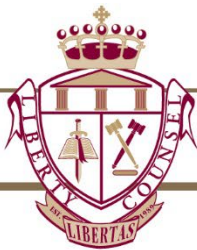


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**TO:** Members of the United States Congress

**FROM:** Mathew D. Staver  
Liberty Counsel

**DATE:** November 15, 2022

**RE:** Failure to Protect Religious Liberty in HR 8404

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## INTRODUCTION

Members of Congress have proposed an amendment to HR 8404, Respect for Marriage Act, purporting to provide protection for religious individual and organizations with sincerely held religious objections to the requirements and restrictions in the Act. The Amendment states: “Nothing in this Act, or any amendment made by this Act, shall be construed to alter or abrogate a religious liberty or conscience protection otherwise available to an individual or organization under the Constitution of the United States or Federal law.” H.R. 8404, Section 6(a). The Amendment severely restricts the purported exemption for religious organizations by restricting it to a limited subset of only nonprofit entities. H.R. 8404, Section 6(b) (“Consistent with the First Amendment to the Constitution, **nonprofit religious organizations**, including churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, religious educational institutions, and nonprofit entities **whose principal purpose is the study, practice, or advancement of religion**, and any employee of such an organization, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage.” (emphasis added)). For the following reasons, nothing in the Bill or the proposed amendment will provide any protection for religious individuals or organization, and the subsequent Amendments to the Bill exclude a large percentage of constitutionally and statutorily protected religious organizations.

## ANALYSIS

### **A. The Proposed Amendment Does Nothing to Protect Religious Liberty Because RFRA Only Applies to the Federal Government and State Action Will Not Be Affected.**

#### **1. RFRA Applies Only to the Federal Government.**

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, requires the **federal** government to provide exemptions to laws and regulations for those who hold sincerely held religious beliefs against the COVID-19 vaccines. Congress enacted RFRA “to provide very broad protection for religious liberty,” going “far beyond what [the Supreme Court] has held is constitutionally required” under the First Amendment. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 706 (2014) (emphasis added). Indeed, the Supreme Court has called RFRA as a “super statute.” See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). RFRA prohibits the government from placing a “substantial burden on a person’s exercise of religion even if the burden results from a rule of general applicability.” *Hobby Lobby*, 573 U.S. at 695. Under RFRA, when the government substantially burdens a person’s exercise of religion, “that person is entitled to an exemption from the rule unless the Government ‘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.’” *Id.* (quoting 42 U.S.C. § 2000bb-1(b)).

As effective as RFRA’s protection may be, **it is only applicable to the federal government**. Indeed, the term “government,” as defined in RFRA, “includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) **of the United States**.” 42 U.S.C. §2000bb-2(1) (emphasis added). Put simply, “RFRA applies only to the federal government.” *Francis v. Mineta*, 505 F.3d 266, 269 n.3 (3d Cir. 2007). See also *Witherspoon v. Waybourn*, No. 4:20-cv-1150-P, 2021 WL 2635917, \*10 (N.D. Tex. June 25, 2021) (“RFRA only applies to the federal government and its actors.” (quoting *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 289 (5th Cir. 2012)).

#### **2. State Action Will Not Be Affected by RFRA.**

Though RFRA undoubtedly provides broad protection against action by the federal government, **it provides no protection against actions from state governments**. As the Supreme Court held in *City of Boerne v. Flores*,

It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference. . . . Congress’ discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has

exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

521 U.S. 507, 536 (1997). See also *id.* at 510 (“The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress’ power.”).

In *City of Boerne*, the Supreme Court made plain that the protections afforded by RFRA are unconstitutional as applied to the States. Thus, any protection that Members of Congress believe may be available under the Proposed Amendment are fundamentally inadequate to protect religious liberty from state action. See, e.g., *Adams v. C.I.R.*, 170 F.3d 173, 175 (3d Cir. 1999) (noting that *City of Boerne* “held that RFRA was unconstitutional as applied to the states”); *Olsen v. Mukasey*, 541 F.3d 827, 830 (8th Cir. 2008) (“Application of RFRA to the states is unconstitutional.”). And, when religious individuals and organizations have raised RFRA claims against state actors, those claims have been promptly and properly dismissed. See *Guillory v. Hodge*, No. 2:14-cv-157-MTP, 2016 WL 1175282, \*4 (S.D. Miss. Mar. 23, 2016) (“RFRA only applies to the federal government and its actors . . . All defendants are state or local actors; therefore, this claim will be dismissed.”).

**B. The First Amendment Will Provide No Protection for Religious Organizations Because HR 8404 Will Be Considered Neutral and Generally Applicable.**

In addition to the fact that RFRA will provide no protection for individuals and organizations with sincerely held religious objections to the text and requirements of HR 8404, the First Amendment will likewise provide no protection because the Act will be considered neutral and generally applicable. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. See 494 U.S. at 886 (holding that to permit religious objectors to “ignore generally applicable laws is a constitutional anomaly”). See also *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (noting that facially neutral laws require only an application of rational basis review); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (same).

Though the First Amendment would provide theoretical protection against state actors enforcing the requirements of HR 8404, the ramifications of it being subject to only rational basis review provide little protection for religious objectors.

**C. Any Effective Religious Liberty Exemption Must Expressly State That Individuals and Organizations Are Exempt from HR 8404's Requirements.**

As Justice Gorsuch has aptly noted, “Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country’s commitment to serving as a refuge for religious freedom.” *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm’n.*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring). The only way to adequately protect individuals and organizations with sincerely held religious objections to the Act’s definitions of marriage and the ramifications those definitions may impose upon such religious objectors is to explicitly exclude and exempt them from any requirements of the Act. Any amendment must state **“all individuals and organizations that have sincerely held religious objections respecting any application or enforcement of HR 8404 are hereby exempted from its requirements or application.”**

The proposed amendment to H.R. 8404 severely restricts the purported exemption for religious organizations by restricting it to a limited subset of only nonprofit entities. H.R. 8404, Section 6(b) (“Consistent with the First Amendment to the Constitution, **nonprofit religious organizations**, including churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, religious educational institutions, and nonprofit entities **whose principal purpose is the study, practice, or advancement of religion**, and any employee of such an organization, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage.” (emphasis added)). This amendment provides not protection to for-profit, closely held religious organizations who have sincere religious objections to the requirements of the Bill. And, neither the First Amendment nor RFRA are limited to nonprofit entities. The Supreme Court has made plain that RFRA’s protections extend to for-profit corporations. *See, e.g., Hobby Lobby*, 573 U.S. at 708 (“No known understanding of the term ‘person’ includes *some* but not all corporations. The term ‘person’ sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. **But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.**” (emphasis added)). Indeed, as the Court held, “[i]t is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected.” *Id.* at 715. And, the First Amendment’s religious liberty protections extend to for-profit corporations. *See id.* at 710 (“The free exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons. . . . Business practices that are compelled or limited by the tenets of religious doctrine fall comfortably within that definition.” (cleaned up)).

**D. Congress Possesses No Constitutional Authority To Define Marriage.**

Finally, and most fatally for the entirety of H.R. 8404, Congress does not have

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jurisdictional authority to enact such legislation under Article I? In striking down DOMA, the reverse of the ill-named Respect for Marriage Act, the Supreme Court said that “[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.” *United States v. Windsor*, 570 U.S. 744, 764 (2013). While it is true that Congress has some authority “in enacting **discrete statutes** . . . that bear on marital rights and privileges,” those “**discrete examples** establish the constitutionality of **limited federal laws** that regulate the meaning of marriage in order to further federal policy.” *Id.* at 765 (emphasis added). Just like DOMA, “[R]OMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations.” *Id.*

If you compare ROMA to DOMA, the bills are virtually identical with the opposite conclusion. DOMA, obviously, said that marriage would only be recognized at the federal level as between a man and wife. ROMA, by contrast, expands that definition to include all individuals. If Congress cannot enact the one, then the necessary constitutional corollary is that Congress cannot enact the other as well.

As *Windsor* noted, “DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees from one State to the next.” *Id.* at 768. “DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.” *Id.* (emphasis added). The Constitution cannot be said to prohibit the exercise of power to define marriage in one manner yet authorize the opposite definition of that same unconstitutional exercise of power. If *Windsor* noted that Congress lacked authority in this realm, then it necessarily lacks the power here.