do not provide significant paid services to the general public or are not primarily funded by sources like government grants, public donations, and fees for mission-related services. Examples include missionary entities, seminaries, church building funds, entities managing church properties or investments, church publishing entities, and so forth. Subparagraph (ii) covers most other religious organizations sufficiently affiliated with and overseen by a church or similar entity to be included in its official list of exempt organizations covered by a group ruling issued by the IRS (but not private foundations). For instance, groups like Catholic Charities or Catholic hospitals might provide too many public-facing services or receive too many government grants to qualify under (i), but could still qualify under subparagraph (ii) by virtue of being included in the official list of organizations covered by the IRS group exemption maintained by the U.S. Conference of Catholic Bishops. Subparagraph (iii) exempts all religious schools—pre-K-12, colleges, universities, seminaries, etc.—allowing them to administer their employment policies according to the dictates of their diverse faiths and without fear of SOGI lawsuits. And subparagraph (iv) exempts other religiously oriented nonprofits that employ only those of their faith and are reasonably consistent in upholding their religious employment standards—a catch-all category that allows religious nonprofits to create devoutly religious workplaces.

⁸⁸ H.R. 5331, 116th Cong. § 4(b)(2)(B)(iii) (2019) (exempting from SOGI employment discrimination claims “(iii) a religious educational institution that is eligible for exemption under section 703(e)(2) of this subchapter . . .”).

⁸⁹ H.R. 5331, 116th Cong. § 4(b)(2)(B)(iv) (2019) (exempting from SOGI employment discrimination claims “(iv) a religious corporation, association, or society under section 702(a) of this subchapter that is eligible for tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986 and that employs only individuals of the employer’s religion, unless the employee demonstrates that the employer has not applied with

Importantly, FFA extends this protection for highly religious employers to *state* law. Using the same constitutional jurisdictional bases as the Civil Rights Act and the RLUIPA,⁹⁰ FFA would preclude state laws from imposing SOGI nondiscrimination requirements on core religious employers. This is not merely an allowance against potential challenges created by adding SOGI to Title VII, but an affirmative enhancement of religious liberty against the threat of aggressive state laws.

Third, FFA’s preservation of RFRA provides a powerful backstop protection in situations of religious hardship that are not expressly covered by a religious exemption.

In sum, FFA provides bona fide religious organizations with broad protections. Under the clarified religious exemption under section 702, more religious nonprofits have a clear path for being able to hire based on religious criteria. Under FFA’s categorical exemption, numerous traditional religious organizations—including religious schools, charities, and a catchall category of potentially numerous other religiously-oriented organizations—are totally free to decide what their religion requires with respect to employment criteria and standards that implicate sexual orientation and gender identity.

b. Protections for individual employees.

FFA provides powerful workplace protections for religious employees. By clarifying that the terms “religion” and “religious” do not require that a religious belief, observance, or practice be “compelled by, or central to, a system of religion,” Title VII’s protection against religious discrimination would be further insulated against employers who argue that excluding or disadvantaging an employee based on an allegedly voluntary or non-essential aspect of his or her religion does not constitute actionable discrimination. Under FFA, it clearly does.

More importantly, FFA incorporates the Workplace Religious Freedom Act (“WRFA”), which has languished in several Congresses. One of the greatest practical impediments to the exercise of religion is the inability of employees—especially those in the middle and lower ranks of employment positions—to get

reasonable consistency its religious standard cited as the reason for the adverse employment action . . .”). *See also* H.R. 5331, 116th Cong. § 4(b)(2)(B)(v) (2019) (exempting from SOGI employment discrimination claims “(v) any association exclusively composed of employers exempt under sections (2)(B)(i)–(iv).”).

⁹⁰ Like these two statutes, the FFA would be based both on section 5 of the Fourteenth Amendment—which allows Congress to enforce constitutional rights—and on Congress’s spending power, which in some circumstances allows Congress to condition state funding on the states’ compliance with federal policy. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (scope of Congress’ spending clause authority); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (scope of Congress’ section 5 authority). *See also* *Tex. Educ. Agency v. U.S. Dep’t of Educ.*, 908 F.3d 127 (5th Cir. 2018) (affirming the maintenance of state financial support clause of the Individuals with Disabilities Education Act did not exceed the scope of Congress’ spending power); *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004) (affirming the vote dilution provision of the Voting Rights Act as a constitutional exercise of Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments).

time off to attend worship services. Those who worship on days other than Sunday are especially hard hit, but increasingly Sunday worshippers are facing the same obstacles. This affects potentially millions of workers who would like to worship regularly with their faith communities but simply cannot due to employers who refuse to accommodate them. Some employers also refuse to accommodate the wearing of religious clothing or symbols, such as head coverings worn by many Sikhs and Muslims or Christian crosses.

Title VII currently requires employers to “reasonably accommodate” an “employee’s religious observance or practice” provided that doing so does not constitute an “undue hardship on the conduct of the employer’s business.” In *TWA v. Hardison*, the United States Supreme Court held that to require an employer “to bear more than a *de minimis* cost” in order to accommodate an employee’s religious exercise (a religious proscription against laboring on the Sabbath) would be “an undue hardship.”⁹¹ Since *Hardison*, courts have held that an employer’s mere showing of a *de minimis* cost to accommodate an employee’s religious exercise constitutes an “undue burden,” which as a practical matter has all but absolved employers of the Title VII duty to accommodate their employee’s religious needs.

By incorporating WRFA, FFA would reverse the effects of *Hardison*. After FFA, the relevant part of Title VII (42 U.S.C. § 2000e) would define as a protected employee or prospective employee someone “who, with or without reasonable accommodation, is qualified to perform the essential functions of the employment position that such individual holds or desires.”⁹² Further, the term “perform the essential functions” only “includes carrying out the core requirements of an employment position,” and excludes less important practices that would infringe the employee’s religion.⁹³ Additionally, the FFA changes the definition of “undue hardship” to require the employer to show not just a “*de minimis* cost” but a “significant difficulty or expense.”⁹⁴ In determining what constitutes a “significant difficulty or expense,” courts must consider factors such as the “identifiable cost of the accommodation” under relevant circumstances, the relative size of the employer (Walmart versus the local bakery), practicalities related to employers with multiple facilities, and whether granting the accommodation would “obstruct the employer from” serving its customers fully and equally.⁹⁵ At the same time, FFA does not

⁹¹ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

⁹² H.R. 5331, 116th Cong. § 4(a)(4)(j)(2)(A) (2019).

⁹³ H.R. 5331, 116th Cong. § 4(a)(4)(j)(2)(B) (2019):

[T]he term ‘perform the essential functions’ includes carrying out the core requirements of an employment position and does not include carrying out practices relating to clothing, practices relating to taking time off, or other practices that may have a temporary or tangential impact on the ability to perform job functions, if any of the practices described in this subparagraph restrict the ability to wear religious clothing, to take time off for a holy day, or to participate in a religious observance or practice.

⁹⁴ H.R. 5331, 116th Cong. § 4(a)(4)(j)(3) (2019) (“[T]he term ‘undue hardship’ means an accommodation requiring significant difficulty or expense.”).

⁹⁵ H.R. 5331, 116th Cong. § 4(a)(4)(j)(3)(A) (2019):

For purposes of determining whether an accommodation requires significant difficulty or

require the employer to provide an accommodation that would otherwise be illegal under federal or state law, or create a hostile work environment.⁹⁶

The practical effect of this one change will benefit religious people across the nation. Most working at medium and large companies will be able to request and receive an accommodation to worship on their holy days. And few employers will have adequate reason to deny their religious employees the right to wear religiously significant clothing. FFA also provides powerful arguments for employees seeking accommodations to avoid performing work duties that violate their religion. A religious employee who works at a printing shop and whose religion condemns pornography as degrading to women would have strong arguments for a religious accommodation to avoid having to print pornographic images. The conservative religious employee at a large bakery could more readily seek to be excused from baking a cake for a marriage that is contrary to her religion, provided other employees can fully and equally serve the customer. A doctor or nurse working at a hospital would have much stronger arguments against having to participate in medical procedures that violate their religious beliefs, again provided that other medical personnel can fully serve the patient.

Drawing from a similar provision included in the 2015 Utah statute, FFA also protects employee speech from censorship based on viewpoint. In many jurisdictions, this will serve as an important protection for religious employees with dissenting views on marriage, family, gender, and sexuality.

This provision protects speech inside and outside the workplace, although in somewhat different ways. In the workplace, absent a showing that “the expression is in direct and substantial conflict with the essential business-related interests of the employer,” an employer could not favor employee speech expressing one viewpoint on religious, political, or moral issues over another viewpoint as long as the manner of the expression is appropriate for a workplace.⁹⁷ If an employer allows the civil

expense, factors to be considered in making the determination shall include—

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another;

(ii) the overall financial resources and size of the employer involved, relative to the number of its employees;

(iii) for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities; and

(iv) whether the accommodation will obstruct the employer from providing its customers or clients the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations offered.

⁹⁶ H.R. 5331, 116th Cong. § 4(a)(4)(j)(3)(B) (2019) (“An employer shall not be required to provide an accommodation that will result in the violation of Federal or State law nor result in liability for a hostile work environment.”).

⁹⁷ H.R. 5331, 116th Cong. § 4(d)(3)(c)(1) (2019):

An employee may express the employee’s religious, political, or moral beliefs in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs allowed by the employer in the workplace, unless the expression is in direct and substantial conflict with the essential business-related interests of the employer.

expression of ideas and beliefs that the LGBTQ community tends to support, then it must also allow the civil expression of contrary views, and vice versa. In more liberal jurisdictions, this means that religiously conservative employees can express their views about traditional marriage without fear of termination. In more conservative jurisdictions, it means that liberal employees can express the opposite views without retaliation. Employers who do not want such debates in their workplaces can simply bar *all* discussions of particular religious, political, or moral topics; but they cannot bar one viewpoint.

Outside the workplace, this provision focuses on protecting lawful employee expression and expressive activity, such as political advocacy, regarding marriage and the proper moral context of sexual relations.⁹⁸ Employees could not be terminated for their expression or advocacy on these topics unless “it directly and materially impedes the employee’s performance of an essential job function.”⁹⁹ The exception is much more difficult for an employer to establish than the one for workplace speech; for ordinary employees, it will most often be impossible for employers to establish. The scope of the protection is narrower, however. An employer would retain the right it now has to terminate an employee for political and other expressions unrelated to marriage and sexuality that it finds offensive.

Lastly, the protection for employee speech does not apply to religious organizations, which have unique interests in controlling employee speech on religious and moral topics.¹⁰⁰

c. Protections for commercial employers.

The freedom of religious owners of commercial businesses to employ persons of their choice will turn on the structure of Title VII and protections afforded by RFRA. Title VII’s existing prohibition on discrimination does not apply to businesses with fewer than fifteen employees. Many small and family businesses fall under this threshold and thus have full freedom to decide whether to hire based

⁹⁸ H.R. 5331, 116th Cong. § 4(d)(3)(c)(2) (2019):

An employer may not discharge, demote, terminate, or refuse to hire any person, or retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified for employment, for lawful expression or expressive activity outside of the workplace regarding the person’s beliefs that—

- (A) Marriage is or should be recognized as a union of one man and one woman, or one woman and one woman, or one man and one man; or
- (B) Sexual activity should or should not be reserved for spouses within a marriage.

⁹⁹ H.R. 5331, 116th Cong. § 4(d)(3)(c)(2) (2019):

The employee’s expression is not protected under this section (c)(2) if it directly and materially impedes the employee’s performance of an essential job function.

¹⁰⁰ H.R. 5331, 116th Cong. § 4(d)(3)(c)(3) (2019):

Subsections (1) and (2) shall not apply to a non-profit organization that operates to express or advocate particular viewpoints, or to an employer that is a religious corporation, association, educational institution, or society covered by section 2000e(o)(4) of this subchapter.

on SOGI, religion, and other categories. Moreover, even in larger businesses there is no prohibition on hiring only one's family members and close friends, many of whom would naturally share the employer's values. And to the extent those structural safeguards are insufficient, religious business owners would rely on RFRA and the First Amendment as their primary defense against applications of FFA that might create a religious hardship. By contrast, the Equality Act would revoke RFRA, leaving business owners to rely solely on uncertain First Amendment defenses.

5. *Housing*

FFA adds SOGI to Title VIII's prohibition on discrimination in the rental or sale of housing based on race, color, religion, sex, familial status, or national origin. FFA does not alter Title VIII's existing "Mrs. Murphy" exemption for "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."¹⁰¹ Thus, if a religious owner lives in one unit of a four-unit apartment complex, then even after passage of the FFA, federal law will permit the owner to have religious or other criteria for selecting renters.

FFA also modestly amends Title VIII's existing allowance for religious organizations that own noncommercial housing, clarifying that they can limit the sale, rental or occupancy of such housing to those who in fact adhere to their faith.¹⁰² FFA also clarifies that the term "operates" "includes the rental or occupancy of dwellings through a lease or contract with the dwelling's actual owner or primary operator."¹⁰³ Those who supply noncommercial housing to religious organizations would also enjoy a religious allowance. Religious schools, for example, can have contracts with private landlords to supply school-approved student housing only to those students who adhere to the school's religious beliefs and standards.

To the extent religious organizations, commercial entities owned by religious individuals, or individuals themselves require additional protections, they must look to RFRA for relief in cases of religious hardship.

¹⁰¹ 42 U.S.C. § 3603(b)(2) (2018).

¹⁰² H.R. 5331, 116th Cong. § 5(a)(4):

Section 807 of the Fair Housing Act (42 U.S.C. 3607) is amended by inserting "or to persons who adhere to its religious beliefs, observances, tenets, or practices" immediately after the phrase "of the same religion" and "or adherence to such beliefs, observances, tenets, or practices" immediately 2 before "is restricted."

¹⁰³ H.R. 5331, 116th Cong. § 5(c)(r) (2019).

6. Public Accommodations

FFA would add SOGI and sex to Title II, which protects against discrimination in places of public accommodation.

a. FFA expands the number of locations covered as public accommodations

Title II is narrow. It protects against discrimination based on race, color, and religion in a small handful of public accommodations, such as hotels, restaurants, and places of entertainment. FFA expands the types of covered establishments to include places of exercise, recreation, or amusement; financial services; medical services and mental health care; transportation services; funeral services; all stores and online retailers for purposes of race, color, and national origin; and stores and online retailers with fifteen or more employees for other protected categories. If passed, FFA would constitute the largest expansion of federal protections against discrimination in public accommodations since the passage of the 1964 Civil Rights Act.

b. Protections for religious organizations and interests.

Consistent with its pluralism approach, FFA provides allowances for key areas of religious sensitivity. Whereas the Equality Act threatens to make even house of worship places of public accommodation subject to Title II—an outcome that will trigger serious First Amendment challenges—FFA, by contrast, provides specific protections for an array of religiously sensitive properties, exempting from Title II:

- “any building or collection of buildings that is used primarily as a denominational headquarters, church administrative office, or church conference center”¹⁰⁴;
- “a place of worship, such as a church, synagogue, mosque, chapel, and its appurtenant properties used primarily for religious purposes”¹⁰⁵;
- “a religious educational institution and its appurtenant properties used primarily for religious purposes”¹⁰⁶;
- “in connection with a religious celebration or exercise: a facility that is supervised by a priest, pastor, rabbi, imam, or minister of any faith, or religious certifying body, and that is principally engaged in providing food and beverages in compliance with religious dietary requirements”¹⁰⁷; or
- “any online operations or activities of an organization exempt under this section”¹⁰⁸

¹⁰⁴ H.R. 5331, 116th Cong. § 2(11)(A)(i) (2019).

¹⁰⁵ H.R. 5331, 116th Cong. § 2(11)(A)(ii) (2019).

¹⁰⁶ H.R. 5331, 116th Cong. § 2(11)(A)(iii) (2019).

¹⁰⁷ H.R. 5331, 116th Cong. § 2(11)(A)(iv) (2019).

¹⁰⁸ H.R. 5331, 116th Cong. § 2(11)(A)(v) (2019).

FFA places these core religious properties—where believers gather, organize, decide, commune, and live out their faiths—beyond the reach of Title II, except in cases of discrimination based on “race, color, or national origin.” Moreover, FFA extends this protection for highly religious properties to *state* law. Using the same jurisdictional basis as the Civil Rights Act itself and RLUIPA, FFA would preclude state laws from taking the dangerous turn the Equality Act contemplates by making core religious properties into places of public accommodations subject to government regulation. As with the similar preclusion for religious employers, this is an affirmative enhancement of religious liberty against the threat of aggressive state laws.

Many religious organizations have other properties of religious significance where light commercial activities may occur. For example, a church that welcomes the public (as most do) may have a coffee shop attached to it where worshippers and others can congregate and socialize following religious services. Some may argue that such spaces are “commercial” and thus should be subject to nondiscrimination rules merely because they involve money for services. FFA rejects this narrow view and excludes such facilities (except in cases of racial discrimination): “other appurtenant properties or facilities owned or operated by a church, by another house of worship, or by a religious educational institution,”¹⁰⁹ or “a property owned or operated primarily for noncommercial purposes by a nonprofit religious corporation that holds itself out to the public as substantially religious, has as its stated purpose in its organic documents that it is religious, and is substantially religious in its current operations.”¹¹⁰ But to be exempt, such properties may not be operated “primarily” for commercial purposes and their operations must be “primarily related to the inculcation, promotion, or expression of religion.”¹¹¹ Notably, this exemption applies not only to properties owned and operated by houses of worship, but also those noncommercial properties owned by nonprofit religious corporations that are openly and operationally religious.

FFA contains an array of other limitations that directly or indirectly benefit religious interests. While Title II would apply to “any place of exercise, recreation, or amusement,” FFA makes an allowance for “religious camps or religious retreat centers” given their role in religious formation.¹¹² Likewise, while “any provider of funeral services or burial plots” would be covered—in recognition of religious sensitivities associated with religious funeral services—FFA makes an allowance for “those that primarily limit their [funeral or burial] services or facilities to those of a particular religion.”¹¹³

Ensuring LGBTQ persons equal access to medical services and mental health care is seldom controversial. The circumstances where religious or conscientious

¹⁰⁹ H.R. 5331, 116th Cong. § 2(11)(B)(i) (2019).

¹¹⁰ H.R. 5331, 116th Cong. § 2(11)(B)(ii) (2019).

¹¹¹ H.R. 5331, 116th Cong. § 2(11)(B) (2019) (“The following shall not be a place of public accommodation, even if used for a commercial purpose, except within the area and during the time that the property or facility is open to the public; operated primarily for a commercial purpose; and not primarily related to the inculcation, promotion, or expression of religion.”).

¹¹² H.R. 5331, 116th Cong. § 2(4) (2019).

¹¹³ H.R. 5331, 116th Cong. § 2(8) (2019).

objections may arise are rare. FFA ensures LGBTQ persons have equal access to these services and then addresses targeted points of potential religious and ethical controversy.

Surgical and other procedures related to gender transitioning can raise sensitive issues. Transitioning procedures are increasingly provided by specialists and clinics dedicated to that end, so the frequency of conflicts in this area should be small. Nevertheless, FFA shields medical service providers from having to perform such procedures by expressly allowing them to limit the services they provide through SOGI-neutral criteria, even if the limitation disparately impacts LGBTQ persons.¹¹⁴

Thus, a Catholic or Adventist hospital with theological objections to providing gender transitioning services could limit, for example, hysterectomies to various instances of disease affecting the uterus without reference to gender identity. Removal of a healthy uterus would simply not be a service provided by the facility to anyone, regardless of reasons, whether or not the patient is transgender, *i.e.*, “without regard to protected class status.”¹¹⁵ Likewise, breast augmentation or reconstruction surgeries could be limited to therapeutic purposes, such as reconstruction post-mastectomy in cases of breast cancer or in the case of a traumatic wound to the breast, again whether or not the patient is transgender. But if the medical facility provides purely cosmetic breast augmentations or reductions, then it cannot deny such surgeries for a transgender person. Likewise, if a transgender woman presented with a wound to the breast, the facility would have to provide medical care to the patient on the same terms as it would to a biological woman, even if that meant reconstructing a breast implant.

This approach is consistent with basic assumptions about public accommodations. A public accommodations law prohibiting sex discrimination does not obligate a woman’s dress shop to offer men’s suits. A man has a legal right to enter and purchase anything the shop has to offer, but he has no right to demand that it provide male-oriented products. A customer can buy whatever the shop is selling regardless of the customer’s sex. Under FFA, the same concept applies to medical facilities.

With respect to a “provider of mental health care,” FFA provides an allowance in the setting of marriage counseling, with a referral requirement, unless the client is “in imminent danger of harming self or others.”¹¹⁶

FFA further ensures that a rule intended to regulate public accommodations does not invade the sensitive space of pastoral counseling. Hence FFA expressly

¹¹⁴ H.R. 5331, 116th Cong. § 2(6)(A) (2019) (“It shall not constitute a violation of this subchapter to provide a service, treatment, therapy, procedure, or drug on the same medical terms or criteria applicable to individuals needing that service, treatment, therapy, procedure, or drug, without regard to protected class status.”).

¹¹⁵ *Id.*

¹¹⁶ H.R. 5331, 116th Cong. § 2(6)(B) (2019) (defining “any provider of mental health care” as a public accommodation, “except that this section shall not apply when the primary objective is to assist a person to enter or sustain a marriage, so long as the provider coordinates a referral of the client to another qualified mental health care provider who will provide the needed service and the client is not in imminent danger of harming self or others”).

provides that it does “apply to a priest, pastor, rabbi, imam, or minister of any faith while acting substantially in a ministerial capacity.”¹¹⁷

FFA also preserves the right of a medical or mental health care provider to refer patients based on traditional criteria, such as “when necessary for a patient’s best interests and welfare, including professional expertise.”¹¹⁸

FFA subtly addresses the battle over wedding vendors with religious or conscientious objections to facilitating same-sex marriages without ever mentioning that white-hot controversy. The drafters of FFA had a choice whether to ignore the issue, expressly address it, or use structural mechanisms to address it without calling it out. They chose the latter. First, while FFA’s definition of public accommodations is dramatically broader than under current Title II, it stops short of reaching every commercial activity. The SOGI nondiscrimination rule applies to stores, shopping malls, and online retailers but not to businesses without a storefront or an online retail presence. Many wedding vendors—cake bakers, florists, wedding planners—operate out of their homes as sole proprietors or family businesses. As is the case now under existing Title II, FFA would not define them as a public accommodation. Second, for those with a storefront or online retail presence, FFA covers them only when they reach fifteen employees (no such threshold exists for racial discrimination, however). Thus, except in the case of race, small wedding vendors remain free under federal law—as they now are—to determine the extent to which they will facilitate same-sex unions. It is likely that the vast majority of wedding vendors, and the overwhelming majority of those who have religious objections to same-sex marriage, have fewer than fifteen employees.

As with other provisions, FFA’s preservation of RFRA provides powerful backstop protection in situations of religious hardship that are not expressly covered by a religious allowance. Overly aggressive efforts to enforce FFA’s public accommodations provisions against religious organizations or religious individuals and their private entities will trigger exacting scrutiny under RFRA.

Finally, FFA takes no side on abortion. Some may have concerns that adding sex to Title II might inadvertently result in expanded abortion rights. FFA is expressly abortion neutral: “Nothing in this subchapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.”¹¹⁹

7. *Religious Education*

Religious education is an area of exceptional sensitivity for the faith community. During a recent oral argument before the U.S. Supreme Court, Justice Breyer captured this concern perfectly. “[T]here is nothing more religious except

¹¹⁷ H.R. 5331, 116th Cong. § 2(6)(C) (2019).

¹¹⁸ H.R. 5331, 116th Cong. § 2(6)(D) (2019) (“A provider of medical services covered by [the nondiscrimination rule] or a provider of mental health care covered by [the nondiscrimination rule] may make evidence-based medical determinations and may refer patients when necessary for a patient’s best interests and welfare, including professional expertise.”).

¹¹⁹ H.R. 5331, 116th Cong. § 2(13) (2019).

perhaps for the service in the church itself than religious education. That’s how we create a future for our religion.”¹²⁰ Conflicts can arise when LGBTQ students or faculty claim that a religious school has discriminated by implementing its religious standards. The FFA drafting team agreed that federal law should respect religious schools and colleges as places where faith communities can form their own identities and live out their own standards. To achieve that end, the FFA Act protects religious education through a variety of means. Indeed, all the provisions already reviewed have protections that directly benefit religious education. This section specifically reviews protections for religious education.

As seen, the backbone of the Act consists of amendments to the Civil Rights Act prohibiting discrimination on the basis of sex and SOGI. These amendments expand existing protections in public accommodations, federal financial assistance, employment, and housing. FFA exempts religious education in each of these areas. Using exemptions to protect religious education is consistent with how the Civil Rights Act treats religion today. Congress included exemptions for religion in employment and housing.¹²¹ These exemptions have been an established part of federal law for fifty years.¹²²

Besides statutory exemptions, the FFA also protects religious education through independent provisions that are written to address known threats to the autonomy of religious educational institutions. In what follows, we will briefly describe the exemptions and independent protections for religious education.

a. Public Accommodations

As previously noted, Section 2 of the FFA adds sex, sexual orientation, and gender identity as classes that may not be discriminated against in public accommodations.¹²³ And the Act also dramatically expands the number of places covered by this prohibition to include places of amusement, financial service providers, healthcare providers, transportation services, funeral homes and cemeteries, and stores and shopping centers.¹²⁴ Expanding the range of places where federal law forbids discrimination increases the opportunities for conflicts with religious organizations.

FFA protects religious education from that risk through a tailored exemption. The statute provides that Title II of the Civil Rights Act, which addresses public accommodations, “shall not apply to ... a religious educational institution and its

¹²⁰ Transcript of Oral Argument at 62:12-15, *Espinoza v. Montana Dep’t of Revenue*, No. 18-1195 (Jan. 22, 2020).

¹²¹ See 42 U.S.C. §§ 2000e-1(a), 3607(a) (2018).

¹²² Title II of the Civil Rights Act, which proscribes discrimination in public accommodations, contains no religious exemption since the law only covers restaurants, hotels, and places of entertainment like theaters—none of which usually involves the exercise of religion. See 42 U.S.C. § 2000a-1(e) (2018). Title VI omits a religious exemption for federal financial assistance because current law prohibits discrimination only for race, color, and national origin, and Congress has rightly declined to protect religious practices founded in racism. See 42 U.S.C. § 2000d (2018).

¹²³ See *supra* Part II.A.6.

¹²⁴ See *supra* Part II.A.6.a.

appurtenant properties used primarily for religious purposes.”¹²⁵ The FFA thus exempts religious educational institutions from the prohibition on discrimination in public accommodations.

FFA does not define the term “religious educational institution” in the context of public accommodations. But its meaning follows Section 7 of the Act, which defines “religious educational institution” as “any organization covered by section 703(e)(2).”¹²⁶ Section 703(e)(2) is a provision of Title VII, which allows a religious educational institution to hire only “employees of a particular religion” if the institution is owned or controlled by “a particular religion” or “the curriculum . . . is directed toward the propagation of a particular religion.”¹²⁷ This exemption covers any “school, college, university, or other educational institution or institution of learning.”¹²⁸ The FFA drafters chose the phrase “religious educational institution” to denote schools, colleges, and universities that are entitled to this well-established exemption under Title VII. Because of the FFA Act’s express exemption, a religious educational institution can decide who accesses its properties and facilities.

The Act also exempts a religious educational institution’s “appurtenant properties used primarily for religious purposes.”¹²⁹ Sometimes a school or college owns property adjacent to its institutional footprint. In those instances, an institution’s adjacent property is also exempt whenever it is “used primarily for religious purposes.”¹³⁰ Not covered by the exemption would be a school-owned parking lot that is not on school grounds and that is primarily operated for commercial purposes.

A separate provision exempts the property of a religious educational institution “even if used for a commercial purpose, except within the area and during the time that the property or facility is open to the public; operated primarily for a commercial purpose; and not primarily related to the inculcation, promotion, or expression of religion.”¹³¹ This provision allows a religious school or college to claim an exemption for off-campus property used for both religious and commercial purposes. When the use is primarily religious, the exemption applies; when commercial, the nondiscrimination rule applies.

b. Federal Financial Assistance

As noted above, Section 3 of the FFA Act adds sex, sexual orientation, and gender identity as classes protected from discrimination by an entity receiving federal financial assistance.¹³² This change to Title VI of the Civil Rights Act

¹²⁵ H.R. 5331, 116th Cong. § 2(11)(A)(iii) (2019).

¹²⁶ H.R. 5331, 116th Cong. § 7(1107)(g)(8) (2019).

¹²⁷ 42 U.S.C. § 2000e–2(e)(2) (2018).

¹²⁸ *Id.*; see also *Killinger v. Stamford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (using the phrase “religious educational institution” to mean schools, colleges, and universities that are eligible for this Title VII exemption).

¹²⁹ H.R. 5331, 116th Cong. § 2(11)(A)(iii) (2019).

¹³⁰ *Id.*

¹³¹ H.R. 5331, 116th Cong. § 2(11)(B) (2019).

¹³² H.R. 5331, 116th Cong. § 3(1) (2019).

would mark a major shift in federal law. Until now, a federal aid recipient is barred only from discriminating because of race, color, and national origin.¹³³

The statutory practice of “pinpointing” means that FFA offers security from the complete loss of federal funding.¹³⁴ Thus, if a religious educational institution were found liable for discriminating as a federal aid recipient on the basis of SOGI, any penalty—including the loss of federal funding—would be “limited to any specific program or activity, or part thereof, that receives Federal financial assistance.”¹³⁵ Limiting the loss of federal support to the program that discriminated will be a practical shield against devastating losses for a religious school or college. Neither a hostile administration nor determined activists could deprive a religious school of all federal funding by showing that the school discriminated.

Religious educational institutions commonly have codes of conduct. Often consisting of religious standards, these codes have been attacked as discriminatory. The FFA safeguards a religious school’s right to maintain its religious standards. In particular, the statute provides that “[a] religious educational institution or daycare center may enforce with reasonable consistency written religious standards in its admission criteria, educational programs, student retention policies, or residential life policy.”¹³⁶ Each of these areas are prone to conflicts between a religious school and those who challenge religious standards that exclude or remove students for noncompliance. Yet rather than apply a balancing test, the Act respects a religious school’s authority to set and carry out religious standards in these areas as long as the standards are “written” and “enforce[d] with reasonable consistency.”¹³⁷ The latter criterion precludes a religious school from implementing its standards selectively.

Two conditions apply. A religious educational institution cannot enforce standards “based on race, color, or national origin.”¹³⁸ Racist standards of admission, education, student retention, and residential life would be intolerable, no matter whether framed in religious terms. Also, a religious educational institution cannot enforce standards that would “exclude or remove a student solely because of a prohibited classification under section 601 with respect to that student’s parent or legal guardian.”¹³⁹ This clause calls for a bit of unpacking. The classifications under Section 601 include race, color, national origin, sex, sexual orientation, and gender identity. A religious school cannot enforce a standard, then, that will

¹³³ See 42 U.S.C. § 2000d (2018).

¹³⁴ See *infra* Part II.A.9.a.

¹³⁵ H.R. 5331, 116th Cong. § 3(607) (2019). This principle of pinpointing applies to a “religious corporation, association, educational institution, or society.” *Id.* The FFA Act defines this term to include “a nonprofit . . . educational institution . . . that is . . . owned, supported, controlled, or managed by a particular religion or by a particular church . . .” H.R. 5331, 116th Cong. § 3(614)(3)(A) (2019). It also includes “a nonprofit . . . educational institution . . . that holds itself out to the public as substantially religious, has as its stated purpose in its organic documents that it is religious, and is substantially religious in its current operations.” *Id.* § 3(614)(3)(B). These same attributes also define a “religious educational institution” in the context of federal financial assistance. See *id.* § 3(614)(4).

¹³⁶ H.R. 5331, 116th Cong. § 3(608)(c) (2019).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

“exclude or remove a student solely” because the student’s parent or legal guardian belongs to one of these protected classes.

With these caveats, the FFA allows religious schools to keep their religious standards.

Religious educational institutions also get protection when they accept federal financial assistance to operate programs offering marriage and family education. Some recipients worry that they will face liability if their marriage and family education programs affirm the sanctity of marriage between a man and a woman, or in some other way differentiate between heterosexual and same-sex relationships. The FFA Act responds to that concern by guaranteeing that a religious school that accepts federal aid for such programs will be “deemed in compliance” with Title VI regardless of the educational program’s “content.”¹⁴⁰

There are two conditions. The religious school receiving federal financial assistance cannot “exclude beneficiaries on the basis of sexual orientation or gender identity.”¹⁴¹ A school can thus control its curriculum, but it must serve all those whom Congress intended to benefit by awarding financial assistance. In addition, the religious school must provide a meaningful referral when “a beneficiary or prospective beneficiary objects to the religious character of the [religious school].”¹⁴²

Adding sex as a protected classification to Title VI might suggest that claims of sex discrimination can be brought against religious schools and colleges without the robust religious exemption long established by Title IX of the Education Amendments of 1972.¹⁴³ The Act eliminates that concern. It declares that “[n]othing contained in this title [VI] shall be construed to alter or affect title IX.”¹⁴⁴ This rule of construction instructs a court or agency not to interpret FFA’s amendments to Title VI as an indirect alteration of Title IX. FFA adds that any sex discrimination claim against an educational institution that accepts federal financial assistance “shall be governed by title IX and not this title.”¹⁴⁵ So the FFA Act maintains Title IX unchanged and makes Title IX the sole legal basis for bringing a claim of sex discrimination against a federally funded school or college.

c. Employment

As already explained, Section 4 of the FFA Act outlaws employment discrimination on the basis of sex, sexual orientation, and gender identity, in addition to the ban in current law on employment discrimination based on race, color, national origin, religion, and sex.¹⁴⁶ Adding these new protected classes will raise the risk of litigation for religious schools and colleges whose religious standards preclude them from hiring LGBTQ faculty or staff.

¹⁴⁰ H.R. 5331, 116th Cong. § 3(608)(d) (2019).

¹⁴¹ *Id.*

¹⁴² H.R. 5331, 116th Cong. § 3(608)(d)(1) (2019).

¹⁴³ 20 U.S.C. § 1681 (2018).

¹⁴⁴ H.R. 5331, 116th Cong. § 3(613) (2019).

¹⁴⁵ *Id.*

¹⁴⁶ *See supra* Part II.A.4.

The Act protects religious education through a new exemption from “claims of employment discrimination because of sexual orientation or gender identity.”¹⁴⁷ This is a categorical exemption, not a balancing test. An organization entitled to this exemption is entirely free from claims of employment discrimination based on sexual orientation or gender identity. Among a select list of religious organizations, the exemption covers religious education, specifically any “religious educational institution that is eligible for exemption under section 703(e)(2) of this subchapter.”¹⁴⁸ Section 703(e)(2) is the exemption allowing a school, college, or university to hire only “employees of a particular religion” if the institution is owned or controlled by “a particular religion” or “the curriculum ... is directed toward the propagation of a particular religion.”¹⁴⁹ Any of these institutions that has the necessary connection with religion qualifies for FFA’s categorical exemption from employment discrimination claims based on sexual orientation or gender identity.

Although it reaches broadly, the Act’s exemption may leave some religious educational institutions unprotected by the categorical exemption. Either an institution will not have a demonstrable relationship with a particular religion or denomination, or its curriculum will not be “directed at the propagation of a particular religion.”¹⁵⁰ When that happens, the FFA has preserved all existing “rights and defenses” now available under Title VII.¹⁵¹ Religious schools and colleges have robust protection under these well-established exemptions even when the FFA Act’s categorical exemption does not apply.

d. Housing

As observed above, Section 5 of the FFA Act adds sexual orientation and gender identity as classes protected from housing discrimination.¹⁵² This protection from discrimination is important for LGBTQ Americans. But amending the Fair Housing Act will expose religious organizations with standards grounded in traditional morality to attention-grabbing claims of unlawful discrimination.

Federal law currently recognizes an exemption for religious organizations that own or control properties used as dwelling places. A religious organization or any organization “operated, supervised or controlled by or in conjunction with a religious organization” is permitted to “limit[] the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons

¹⁴⁷ H.R. 5331, 116th Cong. § 4(b)(2)(B) (2019).

¹⁴⁸ H.R. 5331, 116th Cong. § 4(b)(2)(B)(iii) (2019).

¹⁴⁹ 42 U.S.C. § 2000e–2(e)(2) (2018).

¹⁵⁰ *Id.*

¹⁵¹ H.R. 5331, 116th Cong. § 4(b)(2)(F) (2019). Title VII currently has two separate exemptions that cover religious education. One entitles a “religious ... educational institution” to employ “individuals of a particular religion.” 42 U.S.C. § 2000e–(1)(a) (2018). The other exemption, referenced in the FFA Act, allows a religious educational institution to confine its hiring to “employees of a particular religion” if the institution is owned or controlled by “a particular religion” or “the curriculum ... is directed toward the propagation of a particular religion.” *Id.* § 2000e–2(e)(2) (1964).

¹⁵² See *supra* Part II.A.5.

of the same religion.”¹⁵³ A religious organization and its affiliates may also “giv[e] preference to such persons.”¹⁵⁴ An eligible religious educational institution can therefore decide who can buy or rent its property, so long as the property is owned or operated for noncommercial purposes. Campus housing is an important example. A religious college may limit student housing to members of the same religion, or simply prefer those members. The only condition is that the exemption does not apply if “membership in such religion is restricted on account of race, color, or national origin.”¹⁵⁵

The FFA expands the scope of this exemption by including “persons who adhere to [the owner’s] religious beliefs, observances, tenets, or practices.”¹⁵⁶ Also, the Act adds a new definition of the term “operates” to include “the rental or occupancy of dwellings through a lease or contract with the dwelling’s actual owner or primary operator.”¹⁵⁷ These amendments allow a religious educational institution (or other religious organization) to extend the reach of its control over housing properties in two ways. A religious school or college is free to limit housing to members of its own religion *and* to those who “adhere” to the owner’s religious beliefs and practices.¹⁵⁸ This modification of current law allows a religious owner to maintain religion-based living standards throughout its properties. The other change permits a religious school or college to maintain such standards in properties it does not own by entering a lease or contract with the property owner who agrees to implement those standards as if they were its own. Through these means, the FFA Act strengthens the authority of a religious school or college to provide student housing that is consistent with the institution’s religious standards.

e. Independent Protections for Religious Education

Much of the FFA Act consists of adding sex, sexual orientation, and gender identity as protected classifications to the Civil Rights Act, along with corresponding exemptions intended to protect religious people and institutions from anticipated conflicts between LGBTQ rights and traditional religious beliefs. Section 7 departs from that pattern by establishing affirmative rights for religion, especially for religious educational institutions. As previously noted, protection of religious organization’s tax-exempt status extends to religious educational institutions as well.¹⁵⁹

f. No retaliation for the exercise of federal rights

State and local lawmakers have sometimes sought to penalize religious entities for exercising their federal rights. The FFA Act prohibits any level of

¹⁵³ 42 U.S.C. § 3607(a) (2018).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ H.R. 5331, 116th Cong. § 5(a)(4) (2019).

¹⁵⁷ H.R. 5331, 116th Cong. § 5(c) (2019).

¹⁵⁸ H.R. 5331, 116th Cong. § 5(a)(4) (2019).

¹⁵⁹ *See supra* Part II.A.2.

government—federal, state, or local—from “tak[ing] any adverse action” because of “the existence or invocation of any exemption, defense, or remedy” that the Act provides,¹⁶⁰ with the term “adverse action” defined broadly.¹⁶¹ But it is not an adverse action for a state to withhold contracts, grants, loans, or other financial support “with exclusively State revenues because of noncompliance with State standards that, in purpose and effect, are neutral toward religion and generally applicable.”¹⁶² States thus have leeway to use their own tax revenues to enforce state policies—but only when those revenues are not commingled with federal revenues.

In short, the Act precludes state and local governments from penalizing an entity—including a religious educational institution—either because the Act contains statutory protections for the entity or because the entity exercises the rights that the Act provides.

g. National solutions for religious properties and religious employment

State and local laws offer diverse and often contradictory solutions to the conflicts between LGBTQ rights and religious freedom. Despite these interstate differences, the FFA drafting team agreed that federal law ought to establish national standards for the protection of religious properties and religious employers. Under the Act, no government may “take any adverse action that, as applied, is inconsistent with the exemptions under Section 201(b)(11).”¹⁶³ Section 201(b)(11) is the religious properties exemption from claims of discrimination in public accommodation. Similarly, the FFA Act prohibits any government from taking “an adverse action that, as applied, *abridges* the exemptions provided under Section 702(a)(2)(B).”¹⁶⁴ The term “abridges” means to “diminish, burden, hinder, or obstruct.”¹⁶⁵ Section 702(a)(2)(B) is the categorical exemption for key religious employers—including religious educational institutions—from claims of employment discrimination based on sexual orientation or gender identity. Together, these provisions assure that the balances struck by the Act in favor of protecting religious properties and religious employment will prevail against contrary official action, whether undertaken by federal, state, or local governments.

Preempting state and local law on the basis of federal statutory exemptions gives religious educational institutions an extraordinary degree of protection. The usual rule of construction under the Civil Rights Act is not to invalidate state or

¹⁶⁰ H.R. 5331, 116th Cong. § 7(1107)(a)(1)(a) (2019).

¹⁶¹ H.R. 5331, 116th Cong. § 7(1107)(g)(4) (2019) (defining “adverse action” to include any official action that “suspends, revokes, or withholds licenses, permits, certifications, professional credentials, guarantees, contracts, or cooperative agreements; denies or revokes scholarships, grants, loans, a tax exemption or tax-exempt status; denies access to government-sponsored facilities, activities, or programs; or that imposes any other penalty or denies an otherwise available benefit”).

¹⁶² *Id.*

¹⁶³ H.R. 5331, 116th Cong. § 7(1107)(b)(2)(A) (2019).

¹⁶⁴ *Id.* (emphasis added).

¹⁶⁵ H.R. 5331, 116th Cong. § 7(1107)(g)(1) (2019).

local law “unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.”¹⁶⁶ A state law that burdens the exercise of a federal exemption is not regarded as inconsistent with federal law. To overcome these usual principles of conflict preemption, Section 7 of the FFA Act contains a rule of construction specifying that that section “shall supersede State or local law as provided for expressly herein.”¹⁶⁷ This rule of express preemption means that Section 1107 preempts state and local law exactly as described; it is not bound by the general rule of conflict preemption under Section 2000h-4.

h. No adverse action for religious mission

State and local political officials have sometimes targeted religious schools and colleges for penalties because of their religious standards. Occasionally, government officials have even sought to punish students or graduates because of an institution’s religious character or practices. The FFA safeguards religious education from these threats. A short but critical provision prohibits any government from “tak[ing] any adverse action against a religious educational institution, its faculty, students, or graduates because of its religious mission.”¹⁶⁸ The term “religious mission” includes “religious affiliation, religious tenets, religious teachings, and religious standards, including policies or decisions related to such affiliation, tenets, teachings, or standards with respect to housing, employment, curriculum, self-governance, or student admission, continuing enrollment, or graduation.”¹⁶⁹ In all these respects, no government may take an “adverse action,” as the FFA Act capaciously defines it. Religious education is thus shielded from a wide range of government-sponsored punitive actions based on an institution’s religious beliefs and standards—even when those beliefs and standards appear to the unsympathetic government decisionmaker as discriminatory.

i. Accreditation

Accreditation poses another serious threat to religious education. Without proper accreditation, a school or college cannot award students credentials recognized by graduate programs or the student’s chosen profession. Denying accreditation is, for this reason, a death knell for a school. Too often, accrediting agencies abuse their power by threatening the denial of accreditation solely because a school will not comply with ideological standards that have little or nothing to do with the educational quality of an educational program. This conflict becomes acute when an accrediting agency tries to force a religious school or college into complying with agency standards that contradict the school’s religious beliefs or practices.

¹⁶⁶ 42 U.S.C. § 2000h-4 (2018).

¹⁶⁷ H.R. 5331, 116th Cong. § 7(1107)(h) (2019).

¹⁶⁸ H.R. 5331, 116th Cong. § 7(1107)(c)(1) (2019).

¹⁶⁹ H.R. 5331, 116th Cong. § 7(1107)(g)(9) (2019).

The FFA Act protects religious educational institutions from losing accreditation because of religious beliefs and practices. Specifically, the Act provides that “[n]o accrediting agency shall take an adverse action against a religious educational institution for noncompliance with an accreditation standard that would require the institution to act inconsistently with its religious mission as related to marriage, family, sexuality, or gender identity, except as these matters pertain to race, color, or national origin.”¹⁷⁰ The term “adverse action” carries the broad meaning we have already described, but “religious mission” is limited to matters involving “marriage, sexuality, or gender identity, except as these matters pertain to race, color, or national origin.”¹⁷¹ Limiting the scope of “religious mission” in these ways still accords religious educational institutions ample protection from hostile accreditors. After all, it is issues of “marriage, sexuality, or gender identity” that most often animate accreditation disputes.¹⁷² And carving out “matters pertain[ing] to race, color, or national origin” prevents the FFA Act from protecting racist institutions, to the extent that they exist.¹⁷³

Guarding religious schools from religiously biased accreditation decisions should not come at the expense of educational quality. For that reason, the Act reserves authority for accrediting agencies to “take action necessary to ensure that the courses or programs of study offered by an institution of higher education are of sufficient quality to achieve the stated objective for which the courses or the programs are offered.”¹⁷⁴ But an accrediting agency does not evade the prohibition on adverse actions because of an institution’s religious mission “merely by showing that the action results from a rule of general applicability.”¹⁷⁵ Applying the same diversity or nondiscrimination norms to all programs does not excuse an accrediting agency from its duty to avoid harming a religious college or university because of its religious mission.

j. Remedies for injuries by the government or accrediting agency

A religious educational institution harmed by a government action that violates Section 1107 has robust remedies. Either “an actual violation” or “a credible threat of such a violation” entitles the injured organization to “a claim or defense” for which it can “obtain appropriate relief against a government or accrediting agency, including attorneys’ fees.”¹⁷⁶ Also, a claimant may remove a case to federal court.¹⁷⁷

An adverse accrediting decision may pose an immediate threat to a religious educational institution, which the slow processes of litigation cannot adequately resolve. The FFA Act addresses that problem through a prescribed administrative

¹⁷⁰ H.R. 5331, 116th Cong. § 7(1107)(c)(2) (2019).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ H.R. 5331, 116th Cong. § 7(1107)(c)(2) (2019).

¹⁷⁵ *Id.*

¹⁷⁶ H.R. 5331, 116th Cong. § 7(1107)(f)(1) (2019).

¹⁷⁷ *See* H.R. 5331, 116th Cong. § 7(1107)(f)(2) (2019).

process. When an accrediting agency renders a decision contrary to the Act a religious educational institution harmed by that decision may “obtain injunctive relief against the responsible accrediting agency.”¹⁷⁸ With a copy of the injunction in hand, the U.S. Department of Education will “deem the affected religious educational institution as accredited for all purposes under Federal law.”

For an accrediting agency, the penalty for knowingly violating the prohibition on an adverse accrediting decision because of institution’s religious mission is severe. The U.S. Department of Education “shall deny recognition for any purpose to an accrediting agency that knowingly violates this subsection.”¹⁷⁹ But an accrediting agency may regain its federal recognition if it “demonstrates that the violation resulted from mistake or inadvertence.”¹⁸⁰

k. Preservation of Tax-Exempt Status

Finally, as explained above, the FFA will protect against the loss of tax-exempt status for religious institutions, and thus religious schools, related to “religious beliefs or practices concerning marriage, family, or sexuality,” with an exception for “practices pertain[ing] to race or criminal sexual offenses punishable under constitutionally valid Federal or State law.”¹⁸¹

8. Nonretaliation

Invoking Congress’s powers under Section 5 of the Fourteenth Amendment, the Commerce Clause, the Spending Clause, and the Necessary and Proper Clause, Section 7 of the FFA Act provides additional protection for religious persons and institutions against retaliatory actions by federal, state and local governments. No government can penalize any individual or institution that invokes FFA’s protections: “No government shall take any adverse action because of . . . the existence or invocation of any exemption, defense, or remedy under this Act.”¹⁸² To guard against creative or surreptitious attacks on religious exercise, the FFA defines “adverse action” very broadly.¹⁸³

¹⁷⁸ H.R. 5331, 116th Cong. § 7(1107)(c)(3) (2019).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ H.R. 5331, 116th Cong. § 8(B)(i) (2019).

¹⁸² H.R. 5331, 116th Cong. § 7(1107)(a)(1)(A) (2019).

¹⁸³ H.R. 5331, 116th Cong. § 7(1107)(g)(4) (2019):

The term “adverse action” includes action that suspends, revokes, or withholds licenses, permits, certifications, professional credentials, guarantees, contracts, or cooperative agreements; denies or revokes scholarships, grants, loans, a tax exemption or tax-exempt status; denies access to government-sponsored facilities, activities, or programs; or that imposes any other penalty or denies an otherwise available benefit. Except for a violation of Section (a)(1) of this Section [*i.e.*, provided it is not retaliatory], adverse action does not include a State’s refusal to subsidize contracts, grants, loans, or cooperative agreements with exclusively State revenues because of noncompliance with State standards that, in purpose and effect, are neutral toward religion and generally applicable.

Section 7 protects from retaliation against adoption and foster care agencies, as explained below, and religious educational institutions as explained above. It also gives express statutory protection to the constitutional bar on religious tests in the area of occupational credentialing and eligibility for public office.¹⁸⁴

These protections are then given real teeth by a statutory cause of action, revocation of state sovereign immunity under the Eleventh Amendment, the right to remove to federal court,¹⁸⁵ and remedies that include attorney’s fees.¹⁸⁶ The cause of action covers not only actual violations of the nonretaliation provision but also “a credible threat of such a violation.”¹⁸⁷

By these means, the FFA works to prevent governments at all levels from punishing religious persons or organizations for invoking its protections for religious freedom.

9. Federal Funding

The notion that with public money comes public values, including nondiscrimination, is a deeply engrained and often repeated as a truism. It makes sense in many instances, of course, but often those making such arguments fail to recognize that securing religious freedom is among the very highest of public values—indeed, it is a fundamental *constitutional* value. They may recite the holding in *Employment Division v. Smith* that the Free Exercise Clause does not require individualized exemptions from religious neutral and generally applicable laws and then conclude that that is the end of it.¹⁸⁸ But it is not. *Smith* further teaches that government certainly can—and sometimes must—provide statutory accommodations for religious exercise. Pluralism and sound public policy account for the fact that recipients of federal aid are often best served through faith-based

Commingled State and Federal revenues shall be deemed Federal revenues. Adverse action does include suspending, revoking, or withholding scholarships, grants, and loans, or access to government-sponsored facilities, activities, or programs to qualified students or graduates of religious educational institutions, notwithstanding that the scholarships, grants, loans, facilities, activities, or programs are funded with State revenues.

¹⁸⁴ H.R. 5331, 116th Cong. § 7(1107)(d)(1) (2019):

No government shall (1) exclude a person from an occupation by depriving a person of professional credentials or imposing a fine or penalty, including through a private right of action, because of the person’s religious beliefs or affiliations, provided that the person otherwise complies with occupational or professional standards that, in purpose and effect, are neutral toward religion and generally applicable; or (2) determine eligibility for public office because of religious beliefs or affiliations.

¹⁸⁵ H.R. 5331, 116th Cong. § 7(1107)(f)(2) (2019).

¹⁸⁶ H.R. 5331, 116th Cong. § 7(1107)(f)(1) (2019):

A person or organization may assert an actual violation of this section, or a credible threat of such a violation, as a claim or defense in a judicial, administrative, or arbitration proceeding and obtain appropriate relief against a government or accrediting agency, including attorneys’ fees. A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from a claim under this section.

¹⁸⁷ *Id.*

¹⁸⁸ *See Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

organizations and that such organizations can be fully effective only when they are free to serve while being true to their religious beliefs and commitments. Merely stating that government money comes with strings, or that nondiscrimination norms should always trump religious freedom when government money is at issue, does not begin to account for our nation's commitment to pluralism.

Title VI prohibits racial discrimination in programs that receive federal funding. FFA adds SOGI and sex to the list of protected classes, thus establishing a SOGI and sex nondiscrimination norm in federally funded programs. In the interest of securing pluralism, FFA then addresses sensitive religious areas with various express safeguards, religious allowances, and other targeted protections.

a. Safeguards for religious organizations receiving federal assistance.

Government can be hostile toward religious organizations that receive federal funding and are overt about their faith commitments, especially when their social or moral beliefs are countercultural. That hostility can translate into demands that faith groups abandon or suppress their religious character and may result in denial of funding. FFA provides a series of specific safeguards that help preserve the religious character of faith-based groups receiving federal funding.

Generally, FFA provides protections for faith-based groups against discrimination based on religious beliefs and teachings and ensures that, regardless of federal funding, they can maintain their religious independence as they carry out their religious mission.¹⁸⁹ FFA then specifically addresses key elements in securing the right of faith groups to retain their religious character despite receiving federal funding. Thus, FFA does not “prohibit[] a religious organization receiving Federal financial assistance from using space in its buildings and other facilities to conduct its program or activities where there is religious art, icons, messages, scriptures, or other symbols.”¹⁹⁰ Likewise, “the organization retains authority over its internal governance and thus may have religious words in the organization's name, select members of its governing board based on religious criteria, and have religious references in its mission statement and other governing documents.”¹⁹¹

Many religious schools and daycare depend on federal funding. Religious schools and daycare centers, where parents look to for assistance in raising their children in the faith, are protected as long as they enforce their religious standards

¹⁸⁹ H.R. 5331, 116th Cong. § 3(608)(a) (2019):

An otherwise qualified religious provider shall be eligible to receive Federal financial assistance for a particular service without regard to the provider's religious views or teachings, notwithstanding section 2000d. Subject to this title, a religious organization that applies for, or participates in, a program or activity receiving Federal financial assistance shall retain its independence and may continue to carry out its mission, including the definition, development, and expression of its religious beliefs.

¹⁹⁰ H.R. 5331, 116th Cong. § 3(608)(b) (2019).

¹⁹¹ *Id.*

with reasonable consistency and as long as those standards are not race-based or target students based on their parents' protected class status.¹⁹²

FFA affords targeted protections for faith-based groups that receive federal funding for marriage and family counseling. These programs often have important religious components that aid in their effectiveness. Those groups and programs with traditional beliefs and messages regarding marriage are unlikely to attract many couples (heterosexual or same-sex) with contrary views; there is a natural and healthy self-sorting that occurs in these matters, leading people to seek out the providers and approaches that best match their belief systems and values. FFA focuses on protecting the content of such programs. It provides that the "content of any marriage or family education, strengthening, or counseling programming" is not a violation of Title VI "provided that the recipient does not exclude beneficiaries on the basis of sexual orientation or gender identity."¹⁹³ While exclusion because of SOGI is not permitted under FFA, the religious provider has no obligation to change its content. Instead, the faith group has an obligation to refer those who object to its religious character to an alternative provider.¹⁹⁴

The Section then imposes some basic requirements to ensure that such referrals are carried out in good faith, such as requiring that referrals be "appropriate and timely," respectful of "privacy laws and regulations," and generally effective.¹⁹⁵ Again, voluntary self-sorting will avoid most situations where faith-based providers will have to make such referrals, but in the interest of a pluralism that accommodates both recipients and beneficiaries of federal funding alike, FFA includes referral requirements.

FFA also protects religious organizations that are otherwise eligible for federal financial assistance for supporting "safety and infrastructure," including federal financial assistance for historic preservation, disaster recovery, or facilities security"—such organizations cannot be denied funding because of their "religious beliefs or practices."¹⁹⁶ Moreover, "a religious educational institution or daycare center that receives funds under [the federal school lunch program] shall not be deemed a recipient of Federal financial assistance."¹⁹⁷ Unlike discrimination based

¹⁹² H.R. 5331, 116th Cong. § 3(608)(c) (2019):

A religious educational institution or daycare center may enforce with reasonable consistency written religious standards in its admission criteria, educational programs, student retention policies, or residential life policy, unless those standards are based on race, color, or national origin or would exclude or remove a student solely because of a prohibited classification under section 2000d with respect to that student's parent or legal guardian.

¹⁹³ H.R. 5331, 116th Cong. § 3(608)(d) (2019).

¹⁹⁴ H.R. 5331, 116th Cong. § 3(608)(d)(1) (2019):

If a beneficiary or prospective beneficiary objects to the religious character of the recipient, the recipient will undertake reasonable efforts as described [later in the section] to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection; however, the recipient is not obligated to guarantee that in every instance an alternative provider will be available.

¹⁹⁵ H.R. 5331, 116th Cong. § 3(608)(d)(2) & (3) (2019).

¹⁹⁶ H.R. 5331, 116th Cong. § 3(609)(a) (2019).

¹⁹⁷ H.R. 5331, 116th Cong. § 3(609)(b) (2019).

on race, merely receiving federal school lunch funds does not make the religious school or daycare subject to Title VI's SOGI nondiscrimination norm.

Critically, FFA adopts what is often known as “pinpointing.” With respect to racial discrimination, the rule under Title VI is that racial discrimination within any single program of an institution that receives federal funds disqualifies the entire institution from receiving federal financial assistance. That severe requirement is appropriate for discrimination based on race, and FFA does nothing to change that pillar of civil rights law. Such severity when it comes to religious organizations and faith-based standards pertaining to other categories is not appropriate, however. Pinpointing ensures that in the event specific statutory allowances under FFA or RFRA do not allow a religious organization receiving federal funds to make a particular religious distinction, then only the specific program—not the entire institution—can be penalized for such decisions.¹⁹⁸

Again, this protection is necessary only in rare situations where other statutory protections might fail, but it serves as an important backstop, shielding an entire religious institution from being defunded merely because of a single program that needs to make distinctions based on SOGI or sex.

b. Federally funded adoption and foster care

An area of recurring conflict over LGBTQ rights is adoption and foster care. Private adoption agencies like Catholic Social Services and Bethany Christian Services, motivated by a sense of religious mission, provide invaluable services for vulnerable children who need a safe and loving home. These agencies insist on adhering to religious standards that sometimes do not allow them to place a child with a same-sex couple. LGBTQ advocates perceive this refusal as discriminatory and insist, in turn, that an agency receiving public funding must serve all members of the public on equal terms. (This argument is sometimes described with the slogan “public money, public values.”) Bitter disputes over these contrary demands have pitted LGBTQ advocates against religious adoption agencies in Boston, San Francisco, Philadelphia, Michigan, and elsewhere. Indeed, the Supreme Court has recently agreed to hear such a case from Philadelphia.¹⁹⁹

All parties negotiating the FFA Act agreed that these conflicts are harming children. Closing down private agencies because of their religious standards reduces the number of agencies providing child welfare services. Excluding same-sex couples as adoptive or foster care parents reduces the number of available

¹⁹⁸ H.R. 5331, 116th Cong. § 3(607) (2019):

For the purposes of this subchapter, as applied to sex, sexual orientation, and gender identity, for any religious corporation, association, educational institution, or society, the term “program or activity” and the term “program” are limited to any specific program or activity, or part thereof, that receives Federal financial assistance. Any penalty or loss of Federal financial assistance assessed against such a religious entity shall be limited to the program or activity or program, or part thereof, that is determined to have violated section 2000d.

¹⁹⁹ *Fulton v. City of Philadelphia*, 140 S. Ct. 1104, 206 L. Ed. 177, 2020 WL 871694, 2020 U.S. LEXIS 961 (granting Petition for a writ of certiorari).

homes for needy children. In both instances, it is vulnerable children who are ultimately hurt. The Act seeks to protect children by avoiding these conflicts wherever possible.

Pluralism turned out to be the solution. Section 610 of the FFA Act encourages a diversity of private adoption and foster care providers by amending Title VI to create a new indirect funding program. Behind this program is the basic principle that government funding should carry fewer restrictions when it flows to an adoption agency as a result of personal choice. Under the Act, qualified families will receive a certificate that entitles them to certain services assisting them in having a child placed in their home for adoption or foster care, and a family can use that certificate at the agency of its choice. An agency that receives federal funding in this way is not bound by the same nondiscrimination rules as an agency that receives federal funding directly from a federal agency or the state. In what follows, we discuss each component of Section 610.

Section (a) – Congressional findings and declaration. In this section, Congress finds that “reducing the number of vulnerable children without a permanent home is in the Federal interest.”²⁰⁰ It also finds that there is “a national deficit” in the number of families and private agencies serving those children and that the government should “encourage new agencies” to serve, while acknowledging the “crucial work” performed by “agencies whose commitment to serve arises from profound religious convictions.”²⁰¹ These religious agencies “contribute to the common good of our communities in ways that irreplaceable.”²⁰² Parents are vital too, of course; they “should be empowered to adopt children based on their merits as parents” without facing “discriminatory obstacles.”²⁰³ With these findings in view, the bill expresses Congress’s intent that the indirect funding program will be “a permanent and fully funded program.”²⁰⁴

Section (a) then declares an overarching Federal policy, which consists of complementary goals. The bill is intended “establish[] minimum Federal standards that guarantee the equal treatment of qualified families seeking to offer foster care or adoption.”²⁰⁵ Those same standards are intended to guarantee “an equal respect for the diversity of private agencies, including religious agencies, that provide adoption and foster care services.”²⁰⁶

These findings are not merely hortatory. All of Section 610 must be interpreted and applied consistently with these congressional findings and declaration of federal policy.²⁰⁷

Section (b) – Nondiscrimination requirements. One of the FFA Act’s main thrusts is to prohibit recipients of federal financial assistance from discriminating based on sex, sexual orientation, and gender identity. Applying that rule to all

²⁰⁰ H.R. 5331, 116th Cong. § 3(610)(a)(1) (2019).

²⁰¹ H.R. 5331, 116th Cong. § 3(610)(a)(2) (2019).

²⁰² H.R. 5331, 116th Cong. § 3(610)(a)(4) (2019).

²⁰³ H.R. 5331, 116th Cong. § 3(610)(a)(3) (2019).

²⁰⁴ H.R. 5331, 116th Cong. § 3(610)(a)(5) (2019).

²⁰⁵ H.R. 5331, 116th Cong. § 3(610)(a)(6) (2019).

²⁰⁶ *Id.*

²⁰⁷ *See id.*

private agencies that get federal subsidies for adoption and foster care would spark a crisis for agencies with traditional religious standards. Rather than sacrificing those standards, at least some of those agencies would stop providing much needed services. To avoid that result, this section describes which nondiscrimination norms apply to all private adoption agencies and which apply only when an agency gets federal aid directly. Holding adoption agencies to nondiscrimination rules helps ensure that otherwise qualified parents will be assessed based on their merits. Applying different rules to private adoption agencies participating in the indirect funding program is meant to allow for greater flexibility for a religious adoption agency that receives federal funding as a result of a family's choice to work with it.

The general rule is that any entity receiving federal financial assistance for performing adoption and foster care services must avoid discriminating against a prospective parent or child on the basis of race, color, national origin, sex, sexual orientation, and gender identity.²⁰⁸ This rule applies to states, which contract with the federal government to provide such services, as well as to private adoption agencies when they receive funding directly from the government.²⁰⁹ A private agency is not bound by the same nondiscrimination requirements when receiving federal aid through the indirect funding program.²¹⁰

Section (b) proscribes certain actions that constitute unlawful discrimination against a prospective parent or child.

Unlawful discrimination means denying a qualified prospective parent "equal access to or equal treatment during the adoption or foster care evaluation and placement process."²¹¹ Also prohibited is "delaying or denying the placement of a child for adoption or into foster care" based on the parent's "race, color, national origin, sex, sexual orientation, or gender identity of the qualified prospective adoptive or foster parent, or of the child involved."²¹² It is likewise discriminatory to "require[e] different or additional screenings, processes, or procedures for adoption or foster care placement" because of the prospective parent's protected status.²¹³ And the government may not "requir[e] a qualified prospective foster parent to subscribe" to provisions demanding that a foster child must be treated consistently with his or her gender identity and that no foster child may be subjected to conversion therapy.²¹⁴ The emphasis is on the word "subscribe." A parent who agrees to care for an LGBTQ child must comply with these restrictions. But parents who do not accept responsibility for an LGBTQ foster child need not express their agreement with these restrictions. The bill adds that it is discriminatory to "exclud[e] a qualified prospective adoptive or foster parent because of the parent's religion."²¹⁵

²⁰⁸ H.R. 5331, 116th Cong. § 3(610)(b) (2019).

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ H.R. 5331, 116th Cong. § 3(610)(b)(1)(A) (2019).

²¹² H.R. 5331, 116th Cong. § 3(610)(b)(1)(B) (2019).

²¹³ H.R. 5331, 116th Cong. § 3(610)(b)(1)(C) (2019).

²¹⁴ H.R. 5331, 116th Cong. § 3(610)(b)(1)(D) (2019).

²¹⁵ H.R. 5331, 116th Cong. § 3(610)(b)(1)(E) (2019).

Similar rules spell out the meaning of unlawful discrimination against a child.²¹⁶ In addition, an entity receiving federal aid may not treat a foster child “inconsistently with the child’s gender identity.”²¹⁷ As in the rest of the FFA Act, mere assertion of a nonconforming gender identity is not enough. It has to be “demonstrated by ... evidence that that the gender identity is sincerely held, is part of the child’s core identity, and is not being asserted for an improper purpose.”²¹⁸ An equally controversial provision forbids an entity receiving federal funding from “subjecting” a foster child to conversion therapy.²¹⁹ Critics have voiced concerns that these provisions will force adoptive and foster parents to engage in risky gender-transitioning conduct or withhold potentially beneficial counseling from LGBTQ youth. These concerns might be mitigated by recalling that (D) and (E) only apply to foster children—children already in the state’s legal custody—and that the prohibition falls only on entities receiving federal financial assistance, not on foster parents individually.

Guiding the application of these nondiscrimination norms is a rule of construction. Any entity receiving federal financial assistance for adoption or foster care services remains free to “mak[e] an individualized placement assessment in the best interest of the child’s health, safety, and welfare.”²²⁰ In this way, the best interest of the child remains the ultimate touchstone for difficult child welfare decisions.

Section (c) – An indirect funding program for adoption and foster care services. Creating a new federal funding program for adoption foster care is particularly complex, though the idea behind it is simple enough. Funding that flows to an adoption agency because of choices made by individual families ought to carry fewer restrictions than funding that flows to an agency from the government directly. By empowering families to choose which agency will assist them in reaching their adoption or foster care goals, the indirect funding program is intended to encourage new providers to enter the marketplace and new families to welcome our society’s most vulnerable children into their homes.

Federal agencies like the U.S. Department of Health & Human Services (“HHS”), which are responsible for administering federal funding for adoption and foster care services, are directed to create the indirect funding program through agency rulemaking.²²¹ Within two years after the FFA Act is passed, such agencies are directed to issue regulations “creat[ing] an indirect funding program that delivers Federal financial assistance to eligible prospective parents for the purpose of obtaining such services through a qualified private agency that they select.”²²²

²¹⁶ See H.R. 5331, 116th Cong. § 3(610)(b)(2)(A)-(C) (2019). Both 610(b)(1)(A)-(C) and 610(b)(2)(A)-(C) prohibit the same forms of discrimination based on the protected class status of the prospective parent or child.

²¹⁷ H.R. 5331, 116th Cong. § 3(610)(b)(2)(D) (2019).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ H.R. 5331, 116th Cong. § 3(610)(e)(2) (2019).

²²¹ Other responsible agencies include the Social Security Administration and the Department of State. See H.R. 5331, 116th Cong. § 3(610)(c)(1) (2019).

²²² H.R. 5331, 116th Cong. § 3(610)(c)(1) (2019).

Indirect funding takes the form of a “certificate.”²²³ This certificate will entitle an eligible state resident to receive certain adoption and foster care services. Those services are “a personal assessment, background check, home study, endorsement, certification of a person’s eligibility” to be an adoptive or foster parent, and “placement of a child” with a person or family.²²⁴

The new program is intended to be well-funded. Federal agencies are directed to fund the certificates with “[a] substantial portion” of federal monies already appropriated for adoption and foster care.²²⁵

Placing an exact monetary value on the certificates will be determined “through agency rulemaking.”²²⁶ But that value cannot be “less than \$3,000” as of January 1, 2019.²²⁷ Experts in adoption and foster care services advised the FFA negotiating team that this amount is a fair estimate of the cost of those services that the certificate will subsidize.

The certificate program will open up new opportunities for families that should not be withheld out of prejudice. A state cannot delay or deny a certificate because of a resident’s race, color, national origin, religion, sex, sexual orientation, or gender identity.²²⁸

A private adoption agency is sometimes allowed to refer a person to another agency rather than performing an adoption or foster care service itself. Any such referral must meet standards established by HHS and other responsible federal agencies. Specifically, a referral must be “appropriate and timely”; offered “in a manner consistent with applicable privacy laws and regulations”; and accompanied by a notice to the government agency.²²⁹ Also, an adoption agency must give each applicant for and recipient of adoption or foster care services “written notice . . . of the protections set forth in this section” of the FFA Act.²³⁰

With these preliminaries out of the way, the Act then describes how the indirect funding program will be implemented.

Each state must “develop a written plan approved” by the HHS Secretary.²³¹ This requirement is a condition of getting federal funding for adoption and foster care services under parts B or E of title IV of the Social Security Act.

An approved state plan must show that the state has established “rules, policies, and procedures” “ensuring full participation in the indirect funding program.”²³² State rules giving every qualified resident access to a certificate must be issued within six months after HHS promulgates final rules creating the indirect funding program.²³³ The certificate may be used “solely for the services enumerated” by the

²²³ H.R. 5331, 116th Cong. § 3(610)(c)(1)(A) (2019).

²²⁴ *Id.*

²²⁵ H.R. 5331, 116th Cong. § 3(610)(c)(1)(B) (2019).

²²⁶ H.R. 5331, 116th Cong. § 3(610)(c)(1)(C) (2019).

²²⁷ *Id.*

²²⁸ *See* H.R. 5331, 116th Cong. § 3(610)(c)(1)(D) (2019).

²²⁹ H.R. 5331, 116th Cong. § 3(610)(c)(1)(E)(i)-(iii) (2019).

²³⁰ H.R. 5331, 116th Cong. § 3(610)(c)(1)(E)(iv) (2019).

²³¹ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A) (2019).

²³² H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(i) (2019).

²³³ *Id.*

statute.²³⁴ Those services are “a personal assessment, background check, home study, endorsement, certification of a person’s eligibility” to be an adoptive or foster parent, and “placement of a child” with a person or family.²³⁵ A state may distribute certificates that commingle federal and state funding, but “such commingled revenues shall be deemed Federal financial assistance.”²³⁶

An approved plan must also demonstrate that “the State uses its best efforts to increase the number of private organizations within each catchment area that are qualified to provide foster care and adoption services.”²³⁷ The term “catchment area” refers to the geographical area served by a private adoption agency. The Act’s negotiators believe that the indirect funding program will encourage new adoption and foster care providers to enter the marketplace. Today, government funding compensates a private agency for all adoption and foster care services only after a child is placed with a qualified family. This means that an agency must have sufficient capital resources to perform services long before receiving compensation. Only large and established entities possess that capacity. By offering compensation for adoption and foster care services right away, the indirect funding program would incentivize the creation of niche providers. An agency could specialize in providing home studies, for instance, without bearing the cost of providing other services or waiting until after a child’s placement to receive compensation. Also, by requiring the state to encourage new adoption agencies, the FFA Act presumes that conflicts between religious agencies and LGBTQ couples would be less frequent and severe if there were more qualified adoption agencies available to serve.

State efforts to boost the number of adoption agencies must include organizations that are “willing to serve all qualified prospective parents.”²³⁸ This qualification is intended to avoid conflicts by reducing the number of places where a religious adoption provider holds something like a natural monopoly because of the financial disincentives for competition now in place.

An approved plan also shows that “the State publishes and maintains a current list of licensed adoption and foster care providers with offices in the State, by catchment area.”²³⁹ This list must “identify providers that serve all applicants, as well as those that serve particular communities and those that provide particular services.”²⁴⁰ An emphasis on encouraging agencies who accept all qualified applicants is intended to protect LGBTQ couples. By calling out particular communities and services, this provision presupposes an increased level of pluralism in the adoption and foster care system. The indirect funding program is expected to induce the creation of agencies specializing in placing children with families in particular religious communities or with LGBTQ families, or with other communities where specialized experience is valuable. So too, this provision allows

²³⁴ *Id.*

²³⁵ H.R. 5331, 116th Cong. § 3(610)(c)(1)(A) (2019).

²³⁶ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(i) (2019).

²³⁷ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(ii) (2019).

²³⁸ *Id.*

²³⁹ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(iii) (2019).

²⁴⁰ *Id.*

for small niche agencies specializing in a single discrete service, such as conducting background checks or home studies.

Another element of an approved plan obligates the state to conduct “a prompt and cost-free eligibility assessment,” inform eligible parents of the “licensed adoption and foster care providers in the [their] catchment area,” and offer “additional information to facilitate the prospective parent’s selection of a provider.”²⁴¹ These eligibility assessment and information-sharing duties serve two functions. They respect a state’s authority to set eligibility requirements for adoption and foster care. Additionally, requiring a state to conduct an eligibility assessment and share information about local provider options is meant to avoid needless conflict. A state agency can assess a person’s eligibility more dispassionately than a private agency whose primary interests understandably lie in finding qualified parents for the children they have accepted responsibility for. For the same reason, a state agency can communicate local provider options more objectively than a private agency with an understandable interest in identifying prospective parents that meet the agency’s standards.

Further, an approved state plan must ensure that every eligible resident “has an equal opportunity to obtain adoption or foster care related services from a provider who accepts the certificate.”²⁴² This provision is intended to ensure that prospective parents are judged on their merits and that every eligible resident has the right to participate in the indirect funding program.

An approved state plan must likewise make provision for parents who are turned away from a private adoption agency. In that event, the state must see that at least one private agency “in the same or adjacent catchment area” that serves all eligible applicants.²⁴³ Once again, the Act guards against local monopolies by requiring the state to foster a competitive marketplace for adoption and foster care services. When a private adoption agency declines to serve a particular certificate holder, the agency must offer “an appropriate and timely referral” to another provider.²⁴⁴ The referral must comply with “applicable privacy laws and regulations.”²⁴⁵ In addition, the agency must notify the state of any referral.²⁴⁶ Together, these requirements protect eligible parents whom a private agency refuses service, however lawfully.

To be approved by HHS, then, a plan must ensure that the state (i) issues rules and policies making the state a full participant in the indirect funding program; (ii) employs its best efforts to increase the number of private entities providing adoption and foster care services; (iii) maintains a list of licensed adoption and foster care providers; (iv) conducts an eligibility assessment for interested residents; (v) accords every eligible resident an equal opportunity to participate in the indirect funding program; and (vi) enacts safeguards to protect parents who are turned away

²⁴¹ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(iv) (2019).

²⁴² H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(v) (2019).

²⁴³ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(vi)(I) (2019).

²⁴⁴ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(vi)(II) (2019).

²⁴⁵ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(vi)(III) (2019).

²⁴⁶ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(vi)(IV) (2019).

from a private adoption agency. By meeting these requirements, a state will implement the indirect funding program in a way that increases a state's capacity to serve the needs of vulnerable children while avoiding needless conflicts between religious adoption providers and LGBTQ couples.

The FFA Act protects private adoption agencies from certain kinds of government action. A state may not refuse to let a licensed adoption or foster care provider participate in the indirect funding program.²⁴⁷ A state may not withhold "reasonable payment for services actually rendered" from a private adoption agency that has relied on a certificate.²⁴⁸ Nor may a state require an adoption agency to perform a service as a condition of receiving federal aid through the certificate program, "unless such service is required by Federal law or imposed pursuant to an agreement between the provider and the State that compensates the provider for such service exclusively with State revenues."²⁴⁹ This provision prevents a state from leveraging its authority over the certificate program to compel an agency to perform uncompensated or legally unrequired services. Additionally, a state may not "withhold, suspend, or terminate" contracts or other financial support for a private adoption agency for taking any action that the FFA Act permits.²⁵⁰ This prohibition is not limited to federal financial assistance; it extends to contracts, grants, and other financial support funded by state or local revenues.

Those who negotiated the FFA Act included strong medicine if a state declines to participate in the indirect funding program. Failure to participate, develop an approved state plan, or comply with the Act's adoption and foster care provisions "in any other respect" will result in a serious loss of federal revenues.²⁵¹ Such failures will *require* the HHS Secretary to "withhold payment to the State of amounts otherwise payable under part B or E of title IV of the Social Security Act . . . , to the extent that the Secretary deems the withholding necessary to induce compliance."²⁵² It is worth stressing that while the secretary has discretion to decide how much federal aid is "necessary to induce compliance,"²⁵³ the statute leaves no room for nonprosecution. Failure to comply with the Act's adoption provisions compels the secretary to withhold funding from the most substantial sources of federal financial assistance for adoption and foster care.

Section (d) – Private recipients of federal financial assistance. Next, the Act establishes protections for private adoption agencies.

First, an agency qualified to participate in the certificate program may decline to accept a certificate, thereby refusing to perform adoption or foster care services for that person.²⁵⁴ That right of refusal is effective even if the agency "receiv[es] certificates to perform other covered adoption or foster care services."²⁵⁵ An agency

²⁴⁷ H.R. 5331, 116th Cong. § 3(610)(c)(2)(B)(i) (2019).

²⁴⁸ H.R. 5331, 116th Cong. § 3(610)(c)(2)(B)(ii) (2019).

²⁴⁹ H.R. 5331, 116th Cong. § 3(610)(c)(2)(B)(iii) (2019).

²⁵⁰ H.R. 5331, 116th Cong. § 3(610)(c)(2)(B)(iv) (2019).

²⁵¹ H.R. 5331, 116th Cong. § 3(610)(c)(3) (2019).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See H.R. 5331, 116th Cong. § 3(610)(d)(1)(A) (2019).

²⁵⁵ *Id.*

who exercises this right must give the certificate holder a referral that is “appropriate and timely,” complies with “applicable privacy laws and regulations,” and is communicated to the state.²⁵⁶ This right of refusal, coupled with a meaningful referral obligation, is the heart of the FFA Act’s adoption provisions. It is the means by which religious adoption agencies may continue receiving federal financial assistance without sacrificing their religious standards and without denying LGBTQ couples an equal opportunity to obtain federally subsidized adoption or foster care services from a qualified provider.

Second, sometimes the right to decline a certificate at the outset may not give an adoption agency adequate protection. The process of evaluating a certificate holder may turn up facts that render a child placement with that person contrary to an agency’s standards. Under those circumstances, an agency may “facilitate a mutually voluntary referral.”²⁵⁷ Unlike the right of refusal, a referral must have the certificate holder’s agreement. Also, the referral cannot “unreasonably delay or disrupt the adoption or foster care evaluation and placement process.”²⁵⁸ Experts in the day-to-day workings of adoption and foster care advised the FFA Act’s negotiators that informal referrals that seek to minimize the impact of the referral are commonplace. It is expected that the same kind of arrangements could take place under the Act without undue disruption to the parents or the agency.

Third, in a rare instance, a certificate holder may mislead a private adoption agency into accepting a certificate even though a child placement with that person would be inconsistent with the agency’s religious standards. To protect agencies in that situation, the Act allows the agency to “terminate its relationship with a prospective parent who makes a material misrepresentation of fact that the prospective parent knew or should have known that the agency specifically requested.”²⁵⁹ Requiring evidence that the agency “specifically requested” a particular fact means that religious agencies concerned with maintaining their religious standards must draft applications and other in-take documents clearly. They must transparently inform a certificate holder of those facts that the agency regards as material to the decision whether to accept a certificate and provide adoption or foster care services. When an agency exercises the right to terminate for misrepresentation, it still must provide a meaningful referral.²⁶⁰ And exercise of this right does not deprive an agency of its entitlement to “reasonable payment for services actually performed.”²⁶¹

Custodial parents of foster children get robust protection. When a private adoption agency accepts a certificate, it cannot discriminate against a custodial parent of a child in foster care because of the parent’s race, color, national origin, religion, sex, sexual orientation, or gender identity “with respect to the monitoring of a parent whom the provider [agency] has previously endorsed or with whom the

²⁵⁶ H.R. 5331, 116th Cong. § 3(610)(c)(2)(A)(vi)(II)-(IV) (2019).

²⁵⁷ H.R. 5331, 116th Cong. § 3(610)(d)(1)(B) (2019).

²⁵⁸ *Id.*

²⁵⁹ H.R. 5331, 116th Cong. § 3(610)(d)(2) (2019).

²⁶⁰ *See id.*

²⁶¹ *Id.*

provider has placed a child.”²⁶² Once again, religious agencies concerned with maintaining their religious standards must craft their in-take documents carefully and exercise their right of refusal judiciously. Once an agency endorses a foster parent, or places a child in his or her home, the agency can no longer withhold services simply because they learn that the parent is LGBTQ, belongs to a different faith, or in some other way conflicts with an agency’s religious standards.

Section (e) – Miscellaneous provisions.

Custody of child in foster care. A child in foster care is “deemed to be in the legal custody of the State.”²⁶³ That legal principle animates domestic law in every state of which we are aware.

Individualized placement assessments. The adoption provisions of the FFA Act “shall be construed” to allow any entity receiving federal aid for adoption or foster care services to make “an individualized placement assessment in the best interest of the child’s health, safety, and welfare.”²⁶⁴ Leaving decisionmakers free to make placement decisions based on the best interests of the child is consistent with the approach followed by every state.

Nondiscrimination rules for religious agencies. Those who drafted the FFA Act agreed that a religious adoption agency should not be bound by the Act’s nondiscrimination rules until the indirect funding program is available where it operates. To that end, the general rule is that the nondiscrimination rules in Section (b) “become effective on the date of [the FFA Act’s] enactment.”²⁶⁵ But those same rules do not apply to a religious adoption or foster care provider until “12 months after the State where the provider operates has implemented the certificate program” in compliance with the Act.²⁶⁶ It is anticipated that some states may resist implementing the certificate program. If the program is not “substantially funded” in a particular state, the nondiscrimination rules “shall become enforceable as to a religious adoption or foster care provider until funding is provided or restored.”²⁶⁷ Together, this suspension of nondiscrimination rules and the HHS Secretary’s mandate to withhold federal revenues from noncompliant states²⁶⁸ are powerful measures to make the certificate program a reality in every state—or to protect religious agencies until the program is established in their area.

A licensed nonprofit agency providing adoption or foster care services demonstrates that it is a “religious adoption or foster care provider” in one of two ways. Either it is “owned, supported, controlled, or managed by a particular religion or by a particular church, denomination, convention, or association of churches”²⁶⁹ or the agency “holds itself out to the public as substantially religious, has as its stated purpose in its organic documents that it is religious, and is

²⁶² H.R. 5331, 116th Cong. § 3(610)(d)(3) (2019).

²⁶³ H.R. 5331, 116th Cong. § 3(610)(e)(1) (2019).

²⁶⁴ H.R. 5331, 116th Cong. § 3(610)(e)(2) (2019).

²⁶⁵ H.R. 5331, 116th Cong. § 3(610)(e)(3)(A) (2019).

²⁶⁶ H.R. 5331, 116th Cong. § 3(610)(e)(3)(B)(i) (2019).

²⁶⁷ H.R. 5331, 116th Cong. § 3(610)(e)(3)(B)(ii) (2019).

²⁶⁸ H.R. 5331, 116th Cong. § 3(610)(c)(3) (2019).

²⁶⁹ H.R. 5331, 116th Cong. § 3(610)(e)(3)(B)(iii)(I) (2019).

substantially religious in its current operations.”²⁷⁰ This multi-step definition is intended to screen out all but the most intensely religious providers of adoption and foster care services.

Private rights of action. A disappointed certificate holder has no legal claim against an adoption or foster care provider for exercising its rights to decline a certificate, facilitate a voluntary referral, or terminate a relationship for misrepresentation.²⁷¹ But a private adoption or foster care provider may bring a claim against a government that penalizes it for exercising its rights under Section 610 or denies a license because of the agency’s religious teachings and practices.²⁷²

No supplanting. A recipient of federal aid—including through the certificate program—must use federal assistance to “supplement, not supplant, non-Federal funds that would otherwise be available” for adoption and foster care services.²⁷³ This provision guards against the risk that an adoption agency will use certificate monies, or other federal monetary assistance, to substitute for non-federal sources of financial support.

No effect on federal laws governing racial discrimination. The FFA may not be construed to affect federal law addressing discrimination because of race, color, or national origin by a state or private organization that receives federal aid for adoption or foster care services.²⁷⁴ This provision maintains the status quo in federal law on the topic of racial discrimination in adoption and foster care. Practically speaking, it avoids disturbing laws that permit unique legal treatment for adoption and foster care placement decisions affecting Native American children.

State waivers. The FFA Act will not affect the validity of waivers issued under the Social Security Act, which authorizes states to conduct demonstration projects by innovating new ways of delivering child welfare services.²⁷⁵

Effect on state laws. Several states have enacted laws prohibiting adoption and foster care providers from discriminating against LGBTQ parents. Other states have enacted laws exempting religious adoption and foster care providers from state nondiscrimination laws. The FFA Act strikes a compromise by setting down a rule of construction. Despite the general rule that federal law preempts state and local laws, this provision says that the Act may not be construed to preempt a state or local law that prescribes “the legal conditions of receiving Government funding for adoption or foster care services” unless the state or local law “directly conflict[s]” with Section 610.²⁷⁶ In this way, LGBTQ-friendly states and religion-friendly states maintain their chosen legal regimes unless a law or policy directly conflicts with the Act.

This admittedly complex framework serves a simple purpose. It reconciles the clashing interests of religious adoption or foster care providers and LGBTQ couples through a series of trade-offs. LGBTQ couples are generally protected from

²⁷⁰ H.R. 5331, 116th Cong. § 3(610)(e)(3)(B)(iii)(II) (2019).

²⁷¹ See H.R. 5331, 116th Cong. § 3(610)(e)(4)(A) (2019).

²⁷² See H.R. 5331, 116th Cong. § 3(610)(e)(4)(B) (2019).

²⁷³ H.R. 5331, 116th Cong. § 3(610)(e)(5) (2019).

²⁷⁴ See H.R. 5331, 116th Cong. § 3(610)(e)(6) (2019).

²⁷⁵ See H.R. 5331, 116th Cong. § 3(610)(e)(7) (2019).

²⁷⁶ H.R. 5331, 116th Cong. § 3(610)(e)(8) (2019).

discrimination, but religious providers can decline to accept a certificate for any reason. States must participate in the certificate program, but they may continue enforcing pro-LGBTQ or pro-religion laws and policies so long as they do not “directly conflict” with the FFA Act.

B. RESPONDING TO CONSERVATIVE CRITICISMS OF THE FFA ACT

Important center-right voices in the religious freedom community have endorsed both the concept of “fairness for all” and either the FFA Act itself or something like it.²⁷⁷ And some prominent religious freedom advocacy groups have declined to take a position. But while respectful of the persons and groups involved in the FFA effort, some conservative religious groups have harshly denounced the FFA Act. The attacks are often rhetorical and reveal a failure to realistically grapple with the dangerous state religious freedom finds itself in.

The foregoing demonstrates that the FFA Act contains many broad and meaningful protections for religious freedom. The following responds specifically to a number of conservative criticisms.

1. “LGBTQ Rights and Religious Rights are Fundamentally Incompatible”

Many of the conservative attacks on the FFA Act are philosophical. Putting SOGI protections into the law is fundamentally wrong, they argue, because it constitutes endorsement of radical and profoundly false notions of gender and sexuality. Enshrining SOGI in the Civil Rights Act, they continue, will elevate those contested notions to the same moral status as racial equality. They fear that LGBTQ rights, even as part of an FFA compromise, will render religious beliefs, expression, and practices that affirm traditional understandings of marriage, family, gender, and sexuality the equivalent of racism and racial discrimination, to be punished whenever legally possible and otherwise driven to the margins of society.

We address above the notion that what the law protects the law necessarily endorses. We do not discount the teaching function of the law. Nor do we deny that making SOGI a protected class under the Civil Rights Act will have some effect on the culture. But what would the FFA Act in fact teach? It will certainly teach that unjust discrimination against LGBTQ persons is unlawful and wrong. The FFA coalition makes no apologies for that.

On this point there is a close analogy to protections for religious liberty itself. Whatever one thinks of a person’s religion, we all deserve a fair opportunity to be employed, to have a place to live, and to access the marketplace and federally

²⁷⁷ Stanley Carlson-Thies, *Statement: IFRA Endorses the Fairness for All Bill*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Dec. 5, 2019), <http://irfalliance.org/the-institutional-religious-freedom-alliance-endorses-the-fairness-for-all-bill/>; Shirley V. Hoogstra, *CCCU Statement on Fairness for All*, CCCU (Dec. 6, 2019), <https://www.cccu.org/news-updates/cccu-statement-fairness/>; *The Church of Jesus Christ Supports the Federal Fairness for All Act*, THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS (Dec. 6, 2019), <https://newsroom.churchofjesuschrist.org/article/federal-fairness-for-all-support-december-2019>; Letter from Thomas C. Berg, Carl H. Esbeck, Douglas Laycok, & Robin Fretwell Wilson (Dec. 6, 2019) <https://1stamendmentpartnership.org/letter-of-support-for-the-fairness-for-all-approach/>.

funded programs regardless of our faith. Agreeing that the law should protect Catholics from being excluded from employment based on their religion does not mean that the law, much less people of other faiths or no faith at all, endorse Catholicism. It means we have decided that religion shouldn't be held against someone in those areas.

The same is true of SOGI protections. Whatever one believes about the nature and causes of sexual orientation and gender identity, however one believes a person should respond to orientations or identities that depart from traditional understandings of sexuality and gender, and regardless of beliefs about marriage, we can and ought to agree that all Americans—including LGBTQ Americans—deserve the basic civil rights of a modern society. LGBTQ persons have indisputably been subjected to mistreatment in the past, and they are still vulnerable in some places. The FFA provides reasonable and needed protections for LGBTQ persons in these vital areas.

But that does not mean absolute protection or protection at the expense of all else. Conservative critics invoke the teaching role of the law when condemning the addition of SOGI to civil rights law, but they stop short of acknowledging FFA's important teachings about religious freedom and its relationship to LGBTQ rights. FFA teaches "fairness for all," including people of faith. It protects LGBTQ persons in spaces where they are vulnerable, but it also protects religious people and institutions where they are vulnerable or where they need autonomy to govern themselves. Religious people and faith communities need space—legal, social, cultural space—in which to gather, worship, grow, self-define, unite, strengthen, divide, regroup, evangelize, retreat and, in short, live out their faith. FFA recognizes that need and provides that space. The space is not perfect or always absolute, in part because religious space is not the only space in our diverse nation, and because often religious zones overlap with other spaces subject to secular policy norms. But the space FFA provides for religious flourishing is broad and deep. Under FFA, religious organizations of all sorts receive broad protections and allowances in recognition of this nation's fundamental commitment to religious freedom, even as they continue to be eligible for federal funding for many of their educational and charitable activities. As discussed earlier and further below, religious education—so vital to the faith community—receives sweeping protection.

Moreover, if the FFA model were adopted at both federal and state levels, the bitter wedding industry fights would essentially be over, since objectors to serving same-sex couples are few and virtually always in small businesses with fewer than fifteen employees. Small employers would continue to enjoy exemption from the Civil Rights Act. Individuals could not be denied occupational licenses because of religious beliefs and affiliations. Additionally, the powerful religious freedom protections in federal and state RFRA would shield against the rare abusive application of SOGI-nondiscrimination in contexts not expressly safeguarded by FFA, including commercial contexts.

Thus, while the rigid Equality Act—which has no protections for religious freedom and would effectively revoke federal RFRA in the LGBTQ context—presents an existential crisis to faith communities, FFA ensures not only their

survival but also a protected place in the rich, pluralistic tapestry of American life. Also, unlike the Equality Act, FFA teaches that people and institutions of faith *should* enjoy such protection. It does not, contrary to conservative critics, teach that a single SOGI ideology governs all of American life. It does not teach that government has a mandate to stamp out religiously conservative beliefs and practices about marriage, family, gender, and sexuality. Finally, it most assuredly does not teach that SOGI is the equivalent of race.

On the contrary, with its broad protections and allowances for religious spaces and voices, FFA teaches that religion continues to have a favored place in the American pantheon of rights. It teaches that, while governmental interests in protecting against SOGI discrimination are important, in most areas vital to the faith community religious freedom interests are even more important. Indeed, so important are those religious autonomy interests that, with respect to religious employment and properties, FFA invokes the power of the federal government to preclude state and local governments from interfering. FFA teaches that corporate America must accommodate religious workers in ways not even required for race and certainly not for SOGI—no one has a right under the Civil Rights Act to take time off work to attend an event important to one’s race, color, sex, sexual orientation or gender identity. Yet, absent proof of a material burden on the employer, FFA’s workplace religious freedom protections would require just that for the worshipping needs of religious workers, teaching that accommodating the free exercise of religion remains one of this nation’s highest ideals. Under FFA, expression in the workplace of religious views, including on SOGI issues, cannot be suppressed based on viewpoint.

In short, the suggestion that FFA, with all its protections for religion, teaches that SOGI discrimination is the equivalent of racial discrimination, which receives no such protection, is patently false. FFA treats SOGI discrimination like sex, age, or disability discrimination—areas of the law where context matters and regulations have not been absolute and where, despite modest limitations, traditional religion has continued to flourish.

To be sure, after FFA, federal law *would* teach that secular commercial spheres should be fair and open to everyone regardless of race, religion, sex, or SOGI. The federal government and various states also add categories like pregnancy, age, disability, veteran status, medical conditions, genetic information, and criminal record.²⁷⁸ None of that means commerce is a religion-free zone or that religious values cannot deeply inform business, but rather that in the marketplace the presumption is that everyone gets to participate. Even without FFA, these values are already engrained in the American psyche—not even opponents of FFA openly defend a large corporation’s firing of an employee merely for being gay. Adding SOGI would affirm but not materially change that existing consensus. And federal

²⁷⁸ See e.g., Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2018); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2018); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2018); CAL. GOV’T CODE § 12940(a) (West 2019).

and state RFRA would serve as a backstop in cases of religious hardship resulting from overreach.

A further point is worthy of note. One of the most pernicious attacks on traditional faith communities is that they “hate” or have contempt for persons who identify as LGBTQ. Nearly all would deny this, and, with rare exceptions, it is demonstrably false. Yet these slurs are given credence when conservative faith communities oppose all LGBTQ rights, even when their own interests are protected. This often generates both internal and external opposition to conservative religious organizations and risks equating religion with hostility toward LGBTQ persons. That, in turn, tarnishes the religious freedom “brand” in the minds of many people of good will, which makes them less supportive of religious freedom and even religion itself. The case can certainly be made that rigid ideological opposition to all LGBTQ rights poses far more serious risks to the conservative faith community than a “fairness for all” approach based on the venerable tradition of American pluralism.

In brief, the assertion that FFA would teach an anti-religious ethos that equates SOGI with race, undermining traditional sexual and gender norms and marginalizing religious traditionalists, is not well founded in FFA’s text or current social realities. Indeed, there are good reasons to believe that conservative religious support for FFA would have the opposite effect.

2. “FFA Would Encourage Religiously Forbidden Conduct”

A related concern expressed by some conservative religious thinkers is that FFA—and by extension any other legislation protecting against discrimination based on SOGI factors—would encourage people to participate in sexual conduct and medical treatments forbidden by conservative religious traditions and teachings. As noted earlier, such concerns could also be marshaled against *any* law—including the First Amendment—protecting religious practices that may not be universally shared. Yes, a law like RFRA or the First Amendment that protects Catholics as well as Protestants might, in theory, pave the way for someone to convert from Protestantism to Catholicism. But if that occurs, it is simply the price of protecting human freedom and dignity—a value embraced by nearly all religions.²⁷⁹

In the case of LGBTQ rights, however, it is difficult to imagine that, in today’s legal and social environment, a law like FFA would have any *incremental* effect on people’s willingness to consider or engage in conduct characteristic of the LGBTQ community but condemned by conservative religions. It has been seventeen years since the U.S. Supreme Court held that individuals have a constitutional right to

²⁷⁹ See e.g., ABDULLAH SAEED, ISLAM AND RELIGIOUS FREEDOM: A SOURCEBOOK OF SCRIPTURAL, THEOLOGICAL, AND LEGAL TEXTS (Matthew Anderson & Karen Talifero eds., 2014) (ebook) https://berkeleycenter.georgetown.edu/publications/pdf_download; Hannah Brockhaus, *Religious Freedom is About Human Dignity, Pope says in Morocco*, CNA (Mar. 30, 2019, 10:49 AM), <https://www.catholicnewsagency.com/news/religious-freedom-is-about-human-dignity-pope-says-in-morocco-19765>; *Why Religious Freedom Matters to Mormons*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Feb. 20, 2012), <https://newsroom.churchofjesuschrist.org/article/religious-freedom-matters-mormons>.

engage in homosexual activity.²⁸⁰ It has been seven years since the same Court invalidated the federal Defense of Marriage Act, and five years since it invalidated state bans on same-sex marriage, on the ground that such laws violate the constitutional right of LGBTQ persons to exercise autonomy over their sexual relationships and practices.²⁸¹ Moreover, in the past twenty years, twenty-two states and localities have *already* enacted their own statutory bans on SOGI discrimination, two more states have explicitly interpreted “sex” to include SOGI, and several others are located in a federal circuit with a ruling that explicitly interprets existing federal law to include SOGI—such that today, over seventy percent of the United States population already lives under such a law.²⁸²

In short, to the extent any legal regime could “normalize” and thereby encourage behaviors characteristic of the LGBTQ community, the legal regime in the United States has already done so. A law like FFA that simply regularizes and refines that legal regime—and adds protection for religions and people of faith staunchly *opposed* to such behavior—is hardly likely to encourage additional behavior of that sort.

Indeed, as explained above, by protecting persons and institutions of faith against threats from the LGBTQ movement, FFA would send a powerful message that conservative religious teachings on matters of sexuality are at least deserving of society’s respect—as Justice Kennedy’s *Obergefell* opinion made clear. In today’s environment, that message would more than counterbalance any tendency for the FFA to encourage violations of those teachings.

3. “FFA Protects Religious Organizations But Abandons Religious Individuals”

Another criticism of FFA is the claim that it protects only religious organizations, but not individuals. Not so. Yes, FFA focuses most of its specific protections on religious organizations. But there is a simple reason for that: outside purely private spaces like the family, religious organizations are the most religiously sensitive zones and thus are the most vulnerable to overbroad LGBTQ rights laws. They are often worshipping communities (churches, synagogues, mosques) with exquisitely sensitive doctrinal and liturgical issues that must lie beyond the scope of government regulation. They often have religious employment, housing, educational and other standards that must be maintained to accomplish their religious missions. Very few other entities or individuals, such as for-profit businesses or their owners, have analogous religious freedom concerns. The greater the religious sensitivity, the greater the specificity of the protection FFA provides. And because religious organizations are essential communities of gathering for

²⁸⁰ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Texas statute making it a crime for two persons of the same sex to engage in sexual conduct was unconstitutional).

²⁸¹ *Windsor v. United States*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

²⁸² See *Nondiscrimination Laws*, MOVEMENT ADVANCE PROJECT (May 5, 2020), https://www.lgbtmap.org/equality-maps/non_discrimination_laws

religious *individuals*, protecting a religious institution means protecting the religious *individuals* who assemble within it and are served and supported by it.

But as explained, FFA also ensures robust protections for individual believers outside religious organizations. Religious employees receive important protections at work.²⁸³ FFA protects religious individuals from religious tests in occupational licensing.²⁸⁴ As a practical matter, because of the fifteen-employee threshold,²⁸⁵ nearly all wedding vendors are exempt from participating in weddings that violate their religion. Most importantly, FFA—in stark contrast to the Equality Act—preserves RFRA’s powerful protections for individual religious exercise.

Moreover, experience with similar laws suggests there are likely to be few problems. For example, Utah has a very conservative religious population with deep commitments to traditional morality. In five years under Utah’s FFA-style law, which like Title VII has a fifteen-employee threshold for employment claims but which lacks a state RFRA, there have been few if any controversies or lawsuits involving clashes of “individual” rights. People have worked things out.

4. “FFA Protects Religious Objectors But Not Secular Objectors”

Some have also complained that FFA protects religious objectors to certain LGBTQ-related behavior, but not secular objectors. Yes, the principal focus of FFA’s conservative religious coalition was on protecting religious freedom. But that is because most good-faith concerns over LGBTQ rights are rooted in longstanding religious doctrines and practices, especially those pertaining to the nature of marriage. Very few secular people of good will object to LGBTQ rights at all. The whole point of civil rights protections for LGBTQ people is to protect them from *unjust* discrimination. To the extent secular objections arise from mere prejudice, the authors of the FFA Act did not seek to accommodate them. In today’s cultural context, a civil rights law that exempted everyone with an objection would be useless.

Concerns have also been raised that protecting the tax-exempt status of organizations with *religious* beliefs about marriage, family, or sexuality implies that those protections will not apply to groups with secular beliefs on those topics. But this statutory protection merely underscores the constitutional infirmity of *any* viewpoint discrimination in the tax context. FFA highlights religious beliefs because those were the ones the government specifically called into question at oral argument in *Obergefell*. The likelihood of the Supreme Court’s allowing the IRS to grant tax-exempt status to a nonprofit group with *religious* views on marriage but deny such status to a nonprofit group with substantively similar *secular* views on marriage is virtually nil.

As with abortion, some secular people in the medical profession also have deep objections to facilitating transitioning surgeries and treatments. And the FFA Act

²⁸³ See *supra* Part II.A.4(b).

²⁸⁴ See *supra* Part II.A.8.

²⁸⁵ See *supra* Part II.A.4.

allows hospitals to avoid such procedures through SOGI-neutral criteria.²⁸⁶ More importantly, transgender transitioning has quickly become its own specialty with trained medical professionals dedicated to providing those services. As a practical matter, it will be exceptionally rare for a doctor without specific expertise to be asked to provide transitioning services. The Act allows for referrals based on expertise and the best interest of the patient.²⁸⁷

5. “*Transgender Women and Girls Will Harm Women and Girls in Female-Only Facilities*”

Conservative critics also complain that FFA will allow biological males who identify as women or girls to enter private female spaces, thereby undermining women and girls’ privacy interests. That complaint too is misguided.

In fact, roughly sixty percent of Americans *already* live in a jurisdiction allowing people to use the bathroom or locker room of their gender identity—and the percentage is growing as more and more states and municipalities enact SOGI laws with no exceptions, such as Virginia’s new SOGI law.²⁸⁸ The fear that transgender people would pose a danger to girls and women in private facilities has never materialized, at least not on a widespread basis. Indeed, the vast majority of people do not even know someone who has had a negative experience, much less had one personally. Moreover, any assault or other dangerous activity in restrooms is already a crime. And FFA provides that gender identity cannot be asserted “for an improper purpose,”²⁸⁹ so nothing about FFA makes it more likely that transgender people will commit crimes in restrooms and locker rooms.

By contrast, ensuring privacy is a legitimate concern. The only politically viable solution to the tensions this issue sometimes creates is more privacy for *all* people. The FFA Act thus imposes an affirmative duty on a covered institution to “reasonably accommodate” a patron of a public accommodation, a student in a school that receives federal funding, or an employee “who requests greater privacy” within a facility intended “for the exclusive use of persons of the same sex,” so long as the rights of transgender persons are not prejudiced.²⁹⁰ Most people, including

²⁸⁶ See *supra* Part II.A.6(b).

²⁸⁷ *Id.*

²⁸⁸ This percentage is drawn from the percentage of the population living under a state or municipal “SOGI” nondiscrimination law. It does not count other places (especially school districts) that choose these policies voluntary, and it does not factor in the common-sense fact that transgender Americans use public restrooms and locker rooms millions of times a year without incident.

²⁸⁹ H.R. 5331, 116th Cong. § 3(614)(1) (2019).

²⁹⁰ For public accommodations, FFA provides:

Provided that equivalent treatment, services, facilities, and benefits are made available and without prejudicing rights or protections based on any other protected class status . . . a place of public accommodation shall reasonably accommodate a patron who requests greater privacy within a facility intended for the exclusive use of persons of the same sex. H.R. 5331, 116th Cong. § 2(12)(B) (2019).

transgender people, prefer more privacy in restrooms and locker rooms. Single user and more private multiple-user restrooms and locker rooms are already the trend. FFA hastens and deepens that trend in every jurisdiction in the country. For those concerned about female privacy, this is a practical solution that will enhance the privacy of all girls and women. By contrast, efforts to repeal transgender persons' access to restrooms and locker rooms of their gender identity are politically challenging: those who try to face intense and sustained opposition by LGBTQ groups and corporate America.²⁹¹ Religious conservatives who desire more privacy for girls and women need a vehicle that expands privacy for everyone, not one that expels transgender persons. FFA provides that vehicle.

Another potentially challenging context involves transgender women in women's shelters. As a baseline, FFA requires that charitable entities receiving federal money to run programs that serve the public not discriminate against LGBTQ beneficiaries. Rarely do religious charities have a religious need to exclude beneficiaries based on gender identity. Shelters for physically and sexually battered women *may* qualify as the rare exception. Transgender women who have suffered violence deserve shelter and help. Placing them in men's shelters would put them at further risk of abuse. Most often, women's shelters can take in transgender women and care for them without disrupting the care and sense of security of other women. But if they can't, FFA provides an exception where "sex segregation or sex-specific programming is necessary to the essential operation of a program or activity."²⁹²

6. "FFA Will Allow Transgender Women and Girls to Harm Female Sports"

FFA has unexpectedly spawned intense interest in women's and girls' sports among conservative critics. They charge that the FFA Act will force K–12 schools and colleges to admit transgender girls and women into female sports regardless of circumstances, destroying fair competition. But this is not a new phenomenon and,

For federally funded educational programs, e.g., schools, FFA provides:

An educational institution receiving Federal financial assistance shall reasonably accommodate a student who requests greater privacy with respect to the use of a facility designated for the exclusive use of persons of the same sex, provided that the accommodation does not exclude any student from such a facility to which the student has a right of access or otherwise prejudice any right or privilege protected under this title. H.R. 5331, 116th Cong. § 3(611)(b) (2019).

Employers covered by Title VII have a similar duty:

If equivalent facilities and benefits are made available and without regard to a prohibited classification under this subchapter, an employer shall reasonably accommodate an employee who requests greater privacy within a facility intended for the exclusive use of persons of the same sex. H.R. 5331, 116th Cong. § 4(i) (2019).

²⁹¹ See, e.g., Merrit Kennedy, *North Carolina Reaches Settlement in Long Battle Over Bathrooms and Gender Identity*, NPR (July 23, 2019, 2:36 PM), <https://www.npr.org/2019/07/23/744488752/north-carolina-reaches-settlement-in-long-battle-over-bathrooms-and-gender-ident>; Madeline Holcombe, *Georgia School District Reverse Transgender-friendly Bathroom Policy After Death Threats*, CNN (Oct. 17, 2019, 3:06 AM), <https://www.cnn.com/2019/10/17/us/georgia-transgender-bathroom-policy-reversal-death-threats/index.html>; Associated Press, *Panel: Transgender Locker Room Policy is Discriminatory*, U.S. NEWS (July 26, 2019, 6:44 PM), <https://www.usnews.com/news/best-states/illinois/articles/2019-07-26/panel-transgender-locker-room-policy-is-discriminatory>.

²⁹² H.R. 5331, 116th Cong. § 3(611)(a) (2019).

with rare exception, schools and athletic associations are working it out in ways that avoid serious problems. The NCAA already has extensive guidelines and protocols to ensure fair competition, including medical testing to verify appropriate hormone levels.²⁹³

Still, unlike the Equality Act, which has no caveats, the FFA would allow a federally subsidized program to separate biological males and females if doing so is “necessary to the essential operation” of the program. If allowing transgender girls and women to compete would destroy female sports—or *fair competition* in female sports, which is a primary purpose of such programs—then FFA would allow exclusion of chromosomal males.

Moreover, FFA exempts religious schools from this mandate to the extent sex-separated sports are important to a schools’ religious mission. While this may be a cultural issue, it is not generally a threat to religious liberty.

Finally, some common sense is in order. No one wants fair competition in female sports to be ruined. No one wants transgender girls and women with unfair biological advantages to dominate female sports. In decades of administering nondiscrimination laws, judges and litigants have worked out common sense solutions that uphold the spirit of the law without blindly damaging other interests. Despite laws banning sex discrimination and clear rejection of “separate but equal” in the racial context, for example, courts and custom have always accommodated separate restroom facilities for men and women. Dire predictions based on rigidly ideological readings of the law have nearly always given way to common sense solutions. We find it extremely unlikely that female athletes, parents, feminists, fans, the public regulators, and courts will allow female sports to be destroyed. Unlike the Equality Act, FFA provides ample statutory language to ensure that does not happen.

7. *Religious Freedom Protections Will Just Be Revoked Later*

Some conservative critics further argue that the entire FFA project is naïve because LGBTQ activists and their allies in legislatures will simply accept SOGI nondiscrimination requirements but later repeal religious freedom protections. This argument proves too much.

If the LGBTQ movement is so powerful that it can repeal the religious freedom protections in the FFA Act and other FFA legislation once passed, then the movement would have no reason to support FFA legislation in the first place: the movement and its allies will simply pass legislation like the Equality Act with no religious freedom protections and be done with it.

The argument also assumes that, once passed, compromise legislation can be easily undone. But that assumption is contrary to experience with similar compromises. For example, no one with real influence is calling for the religious protections in the Utah FFA statute to be revoked. Similarly, the religious

²⁹³ NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER ATHLETES (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

exemption has existed in Title VII for almost five and a half decades, and not even advocates of the Equality Act have sought to narrow much less revoke it despite its potential to exempt religious organizations from much if not most of the SOGI nondiscrimination mandate. Given the roadblocks to legislation, undoing a reasonable deal that has brought reconciliation and peace to this conflict would take herculean efforts—even in a far more progressive political environment.

These types of all-or-nothing arguments (there are other variants) fail to acknowledge that, in the end, it is the broad middle of American public opinion that will decide this issue. We believe most Americans want two things they can't fully reconcile: reasonable religious freedom and reasonable LGBTQ nondiscrimination. They do not know precisely how to accomplish both, and they aren't expecting perfection, but they do want something that works well enough. They are tired of this divisive conflict. Advocates on the left and right—who are invested in the conflict but do not represent the sentiments of most Americans—will be hard-pressed to undo a workable compromise merely because it fails their demands for total victory.

8. *FFA's Religious Freedom Protections Are Imprecise and Untested.*

Some have also argued that FFA's religious freedom protection are untested and thus cannot be relied on. They speculate that courts are likely to interpret them narrowly in a way that seriously undermines their protective power.

The irony of such assertions is that they are often made by the same conservative advocates who claim the Supreme Court will be so favorable to religious freedom that it will strike down large swaths of the Equality Act. They can't have it both ways. The Supreme Court currently has a 5-4 conservative majority that has demonstrated sensitivity to religious liberty issues. More liberal justices have also shown some concern about religious freedom even in the context of LGBTQ rights.²⁹⁴ There is no reason to believe the Supreme Court will ignore or work to undermine provisions in the FFA Act that were clearly designed to alleviate pressure on religious liberty in the context of a compromise settlement. The Court's vigilance in upholding religious liberty under RFRA's and RLUIPA's indeterminant balancing test, even in the face of strong media and academic criticism, demonstrates its willingness to apply the law to protect religious interests.²⁹⁵ Recognizing that no legislation can wring out all ambiguity for either side, the FFA Act's religious freedom protections are as precise as reasonably possible and bolstered by a quarter-century of jurisprudence under RFRA and the First Amendment itself.

²⁹⁴ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1723 (2018) (Justice Kennedy writing for a 7-2 majority addressing the "difficult questions as to the proper reconciliation of" of LGBT interests and "the right of all persons to exercise fundamental freedoms under the First Amendment..." and concluding that the plaintiff's First Amendment right to free exercise of religion had been violated by the Colorado Human Rights Commission in that case).

²⁹⁵ See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (unanimously upholding constitutionality of RLUIPA in the prison context); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) (applying RFRA to protect religiously oriented business from federal contraception mandate).

* * * *

The best response to conservative critics is a reality check. It is easy to nitpick any effort at compromise—rarely are they perfect. But if not the FFA Act or something like it, then what is *their* plan for preserving religious liberty from the threat of laws like the Equality Act? Deny the threat, hoping for legislative gridlock forever despite tectonic shifts in public opinion? Hope the public grows tired of LGBTQ rights and the whole issue just goes away? Sweeping exemptions for everyone who might be inclined to discriminate, so the SOGI nondiscrimination rule applies only to those who never would discriminate in the first place? Trust the Supreme Court to hand out exemptions to anyone who wants one?

The truth is that conservative critics have no realistic alternative to something like the FFA Act. Absent a massive and highly improbable cultural change—one bucking the deep trend of nearly every developed country in the world, federal law will eventually grant civil rights protections to LGBTQ Americans. The real question is not whether LGBTQ protections will be granted but whether they will be balanced with protections for important religious freedoms—or not. The FFA Act is a carefully crafted effort, with support from both conservative religious groups and LGBTQ rights advocates, to reach such a balance.

CONCLUSION

In our view, protecting members of the LGBTQ community against threats like employment and housing discrimination by wholly secular businesses is morally right and just, both philosophically and theologically. And something like FFA—embodying as it does the “live-and-let-live” approach urged by Justice Kennedy and embraced by the LGBTQ movement before its present ascendancy—is, as a practical matter, the only plausible way to provide robust legislative protections for religious liberty. No one has proposed a politically plausible alternative path. The proposed FFA is a balanced implementation of that “live-and-let-live” principle—one that would protect the ability of conservative religious believers, and the institutions that support them, to continue practicing and teaching those beliefs about marriage and sexuality that, as *Obergefell* recognized, “long ha[ve] been held—and continue[] to be held—in good faith by reasonable and sincere people . . .”²⁹⁶

²⁹⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).