THE RESPECT FOR MARRIAGE ACT: LIVING TOGETHER DESPITE OUR DEEPEST DIFFERENCES

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The recently enacted Respect for Marriage Act is important bipartisan legislation that will protect same-sex marriage if the Supreme Court overrules Obergefell v. Hodges. *And it will protect religious liberty for traditional beliefs about marriage. The Act has been attacked by hardliners on both sides. We analyze the Act section by section, showing how it works, why it is constitutional, and why it does not do the many things its critics have accused it of.*

The Act requires every state to recognize same-sex marriages performed in other states. If Obergefell *were overruled, Congress would have no authority to require each state to license same-sex marriages within its borders. By invoking the Full Faith and Credit Clause, Congress did all that it could for same-sex couples.*

The Act protects religious liberty with congressional findings, rules of construction, modest new substantive protections, and a limitation on the Act's reach: only persons acting under color of state law are required to recognize sister-state marriages. The Act specifically addresses the fear

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The authors provided a letter to senators analyzing the religious liberty provisions of the near-final version of the Respect for Marriage Act and concluded that those protections were "meaningful and important even if not comprehensive." *See* Letter to Hon. Susan Collins and Hon. Tammy Baldwin from Douglas Laycock, Thomas C. Berg, Carl H. Esbeck, and Robin Fretwell Wilson, Nov. 16, 2022. The letter is reprinted at 168 CONG. REC. 6720–21 (daily ed. Nov. 16, 2022); the original is available, at least for now, at https://www.collins.senate.gov/imo/media/doc/rma_letter_from_legal_scholars.pdf [https://perma.cc/AC74-FNEB]. This Article expands greatly on that assessment of the religious liberty provisions and adds analysis of the statute's provisions on marriage recognition.

that conservative religious entities could lose their federal tax-exempt status.

The Act is a model for pluralistic approaches that protect both sides in the culture wars. State legislatures have passed many gay-rights bills with protections for religious liberty. But neither side has been able to pass gay-rights bills without such protections, or absolute religious liberty bills with no allowance for gay and lesbian rights. The Respect for Marriage Act is an encouraging return to the practice of protecting liberty for all Americans—both the LGBTQ community and the conservative religious community.

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I. INTRODUCTION

On December 13, 2022, President Joseph R. Biden, Jr. signed the Respect for Marriage Act (the RMA, or the Act).[1] The RMA requires interjurisdictional recognition of same-sex and interracial marriages lawfully entered into in another state—recognition already required by the Supreme Court's decisions in *Obergefell v. Hodges*[2] and *Loving v. Virginia*[3]—while also protecting religious freedom concerning beliefs and practices about marriage. Recognition of interracial marriages, unlike recognition of same-sex marriages, is no longer contested. No serious scholar, jurist, attorney, politician, or citizen argues for reversing *Loving*. That is not true of *Obergefell*, however unlikely reversal may be. Thus, the RMA was overwhelmingly about codifying *Obergefell*, and so we focus on the RMA's implications for issues surrounding marriage equality for same-sex couples.

Many interest groups from both the religious and the LGBTQ communities welcomed the RMA as a rare bipartisan accomplishment.[4] An earlier version of the RMA, with no religious liberty protections, passed in the House with unanimous Democratic support and a surprising forty-seven votes from Republicans.[5] And then, in the waning days of the 117th Congress, and despite fears of gridlock, the bill in its final form, with substantial protections for religious liberty, overcame a Senate filibuster with the votes of twelve Republicans and, once again, unanimous support from Democrats.[6]

But the public debate produced a fog of misinformation about what the RMA would do. The bill drew intense criticism from hardliners on both sides of

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1. Respect for Marriage Act, Pub. L. 117-228, 136 Stat. 2305 (2022), reprinted in the Appendix to this Article.

2. 576 U.S. 644, 680–81 (2015).

3. 388 U.S. 1, 7–12 (1967).

4. *See, e.g.*, Press Release, Human Rights Campaign, Delphine Luneau, Respect for Marriage Act: What it Does, How it Interacts With the Obergefell Ruling, and Why They're Both Essential to Protecting Marriage Equality (Nov. 16, 2022), https://www.hrc.org/press-releases/respect-for-marriage-act-what-it-does-how-it-interacts-with-the-obergefell-ruling-and-why-theyre-both-essential-to-protecting-marriage-equality [https://perma.cc/68YC-JNXZ]; 168 CONG. REC. S6718–20 (daily ed. Nov. 16, 2022) (reprinting letters in support of the bill from an Elder of the Church of Jesus Christ of Latter-day Saints, the Director of Government Affairs for the Seventh-day Adventist Church-North American Division, the Executive Director of Public Policy for the Union of Orthodox Jewish Congregations of America, the President of the Council of Christian Colleges and Universities, the President of the AND Campaign (a Christian advocacy group), the Founder and Senior Director of the Institutional Religious Freedom Alliance, the Chief Executive Officer of the Center for Public Justice, the President of the 1st Amendment Partnership, and the President of the National Association of Evangelicals).

5. *See* 168 CONG. REC. H6859 (daily ed. July 19, 2022) (reporting the yeas and nays); Annie Karni, *Same-Sex Marriage Bill, Considered Dead on Arrival, Gains New Life*, N.Y. TIMES (July 20, 2022), https://www.nytimes.com/2022/07/20/us/politics/same-sex-marriage-bill-senate.html [https://perma.cc/N37A-U8RN] (reporting the vote by party affiliation).

6. *See* 168 CONG. REC. S6725 (daily ed. Nov. 16, 2022) (reporting the yeas and nays); Annie Karni, *The 12 Republicans Who Voted for the Same-Sex Marriage Bill*, N.Y. TIMES (Dec. 13, 2022), https://www.nytimes.com/2022/12/13/us/politics/republican-senators-vote-same-sex-marriage.html [https://perma.cc/63CB-MPMY].

the culture wars.[7] Some on the left complained that it failed to codify a federal definition of marriage or that it did codify religious bigotry.[8] But most of the attacks came from the right, which made dire predictions that it would strip tax-exempt status and federal benefits from conservative religious organizations or subject them to ruinous lawsuits for not recognizing same-sex marriages.[9]

As this Article demonstrates, the RMA does none of these things. Its core is a mandate that government actors—not private citizens or organizations—give full legal effect to same-sex marriages entered into in other states. Congress added findings, substantive protections, and rules of construction to ensure that the RMA could not be used, directly or indirectly, to harm religious freedom. In our view, Congress succeeded in achieving its dual aims of marriage recognition and religious freedom.

All the authors of this Article have advocated for protecting both same-sex marriage and religious liberty with respect to marriage, and three of us have taken that position for well over a decade now. Protection of both sides in the conflict between LGBTQ equality and religious freedom is a worthy goal, consistent with the historic purposes of civil liberties and civil rights. In matters as important to each individual as one's marriage and one's religious beliefs and commitments, strong protection of civil liberty reduces human suffering and protects against hostile and burdensome regulation.[10] Protection of civil liberties for all also reduces resentment and cultural conflict by assuaging people's existential fears that a hostile majority will attack their most deeply held commitments.

Protections for religious liberty, in particular, arose in colonial America in reaction to the Reformation-era cycles of coercion and violence between Catholics and Protestants and among Protestants.[11] Such fears and resentments continue to operate today, even though the principal axis of conflict has shifted. The most intense religious conflict in America today is not between competing religions but between religious conservatives of multiple faiths on one side and secularists on the other.[12] Religious progressives frequently ally with the secularists

7. *See, e.g.*, Kristen Waggoner, *A Friend's Response to David French on the Respect for Marriage Act*, WORLD (Dec. 1, 2022), https://wng.org/opinions/a-friends-response-to-david-french-on-the-respect-for-marriage-act-1669898899 [https://perma.cc/SG29-XW8P]; *see also* sources cited *infra* note 137.

8. Theia Chatelle, *Is the Respect for Marriage Act a Win for the Right*, NATION (Jan. 16, 2023), https://www.thenation.com/article/politics/respect-for-marriage-act-religious-exemptions-republicans/ [https://perma.cc/2TNT-N55W].

9. Waggoner, *supra* note 7.

10. Some of us have explored the parallels between these two (sometimes conflicting) components of identity: sexual orientation and religious faith. *See, e.g.*, Thomas C. Berg & Douglas Laycock, *Protecting Same-Sex Marriage and Religious Liberty*, *in* RELIGION AND EQUALITY: LAW IN CONFLICT 167 (W. Cole Durham, Jr. & Donlu Thayer eds., 2016); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 848–51, 866–80; Thomas C. Berg, *What Same-Sex-Marriage and Religious Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 206–26 (2010).

11. *See, e.g.*, Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1049–69 (1996) (citing historical sources).

12. *See* Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOB. LEGAL STUD. 503, 507–13 (2006) (identifying three historic alignments of religious conflict in the United States: Protestant-Protestant, Protestant-Catholic, and religious-secular); *see generally* THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE 23–85, 257–99 (2023).

on social issues such as marriage equality.[13] Adherents of the two major political parties now distrust each other more than at any time in decades, and the conflict over LGBTQ equality and religious objections to same-sex relationships contributes significantly to this polarization.[14] Legislation that would temper the conflict, to any extent, is good for individuals, reducing levels of fear and anger, and good for the reintegration of the nation.

This Article analyzes the RMA's eight sections and explains their legal effects. It assesses and responds to the fears of both sides, demonstrating that the RMA does what its sponsors claimed, providing substantial protection for same-sex marriages and for religious dissenters who conscientiously object to assisting with or participating in the solemnization or celebration of those marriages. With respect to marriage, the RMA goes as far as Congress could within its delegated powers. With respect to religious liberty, the RMA provides complete protection against any risks to religious liberty that might arise from the RMA itself, and it even provides a bit of new protection against threats from other sources of law. It does not protect small businesses in the wedding industry, but neither does it threaten those businesses or make their situation worse in any fashion. And it points the way to further efforts at legislative compromise in this fraught area of LGBTQ rights and religious liberty.

II. SECTION-BY-SECTION ANALYSIS OF THE RMA

This part of the Article describes each section of the RMA and its legal implications. We also respond to the principal criticisms of its provisions. The full statutory text is reprinted in the Appendix.

A. Section 2: Congressional Findings on Marriage and Pluralism

Section 1 of the Act provides only that it can be cited as the "Respect for Marriage Act."[15] The first substantive provision is section 2, which enacts three congressional findings. These findings lay the ground for protecting both marriage rights for same-sex couples and religious liberty for dissenters.

First, Congress found that "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."[16] Many Americans would agree with this statement, but some would not. Religious

13. *See, e.g.*, Sarah Dreier, *Expressing Faith Through Marriage Equality*, CTR. FOR AM. PROGRESS (Mar. 3, 2009), https://www.americanprogress.org/article/expressing-faith-through-marriage-equality/ [https://perma.cc/ZL8J-QB3V]; *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), https://www.pewresearch.org/religion/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.cc/W49N-EMLK].

14. Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 412–23 (2011); Thomas C. Berg, *"Christian Bigots" and "Muslim Terrorists": Religious Liberty in a Polarized Age*, *in* LAW, RELIGION, AND FREEDOM: CONCEPTUALIZING A COMMON RIGHT 164 (W. Cole Durham, Jr., Javier Martínez-Torrón & Donlu Thayer eds., 2021).

15. Respect for Marriage Act, Pub. L. 117-228, § 1, 136 Stat. 2305 (2022) (codified as a note to 1 U.S.C. § 1). Statutory provisions codified as notes to the United States Code are fully enforceable as enacted federal statutes. *See infra* notes 275–76 and accompanying text.

16. Respect for Marriage Act § 2(1) (codified as a note to 1 U.S.C. § 7).

believers from traditionalist faith communities might consider the finding incomplete, because it omits what they consider to be the unique religious and cultural significance of marriage between a man and a woman. And many other Americans might qualify the finding or even dissent. Polls show that while most Americans regard marriage as important to living a fulfilling life, relatively few (especially among young adults) regard it as essential.[17] Even so, most Americans would agree with the thrust of Congress's first finding: marriage is an extremely close and intensely personal relationship and a fundamental social institution, even if a fair number of Americans also think that Congress exaggerated for political effect.[18]

Second, Congress adopted a finding with important implications for religious believers and institutions: "Diverse beliefs about the role of gender in marriage are held by reasonable and sincere people based on decent and honorable religious or philosophical premises. Therefore, Congress affirms that such people and their diverse beliefs are due proper respect."[19]

This finding deliberately echoes *Obergefell.* There, as the Court announced the constitutional right to same-sex marriage, it also affirmed that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[20] Congress's finding that "diverse beliefs" are honorable and entitled to respect extends to the progressive belief that same-sex and opposite-sex marriages are of equal value and also to the conservative belief that marriage is properly or necessarily confined to traditional marriages between one man and one woman. The finding endorses the value of religious and philosophical pluralism with respect to our nation's contested beliefs about marriage.

Critics might discount this finding as meaningless window dressing, but courts and lawmakers should not. This finding is principally addressed to the courts; it is an important premise for interpreting both the RMA and other laws addressing conflicts between LGBTQ rights and religious liberty.

Conservative religious communities have been deeply worried that expanding protections for LGBTQ rights in federal law will support the inference that theological and ecclesiastical opposition to same-sex marriage is akin to racism. A prime focus of this worry has been the Supreme Court's decision in *Bob Jones University v. United States*, which affirmed an Internal Revenue Service decision stripping a religious university of its federal tax-exempt status because the university, acting on its interpretation of scripture, prohibited interracial dating or

17. Amanda Barroso, *More Than Half of Americans Say That Marriage is Important but not Essential to Leading a Fulfilling Life*, PEW RSCH. CTR. (Feb. 14, 2020), https://www.pewresearch.org/fact-tank/2020/02/14/more-than-half-of-americans-say-marriage-is-important-but-not-essential-to-leading-a-fulfilling-life/ [https://perma.cc/3CYH-FHET]. 71% said that marriage is important, but only 63% of young adults agreed, and only 16-17% of all adults called it essential. The poll question is not identical to the question Congress opined on, but the two questions are related. Those who do not find marriage essential, or even important, seem unlikely to believe that it is the most profound of all relationships or that it embodies the highest ideals.

18. *See id.*

19. Respect for Marriage Act § 2(2) (codified as a note to 1 U.S.C § 7).

20. Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

marriage among its students.[21] Central to the Court's analysis was a review of its own decisions, and of congressional acts and executive orders, that together showed "a firm national policy to prohibit racial segregation and discrimination in public education."[22] Therefore, the Court concluded, a racially discriminatory school could not be part of what Congress meant when it exempted "charitable" organizations from the income tax.[23]

Bob Jones illustrates the broader point that racist practices, whether motivated by religion or not, receive almost no constitutional protection. If beliefs in opposite-sex-only marriage were to be equated with racism, they too would receive little or no protection. President Obama's solicitor general, Donald Verrilli, fueled such fears at the oral argument in *Obergefell*. In response to a Justice's question, he said that the potential withdrawal of tax exemptions from religiously affiliated schools that reject same-sex marriage was "certainly going to be an issue."[24] His statement "was big news" during the 2016 election campaign "in both the conservative blogosphere and in publications catering to religiously traditionalist audiences."[25] At least one conservative commentator believes that this threatening answer made Donald Trump President of the United States.[26]

The RMA addresses these fears both directly and indirectly. Through the express congressional finding that "[d]iverse beliefs about the role of gender in marriage" are held on "honorable" premises by "reasonable" people who are "due proper respect," the RMA fatally undermines the inference that congressional support for same-sex marriage implies condemnation of those who oppose it for sincere religious reasons.[27] It negates any inference that Congress meant to exclude such people, or such beliefs, from the benefits of federal law. And later in the RMA, there are explicit provisions to similar effect.[28]

More broadly, this finding on respecting diverse beliefs, by a bipartisan Congress and with unanimous Democratic support, recognizes that religious belief in an exclusively traditional view of marriage is not akin to the racism that the *Bob Jones* Court found anathema to national policy. From the civil rights era to the present, Congress and the Supreme Court have never spoken of institutional racism with anything but condemnation. But Congress treats opposition to same-sex marriage very differently. Paraphrasing the Supreme Court's own view, the RMA speaks with respect for diverse beliefs about same-sex marriage. That amounts to a declaration that courts should also treat these diverse beliefs

21. 461 U.S. 574, 585–604 (1983).

22. *Id.* at 593.

23. *Id.* at 595–96.

24. Transcript of Oral Argument at 38, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556).

25. David Bernstein, *The Supreme Court Oral Argument That Cost Democrats the Presidency*, WASH. POST: THE VOLOKH CONSPIRACY (Dec. 7, 2016, 4:29 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/ [https://perma.cc/G89X-JDHW].

26. *Id.*

27. Respect for Marriage Act, Pub. L. 117-228, § 2(2), 136 Stat. 2305 (2022) (codified as a note to 1 U.S.C § 7).

28. *See infra* Section II.E.

with respect in interpreting and applying federal law. It clearly states that *Congress* views these diverse beliefs with respect, effectively forbidding courts to infer that Congress believes or has legislated otherwise.

Moreover, by recognizing that "reasonable and sincere people" remain committed to traditional understandings of marriage based on "decent and honorable" religious beliefs that should be respected, Congress has provided substantial support for the argument that the federal government—and by extension or analogy, state and local governments—have no compelling interest in eradicating or suppressing sincere religious beliefs and practices favoring traditional marriage.[29]

Finally, the findings conclude with language of particular importance to racial minorities and to the LGBTQ community: "Millions of people, including interracial and same-sex couples, have entered into marriages and have enjoyed the rights and privileges associated with marriage. Couples joining in marriage deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children."[30]

This finding too is addressed primarily to the courts, and it is intended to protect same-sex couples from the risk that the Supreme Court might roll back the constitutional right to same-sex marriage. This concern arose from Justice Clarence Thomas's concurring opinion in *Dobbs v. Jackson Women's Health Organization*,[31] where he argued that the Court should "reconsider all of [its] substantive due process precedents, including *Griswold* [*v. Connecticut*, on contraception], *Lawrence* [*v. Texas*, on same-sex relationships], and *Obergefell* [on same-sex marriage]."[32] "Substantive due process" is the doctrine by which the Court has protected constitutional liberties, such as abortion and same-sex marriage, that are not explicitly and specifically mentioned in the Constitution.[33]

Although Justice Thomas has long advocated a root-and-branch abolition of substantive due process,[34] his latest invitation to reconsider fundamental rights poured more fuel on the political firestorm ignited by *Dobbs*. This time, the Court really had abolished one of the most important substantive due process rights (in the view of abortion-rights supporters), and who knew how far it would go? Members of Congress, LGBTQ organizations, and same-sex couples fear that

29. Respect for Marriage Act § 2(2) (codified as a note to 1 U.S.C § 7). *See also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (holding that city had no compelling interest in terminating municipal contract with religious child-placement agency that would not serve same-sex couples, at least where city allowed discretionary exceptions to its nondiscrimination rule).

30. Respect for Marriage Act § 2(3) (codified as a note to 1 U.S.C § 7).

31. 142 S. Ct. 2228, 2300 (2022).

32. *Id.* at 2301; *see* Obergefell v. Hodges, 576 U.S. 644, 663–76 (2015); Lawrence v. Texas, 539 U.S. 558, 564–79 (2003); Loving v. Virginia, 388 U.S. 1, 12 (1967).

33. *See Dobbs,* 142 S. Ct. at 2301.

34. *See* McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment).

the Court might move from renouncing abortion rights to renouncing same-sex marriage rights.[35]

This fear is why most of the LGBTQ movement supported the RMA and why Democrats in both houses voted for it unanimously.[36] Congress's third finding seeks to bolster the case that the right of same-sex couples to marry is and should remain a fundamental right, and it emphasizes the reliance interests of couples who married under the protection of *Obergefell*.[37]

Interracial couples have far less to fear, but they get the protection of the same finding. The reasons for including interracial marriage may be more political than legal. No one, not even Justice Thomas, seriously questions the legal basis of interracial couples' constitutional right to marry.[38] Protecting interracial marriage in the RMA was a feel-good provision that everyone could agree on.

But this finding also enabled Congress to sharply contrast opposition to same-sex marriage with opposition to interracial marriage. The RMA protects both kinds of marriages, but its finding that diverse views about marriage are entitled to respect applies only to diverse beliefs "about gender and marriage."[39] Congress found that opposition to same-sex marriage is honorable and entitled to respect, but it found no such thing with respect to opposition to interracial marriage.

B. Section 3: Repeal of the Defense of Marriage Act

In two separate provisions,[40] the RMA repeals the Defense of Marriage Act (DOMA).[41] DOMA had two substantive provisions. Section 3 of DOMA defined marriage for all purposes of federal law as the marriage of one man and one

35. *See, e.g.*, Zack Beauchamp, *Could Clarence Thomas's Dobbs Concurrence Signal a Future Attack on LGBTQ Rights?*, VOX (June 24, 2022, 2:36 PM), https://www.vox.com/2022/6/24/23181723/roe-v-wade-dobbs-clarence-thomas-concurrence [https://perma.cc/GM4X-R6F6].

36. 168 CONG. REC. H6859 (daily ed. July 19, 2022) (reporting the yeas and nays); 168 CONG. REC. S6725 (daily ed. Nov. 16, 2022) (reporting the yeas and nays).

37. Respect for Marriage Act, Pub. L. No. 117-228, § 2(3), 136 Stat. 2305, 2305 (2022) (codified as a note to 1 U.S.C. § 7).

38. Loving v. Virginia, 388 U.S. 1, 7–12 (1967), invalidated bans on interracial marriage on both equal protection and substantive due process grounds. "[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. Justice Thomas's concurrence in *Dobbs* nowhere mentions *Loving*. *See Dobbs*, 142 S. Ct. at 2300–04 (Thomas, J., concurring); *see also* Obergefell v. Hodges, 576 U.S. 644, 730 n.5 (2015) (Thomas, J., dissenting) (distinguishing anti-miscegenation laws from non-recognition of same-sex marriage on the ground that the former were "the foundation of post-Civil War white supremacy") (quoting PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 27–28 (2009)). Even if his long-running and quixotic campaign ultimately convinces a majority of the Court to discard substantive due process, that jurisprudential shift would not threaten the equal protection right of interracial couples to marry.

39. Respect for Marriage Act § 2(2) (codified as a note to 1 U.S.C. § 7).

40. *Id.* § 3 (repealing 28 U.S.C. § 1738C); *id.* § 5 (codified at 1 U.S.C. § 7).

41. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *repealed by* Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

woman.[42] The Supreme Court held this provision unconstitutional in *United States v. Windsor*,[43] and Congress repealed it in section 5 of the RMA.[44]

Section 2 of DOMA authorized states "to refuse to recognize same-sex marriages performed under laws of other States."[45] But any state authority to deny recognition to a same-sex marriage validly performed in another state ended with *Obergefell*, which held that the Fourteenth Amendment entitles a same-sex couple married in one state to have their marriage recognized in every other state.[46] The Court reasoned that interstate recognition is a component of the constitutional right to same-sex marriage.[47] *Obergefell* directly invalidated only the state laws explicitly at issue in that case, but its reasoning is equally applicable to section 2 of DOMA, a federal law that authorized and protected those state laws.

Section 3 of the RMA explicitly repeals section 2 of DOMA.[48] Because section 2 of DOMA was obviously unconstitutional after *Obergefell*, the repeal can be viewed as simply tidying up the United States Code to reflect the current state of federal law. But the repeal also means that section 2 of DOMA is gone forever, even if the Supreme Court overrules *Obergefell*. To resurrect anything like DOMA, the Court would have to overrule *Obergefell*, Congress would have to pass a new law through both houses, and a President would have to sign it. And quite apart from any risk that *Obergefell* might be overruled, removing DOMA from the United States Code is an important symbolic victory for the LGBTQ community. DOMA had become an embarrassing relic from a less tolerant time.

C. Section 4: Full Faith and Credit for Same-Sex Marriages

Section 4 of the RMA replaces DOMA's repealed provision on interstate marriage recognition with an entirely new provision that requires all states to give "full faith and credit" to the records of certain marriages licensed and performed in a sister state.[49] It thus clarifies that a same-sex marriage validly performed in, say, Massachusetts, must be recognized as valid in every other state. The Act does not require any state to license or perform same-sex marriages within its own borders. But as long as at least one of the fifty states does license and perform same-sex marriages, same-sex couples will be able to travel to that state, get married, and have the marriage recognized back in their home state.

42. *Id.* § 3.

43. United States v. Windsor, 570 U.S. 744, 769–75 (2013).

44. *See infra* notes 131–33 and accompanying text.

45. *Windsor*, 570 U.S. at 752.

46. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

47. *See id.* ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

48. Respect for Marriage Act, Pub. L. No. 117-228, § 3, 136 Stat. 2305 (2022) (repealing 28 U.S.C. § 1738C). The repealed section was Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (formerly codified at 1 U.S.C. § 7), *repealed by* Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

49. Respect for Marriage Act § 4(a)(1) (codified at 28 U.S.C. § 1738C(a)(1)).

This is the heart of the RMA for those who worked to protect same-sex marriage against the risk that *Obergefell* might be overruled.

Specifically, RMA subsection 4(a) amends 28 U.S.C. § 1738C by substituting new language for the previously existing (now repealed) DOMA language in that section.[50] The new language provides that "[n]o person acting under color of State law may deny . . . full faith and credit to any . . . marriage" entered into by two individuals in a sister state, or deny any "right or claim arising from such a marriage . . . on the basis of the sex, race, ethnicity, or national origin of those individuals."[51]

1. Subsection 4(a): Governing Only State Actors

Both parts of subsection 4(a) apply only to a "person acting under color of State law."[52] This phrase is a term of art. It originated in the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983.[53] Animating the phrase is the principle that section 1 of the Fourteenth Amendment bars discrimination by government entities and public officials but does not apply to private parties.[54] In the Fourteenth Amendment context, this distinction is often referred to as the requirement of "state action." State action, and action "under color of state law," are, for all practical purposes, synonymous.

The most common criticism of the RMA from the political right was that it would enable private lawsuits against religious organizations that refused to perform or recognize same-sex marriages.[55] This criticism was mistaken. Subsection 4(a)'s requirement to recognize sister-state marriages applies only to governments and government officials and only very occasionally, if a relevant situation ever arises, to private individuals or organizations acting pursuant to instructions from government officials. It does not apply to religious organizations, nor does it apply to religious individuals in the wedding business or elsewhere.

Under the state-action doctrine, "merely private conduct" is not actionable for alleged constitutional violations, "however discriminatory or wrongful."[56] Maintaining a sharp distinction between public and private activity "preserves an area of individual freedom by limiting the reach of federal law" and not "imposing on the State . . . responsibility for conduct for which [the government] cannot fairly be blamed."[57] The RMA's state-action requirement is a powerful protection for religious liberty, because religious organizations do not act under color of law. The RMA requires nothing of religious organizations, and no one can plausibly sue religious organizations under the RMA.

50. *Id.* § 4(a) (codified at 28 U.S.C. § 1738C(a)).
51. *Id.*
52. *Id.*
53. 42 U.S.C. § 1983.
54. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).
55. *See, e.g.*, Waggoner, *supra* note 7.
56. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).
57. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

Before briefly surveying the Supreme Court's modern interpretation of state action and color of state law, we note a simpler point. If LGBTQ litigants thought they could show that religious organizations are state actors, they could have sued them years before the RMA, under *Obergefell* and section 1983. Such lawsuits did not appear in the seven years between *Obergefell* and the RMA. Religious organizations, and religiously motivated individuals and businesses, have been caught up in litigation to enforce or challenge state and local civil rights laws[58] and under the terms of government contracts.[59] But they have not been sued under section 1983, because no one really believes that they are acting under color of state law.

Private citizens and organizations rarely qualify as state actors. "Numerous private entities in America obtain government licenses, government contracts, or government-granted monopolies."[60] But none of these arrangements makes such an entity a state actor, "[a]s this Court's many state-action cases amply demonstrate."[61]

Being highly regulated by the government "does not by itself convert [private] action into that of the State for the purposes of the Fourteenth Amendment."[62] Nor does accepting public funding, even if it accounts for the lion's share of an organization's operating expenses.[63] Nor does combining the two factors; being highly regulated *and* publicly funded does not make a private organization's actions government actions.

In *Blum v. Yaretsky*,[64] for example, a privately owned skilled nursing facility was not a state actor even though it was heavily regulated, received 90% of its income from Medicaid payments, received state subsidies for its capital costs, and was doing something the government required it to do—evaluating patients for transfer to less skilled facilities.[65] Plaintiffs complained about *how* the defendant performed those evaluations, but the government had not directed or

58. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018) (challenging application of a state civil rights statute); Brush & Nib Studios, LC v. City of Phoenix, 448 P.3d 890, 898–99 (Ariz. 2019) (challenging threatened application of a local ordinance).

59. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875–76 (2021) (challenging terms of contract with city).

60. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1932 (2019).

61. *Id.* The issue under the RMA, and in all the cases discussed in text, is whether and when the actions of a private organization sometimes qualify as state action. In its October 2023 Term, the Supreme Court is considering the quite different issue of whether and when the actions of a government official, connected to the officer's official actions, are taken sufficiently in the officer's private capacity that they do *not* qualify as state action. *See* Lindke v. Freed, No. 22-611, and O'Connor-Ratcliff v. Garnier, No. 22-324. Because religious organizations are never government officials, these two cases are irrelevant to the controversy here.

62. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974)); *accord Halleck*, 139 S. Ct. at 1932 ("New York State's extensive regulation of MNN's operation of the public access channels does not make MNN a state actor.").

63. *See Blum*, 457 U.S. at 1011 (a nursing home that accepted "substantial funding" from the state was not a state actor); *accord* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (a private school's "receipt of public funds does not make the discharge decisions acts of the State").

64. 457 U.S. 991 (1982).

65. *Id.* at 993–95, 1011.

mandated the challenged methods.[66] As the Court explained, "constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains."[67] Because the state had not required the nursing facility to take the contested actions, those actions were not state actions.

Similarly in *Rendell-Baker v. Kohn*,[68] a private school specializing in educating high school students with substance abuse or other behavioral problems received all its students by government referrals, was subject to "detailed regulations," and received from 90% to as much as 99% of its funding from government agencies.[69] But the government did not direct or control its decision to fire some teachers, so nothing in the case made those "discharge decisions acts of the state."[70]

These principles limit the reach of the RMA. Its prohibitions under section 4 apply only when a state is "responsible for the specific conduct" challenged in court.[71] Governments do not direct the adoption or development of religious doctrines under our constitutional system, so the state will never be responsible for a religious organization's decision not to perform same-sex marriages or not to recognize such marriages. The duties imposed by subsection 4(a) will rarely, if ever, affect anyone beyond public officials and government offices, and it is hard to imagine a scenario in which those duties could ever reach a religious organization. Even in the case of child-placement agencies and foster care of children, which are highly regulated and often subsidized, the government will not be responsible for a religious agency's decision not to place children with same-sex couples. And this last point is what matters under the Court's state-action decisions.

A private organization can also become a state actor if it performs some function that has traditionally and exclusively been performed by the state. But this is a stringent test, and the emphasis is on "exclusively."[72] Running a company town[73] and conducting an election[74] have been held to qualify; a much longer list of activities has not qualified.[75] Neither the nursing facility in *Blum*[76]

66. *Id.* at 1005–08.

67. *Id.* at 1004.

68. 457 U.S. 830 (1982).

69. *Id.* at 832–33.

70. *Id.* at 840.

71. *Blum*, 457 U.S. at 1004.

72. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–30 (2019); *Rendell-Baker*, 457 U.S. at 842.

73. Marsh v. Alabama, 326 U.S. 501 (1946). Company towns were towns in which all or substantially all the property—residences, business district, churches, streets, etc.—was owned by a single corporation that was also the only or dominant employer. *See, e.g.*, Allen Seager, *Company Towns*, CAN. ENCYCLOPEDIA (Dec. 16, 2013), https://www.thecanadianencyclopedia.ca/en/article/company-towns [https://perma.cc/2ZXH-3VU5].

74. Terry v. Adams, 345 U.S. 461, 468–70 (1953).

75. *See Halleck*, 139 S. Ct. at 1929 (collecting cases).

76. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

nor the school for troubled youth in *Rendell-Baker*[77] nor the public-access cable channel in a more recent case[78] qualified as an exclusive government function.[79]

A recent decision by the United States Court of Appeals for the Fourth Circuit defies the general trend. *Peltier v. Charter Day School, Inc.* held that North Carolina charter schools qualify as state actors.[80] That conclusion primarily turned on a statute declaring that a charter school is a "public school" that exercises powers delegated by the state.[81] "[The school] operates a 'public school,' under authority conferred by the North Carolina legislature and funded with public dollars, functioning as a component unit in furtherance of the state's constitutional obligation to provide free, universal elementary and secondary education to its residents."[82]

The decision is at odds with the Supreme Court's holdings in *Blum* and *Rendell-Baker*. Those cases did not ask whether the institution as a whole was a state actor, but whether the particular challenged action was state action because it had been directed or required by the government.[83] And in any event, *Peltier* is quite unlikely to ever apply to a religious organization. States do not declare religious organizations to be governmental organizations. And a religious charter school, if states eventually recognize such a school, could not be declared to be a "public school" or made a state actor in any other way. Declaring a religious charter school to be a public school would subject the school to the Establishment Clause,[84] which would prevent it from teaching religion and largely defeat the purpose of recognizing religious charter schools in the first place.

No state is likely to attempt such a thing, and no religious school affirming that it cannot recognize same-sex marriages would ever accept such a designation. The Respect for Marriage Act will never intersect with the facts of *Peltier*. Or to put the point slightly differently: if any religiously affiliated school ever

77. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

78. *Halleck*, 139 S. Ct. at 1928–30.

79. One article predicting that the RMA would have dire consequences for religious organizations claims that they might be liable under the notion that they are sufficiently "entwined" with the state. Waggoner, *supra* note 7. The article relies on *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, where the Court held the association sufficiently intertwined with the state to be a state actor. 531 U.S. 288, 296–301 (2001). But there, the defendant was principally an association of governmental units, organized by governments and controlled by governments, which also accepted private schools as members. 84% of the Association's members were public school districts, all within Tennessee, and these governments had voting power to set policy for the nominally private Association. *Id.* at 298–99. That situation is not remotely analogous to a private religious organization's refusal to recognize a same-sex marriage, a decision made by the private institution and not directed or controlled by the state. If *Brentwood* is Ms. Waggoner's best example of what it takes for a private organization to be "entwined" with government, this reinforces our confidence that religious organizations are not state actors. *Brentwood* does not touch the rulings in *Blum* and *Rendell-Baker*—which are far more on point—that a private institution can receive nearly all its revenue from state subsidies, be comprehensively regulated, and perform a function sometimes or even usually (but not exclusively) performed by government, and still not be a state actor unless the state directs the specific conduct complained of.

80. 37 F.4th 104, 122 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

81. *Id.* at 117–18.

82. *Id.* at 119.

83. Blum v. Yaretsky, 457 U.S. 991, 1004–08 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 838–42 (1982).

84. U.S. CONST. amend. I.

agrees to be formally designated as a public school, it will have surrendered so much of its religious liberty that any additional impact from the RMA would be incidental at most.[85]

2. *Subsection 4(a)(1): Requiring Interstate Recognition of Marriages*

Subsection 4(a)(1) of the RMA prohibits state actors from denying "full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals . . . ."[86] Congress has long provided that "full faith and credit" requires state courts to give "such Acts, records and judicial proceedings . . . the *same* full faith and credit . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken,"[87] and that "every court or office within the United States" shall give "nonjudicial books and records . . . the same effect as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken."[88] The RMA repeats these commands with respect to marriage records from a sister state, and it makes clear that there is no implied exception for same-sex marriages, whether derived from "public policy" or from any other rationale. So a state official in Texas must give the relevant "public acts, records, or judicial proceedings" from New York the same effect that they would be given in New York.

The RMA does not apply to all government refusals to recognize sister-state marriages. It applies only when a state refuses to recognize a sister-state marriage "on the basis of the sex, race, ethnicity, or national origin of those

85. Professors Lupu and Tuttle offer a contrasting view, but one in which the free-exercise rights of religious schools would still be protected. *See generally* Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023). They predict that the current Supreme Court will require the recognition of religious charter schools and protect their right to conduct religious exercises even if they are held to be public schools. *Id*. at 1789–91, 1805. They note recently filed litigation on this issue in Oklahoma, where a state agency has approved funding for an online Catholic charter school. *Id*. at 1790 n.151. *See* OKPLAC, Inc. v. Statewide Virtual Charter School Board, No. CV-2023-1857, filed July 31, 2023 in the District Court of Oklahoma County, in Oklahoma City. On October 20, 2023, the state's Attorney General filed suit in the original jurisdiction of the state Supreme Court, also arguing that the new charter school is unconstitutional. Drummond v. Okla. Statewide Virtual Charter Sch. Bd. For a description and links to key documents, see Howard Friedman, *Oklahoma AG Sues State's Charter School Board Over Its Approval of Religious Charter School*, RELIGION CLAUSE (Oct. 24, 2023), http://religionclause.blogspot.com/2023/10/oklahoma-ag-sues-states-charter-school.html [https://perma.cc/E5UP-MM4M].

Lupu and Tuttle do not address the RMA, but even in their scenario, the government would not be directing the religious school's decision not to recognize same-sex marriages. It would also appear that in their scenario, the Free Exercise Clause would protect religious charter schools from any obligation to recognize same-sex marriages, even if the RMA were held to apply.

86. Respect for Marriage Act, Pub. L. 117-228, § 4(a)(1), 136 Stat. 2305 (2022) (codified at 28 U.S.C. § 1738C(a)(1)).

87. 28 U.S.C. § 1738 (emphasis added)*; see also* Smithsonian Inst. v. St. John, 214 U.S. 19, 28–29 (1909):

> Without doubt the constitutional requirement, art, 4, § 1, that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in Mills v. Duryee, 7 Cranch 481, 3 L. ed. 411, and steadily adhered to ever since.

88. 28 U.S.C. § 1739.

individuals" who are the spouses in the marriage. Race, sex, ethnicity, and national origin are common classifications in federal civil rights law.[89] The RMA leaves the body of state marriage laws undisturbed on all issues outside its narrow focus on same-sex marriages, interracial marriages, and the near analogs to race of ethnicity and national origin.[90]

So the RMA does not require a state to recognize polygamous, incestuous, or under-age marriages, even if some other state authorizes them. These undisturbed state marriage laws are widely seen as protecting the general welfare of citizens. And although no state currently allows polygamous marriages to be licensed or performed, the RMA also excludes them more explicitly: It requires full faith and credit only to acts, records, or proceedings "pertaining to a marriage between 2 individuals."[91] *State* action recognizing or refusing to recognize polygamous marriages is thus doubly excluded from the RMA. Subsection 7(b) adds that nothing in the RMA requires or authorizes *federal* recognition of polygamous marriages.[92] This triple protection against polygamy responded to another set of unwarranted fears about the bill.

The practical impact of the RMA's full-faith-and-credit provision is straightforward. A state official in Kentucky, for instance, cannot treat the public acts, records, or judicial proceedings "pertaining" to a same-sex marriage lawfully entered into in California any differently than that marriage would be treated in California. California law makes the marriage valid. And because all states recognize valid marriages, this is effectively the same as saying that the official must treat the California marriage as she would treat a valid marriage contracted in Kentucky.

This statutory guarantee of equal treatment for same-sex marriage in every state is unnecessary today, because *Obergefell* guarantees interstate recognition as a matter of constitutional right.[93] But the RMA is a backstop for same-sex couples: if *Obergefell* were ever overruled, the RMA would still provide a statutory right to interstate recognition of same-sex marriage.

3. Subsection 4(a): Constitutional Authority

The RMA does not expressly identify the constitutional basis for Congress's authority to impose this full-faith-and-credit obligation, but other civil rights laws do not spell out their constitutional authority either.[94] The obvious source of authority for the RMA is the enforcement provision of the Full Faith and Credit Clause: "Full Faith and Credit shall be given in each State to the public

89. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (employment discrimination prohibited on the basis of "race, color, religion, sex, or national origin").

90. *See* Respect for Marriage Act § 4(a)(1) (codified at 28 U.S.C. § 1738(C)(a)(1)).

91. *Id*.

92. *See infra* notes 202–04 and accompanying text.

93. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

94. *See, e.g.*, 42 U.S.C. §§ 2000a–2000h-6 (Civil Rights Act of 1964); 42 U.S.C. §§ 2000bb–2000bb-4 (Religious Freedom Restoration Act of 1993); 42 U.S.C. §§ 2000cc–2000cc-5 (Religious Land Use and Institutionalized Persons Act of 2000).

Acts, Records, and judicial Proceedings of every other State. *And the Congress may by general Laws prescribe* the Manner in which such Acts, Records and Proceedings shall be proved, and *the Effect thereof*."[95]

Legislative authority comes in the second sentence, although its meaning depends partly on the first. The second sentence delegates to Congress an enumerated power to adopt laws that "prescribe" how the materials in the first sentence ("such Acts, Records and Proceedings") are to be "proved, and the Effect thereof."[96] Congress has exercised this power before, specifying how a sister state's legislative acts and judicial records can be authenticated and proved and requiring that these acts and records be given the same effect as they would have in their home state.[97] A second statute prescribes similar rules for the handling of "nonjudicial records or books" kept in state offices.[98] The first of these statutes is little changed since its original enactment by the First Congress,[99] and the second dates to 1804.[100]

Neither statute appears to have been challenged on constitutional grounds, except with respect to their application to the territories, which was upheld.[101] Congress also exercised this power in the Defense of Marriage Act, when it said that acts, records, and proceedings recognizing same-sex marriages need have *no* effect in other states.[102] The same power validates Congress saying that such records and proceedings *shall* have effect.

It is less clear whether the Constitution's Full Faith and Credit Clause itself, as judicially interpreted, would require interstate recognition of marriages. The Supreme Court has enforced the Clause more vigorously with respect to judicial proceedings than with respect to legislation, and there is relatively little law on other kinds of records. States have been allowed to reject a sister state's law, but not its judgments, on grounds of public policy or on the basis of a wide array of choice of law rules that often lead to applying the forum's law.[103]

95. U.S. CONST. art. IV, § 1 (emphasis added).

96. *Id.*

97. 28 U.S.C. § 1738.

98. 28 U.S.C. § 1739.

99. Act of May 26, 1790, 1 Stat. 122 ("An Act to prescribe the mode in which the public Acts, Records, and judicial Proceedings in each state, shall be authenticated so as to take effect in every other state.").

100. Act of Mar. 27, 1804, 2 Stat. 298 ("An Act supplementary to the act intituled [sic] 'An act to prescribe the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated so as to take effect in every other state.'").

101. *See* Atchison, Topeka & Santa Fe Ry. Co. v. Sowers, 213 U.S. 55, 64–65 (1909) (§ 1739); Americana of P.R., Inc. v. Kaplus, 240 F. Supp. 854, 855–56 (D.N.J. 1965), *aff'd*, 368 F.2d 431 (3d Cir. 1966) (§ 1738). Both decisions relied on the Territory Clause, art. IV, § 3, to extend the literal reach of the Full Faith and Credit Clause, art. IV, § 1, which mentions only states. U.S. CONST. art. IV, §§ 1, 3.

102. Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) (repealed by Respect for Marriage Act, Pub. L. 117-228, 136 Stat. 2305 (2022)).

103. *See* Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 96–108 (1984).

Choice of law rules for marriage have generally looked to the state where a marriage was entered into to determine its validity.[104] But before *Obergefell*, it was argued that the public policy exception allowed states to refuse to recognize same-sex marriages entered into elsewhere, and many states enacted statutes based on that argument.[105] So is a marriage more like a judgment, a specific result for two individuals? Or is it subject to the looser rules for statutes, rules of law, and disagreements over public policy? If a couple is married by a judge, does that make their marriage record a judicial proceeding? Questions such as these leave it unclear whether the Constitution, as judicially interpreted, would itself require full faith and credit to marriages.[106]

But whether the first sentence of the Full Faith and Credit Clause would require interstate recognition of same-sex marriages of its own force and as judicially interpreted is a different question from whether Congress can require it under the broadly phrased power to "prescribe . . . the effect" of other states' acts, records, and proceedings. In the marriage context, Congress could justifiably conclude that requiring recognition is necessary to protect strong reliance interests and to prevent "the chaos and injustice that would be caused by allowing one state to nullify another state's existing legal marriage."[107] The RMA is a valid expression of Congress's authority to prescribe the effect of one state's public acts and records in a sister state.

4. *Subsection 4(a)(2): Protecting Rights and Claims Arising from a Marriage*

Nothing in the RMA prohibits a state from authorizing only opposite-sex weddings within its borders. Many conservative states still have such laws or constitutional provisions, enacted before *Obergefell* and never repealed.[108] Under the RMA, those states cannot apply such a policy to marriages entered into in a sister state, or to rights and privileges arising out of those marriages.

Subsection 4(a)(2) of the RMA provides that no state may deny "a right or claim arising from such a marriage on the basis that such marriage would not be recognized under the law of that State on the basis of the sex, race, ethnicity, or

104. *See* Patrick J. Borchers, Baker v. General Motors*: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 154–58 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1969 (1997).

105. *See* Kramer, *supra* note 104, at 1965–66, 1966 n.3.

106. For an affirmative answer, see *id.* at 1968–80. For a negative answer, see Borchers, *supra* note 104, at 164–72.

107. Ilya Somin, *Steve Sanders on Full Faith and Credit and the Respect for Marriage Act*, REASON: VOLOKH CONSPIRACY (July 20, 2022, 9:22 PM), https://reason.com/volokh/2022/07/20/steve-sanders-on-full-faith-and-credit-and-the-respect-for-marriage-act/ [https://perma.cc/Y7AL-QXEU] (quoting Prof. Steven Sanders). For the view that Congress's power to prescribe the effects of sister-state acts, records, and proceedings is broad and underutilized, see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 289–315 (1992).

108. *See* Kramer, *supra* note 104, at 1969.

national origin of those individuals" who are spouses in the marriage.[109] The word "such" refers back to subsection 4(a)(1), which addresses "a marriage between 2 individuals" entered into in another state. As already noted,[110] this requirement applies only to state actors, and not to religious organizations or private citizens.

In a context characterized by restrictions on state actors, a "right or claim arising from" a marriage between two people can only mean the rights and claims arising from marital status (or the dissolution of that status) under state or federal law. Those rights and claims include the presumption of legitimacy for any children of the marriage, rights of inheritance, rights in divorce, rights to community or common-law marital property, rights to spousal support, rights to sue for torts inflicted on one's spouse, rights to file joint tax returns or joint bankruptcy petitions, and much more.[111]

Although the RMA does not enumerate particular rights and claims covered by the prohibition, it does say that a relevant "right or claim" must be one "arising from" a marriage between two people.[112] That limiting principle means that state-law rights and claims independent of marital status are outside the scope of section 4.[113]

The practical meaning of subsection 4(a)(2) is evident. Suppose a state, say Alabama, is one of those states that has retained its laws recognizing the validity of only opposite-sex marriages. Further, assume that *Obergefell* were overturned and an Alabama official sought to deny survivor benefits to a spouse in a same-sex marriage lawfully entered into in New York. Subsection 4(a)(1) of the RMA would mandate that Alabama recognize the marriage as a matter of full faith and credit, and subsection 4(a)(2) would prohibit any denial of Alabama's marriage-based benefits.

The better reading of subsection 4(a)(2) is that the right to these benefits, or property rights in a divorce, or any other dispute about a marital right, would be governed by the same choice of law rules that the forum state would apply to an opposite-sex marriage. The purpose of the RMA is achieved by requiring that the *validity* of the marriage be governed by the law of the state where the marriage was entered into. Alabama cannot deny marital claims under its own law on the basis that it would not have recognized the marriage as valid under its own law.

But subsection 4(a)(2) should not be read to require that the law of the licensing state, New York in this example, must govern all marital rights and duties for the rest of the couple's lives, no matter where they reside. The usual

109. Respect for Marriage Act, Pub. L. 117-228, § 4(a)(2), 136 Stat. 2305 (2022) (codified at 28 U.S.C. § 1738C(a)(2)).

110. *See supra* Subsection II.C.1.

111. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 752 (2013) ("over 1,000 federal laws" addressing marital status); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955–56 (Mass. 2003) ("hundreds of statutes" relate to marriage and marital benefits).

112. *See* Respect for Marriage Act § 4(a)(2) (codified at 28 U.S.C. § 1738C(a)(2)).

113. Compare the contrasting treatment of rights not arising from a marriage in subsection 7(a). *See infra* notes 195–96 and accompanying text.

choice of law rule for marital issues that arise during the course of the marriage is to apply the law of the place where the marriage is centered or has the most significant contacts—typically the place of joint domicile[114]—at the time most relevant to the particular right or claim at issue.[115]

If Alabama were to apply its own law to opposite-sex divorces, and the law of New York to same-sex divorces, it would be discriminating between opposite-sex and same-sex marriages, applying different legal rules to the two kinds of marriages. In any particular case, this might be to the benefit or detriment of the same-sex couple, or to one or both of the same-sex spouses. But either way, it would be at odds with the spirit of the RMA, which is to treat opposite-sex and same-sex marriages as equally valid and equally protected to the extent of congressional power to so require. So the best interpretation of subsection 4(a)(2) is that the law of the licensing state controls the validity of the marriage, and any rights and claims arising under that state's law while the couple lived in that state, but that the law of the state of common domicile generally governs rights and claims arising later.

5. Subsections 4(b) and 4(c): Enforcing the RMA

Subsection 4(b) of the RMA authorizes the Attorney General of the United States to "bring a civil action" in federal district court "against any person who violates subsection (a)."[116] Only "declaratory and injunctive relief" are available in such a suit.[117] Enlisting the Attorney General to enforce the RMA through civil litigation is a familiar feature of federal civil rights law.[118]

Congress also expressly created a private right of action for same-sex couples who are denied recognition of their marriages. Subsection 4(c) provides that "[a]ny person who is harmed by a violation of subsection (a)" may sue the violator in federal district court for "declaratory and injunctive relief."[119] Money damages are not authorized, and attorneys' fees are not authorized.[120]

114. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 7.12 (AM. L. INST., Tentative Draft 4, 2022).

115. *See, e.g.*, *id.* § 7.13 (rights to property acquired during marriage are "governed by the law of the marital domicile at the time of acquisition"); *id.* § 7.14 (property rights on divorce are "governed by the law of the marital domicile at the time of divorce"); *id.* § 7.15 (property rights at death of spouse are "governed by the law of the marital domicile at the time of death").

116. Respect for Marriage Act § 4(c) (codified at 28 U.S.C. § 1738C(c)).

117. *See id.*

118. *See, e.g.*, 42 U.S.C. § 2000e-6 (authorizing the Attorney General to bring a civil suit enforcing the federal ban on employment discrimination in cases where evidence shows "a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17); 42 U.S.C. § 2000cc-2(f) (authorizing the Attorney General to bring a civil suit to enforce the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5).

119. Respect for Marriage Act § 4(c) (amending 28 U.S.C. § 1738C(c)).

120. *Id.*

6. *Subsection 4(c): No Threat to Religious Freedom*

In opposing the RMA's enactment, some critics asserted that the private right of action in subsection 4(c) would unleash discrimination lawsuits against private individuals and organizations, even religious ones.[121] That fear is misplaced for three reasons.

First, as discussed above,[122] the RMA's requirement to recognize sister-state marriages, and rights and claims arising from those marriages, applies only to those who are "acting under color of state law," *i.e.*, only to state actors. That is an extremely limited set of private individuals and groups that rarely or never includes religious organizations engaged in religiously motivated activities. Unless a religious organization allows the government to direct its religious teachings on marriage,[123] or unless it operates prisons or law enforcement services or some other heretofore exclusively governmental function,[124] it has little to fear. Public subsidies for private religious educational institutions have not rendered them state actors, contrary to fears that some advanced.

The same is true of businesses that provide marriage-related services—they simply are not state actors absent extraordinary circumstances that seldom, if ever, apply.[125] The RMA imposes no new requirements on wedding vendors, marriage counselors, or the like.[126]

Second, any valid theory making the RMA apply to a religious individual or organization on state-action grounds would make that person or organization subject to liability under existing civil rights laws. Under 42 U.S.C. § 1983, state actors are *already* liable for violations of constitutional rights, including denial of rights arising from same-sex marriage.[127] This means that the miniscule risk of a private individual, business, or religious organization being deemed a state actor, and thus being forced to recognize a same-sex marriage contrary to its beliefs, existed under *Obergefell* and well before the RMA. The RMA does not increase the risk of a person or group being considered a state actor for purposes of marriage recognition beyond what has existed since 2015.

And that risk never materialized. We are unaware of any litigants making such arguments against private individuals, businesses, or religious organizations in the years since *Obergefell*. In *Fulton v. City of Philadelphia*,[128] for example, the City barely hinted that Catholic Social Services might be a "potential 'state actor.'" It did not seriously argue the point, even though Catholic Social Services contracted with the government to provide foster-care services and received

121. *See, e.g.*, Waggoner, *supra* note 7.
122. *See supra* Subsection II.C.1.
123. *See supra* notes 64–70 and accompanying text.
124. *See supra* notes 72–79 and accompanying text.
125. *See supra* notes 64–79 and accompanying text.
126. *See generally* Respect for Marriage Act §§ 1–8 (amending 1 U.S.C. § 7 and 28 U.S.C. § 1738C, and codified as notes to 1 U.S.C. §§ 1 and 7 and 28 U.S.C. § 1738C).
127. 42 U.S.C. § 1983.
128. 141 S. Ct. 1868 (2021).

substantial government funding.[129] No sensible litigator would bring a section 1983 action against Jack Phillips of *Masterpiece Cakeshop* fame on the theory that he is a state actor. The claim would be baseless under section 1983, *Obergefell*, and the Court's state-action precedents. It is just as baseless under the RMA.

Third, the explicit religious freedom protections in subsections 6(a) and 7(a), detailed below, would preclude the RMA from expanding the scope of liability under subsection 4(c) in a manner that diminishes existing rights to religious liberty.[130]

For all these reasons, the fear that the RMA increases the risk to traditional believers, or that their religious organizations will be sued for declining to recognize same-sex marriages, is unfounded. The Supreme Court would first have to overrule *Obergefell*, in a sharp move to the right, and then greatly expand its state-action rules, in a sharp move to the left. The odds of the same Court doing both of these things are effectively zero.

We do not claim that no such result will ever come out of a lower court. There are too many potential plaintiffs and too many judges, some of them ideological or idiosyncratic. We cannot categorically say "never." But we do believe that such results are unlikely even in district courts, and extremely unlikely to hold up on appeal. The RMA has too many valuable provisions, both for same-sex couples and for religious liberty, to have been held up by such implausible concerns. Congress was right to disregard these fears and pass the bill.

D. Section 5: Federal Recognition of Same-Sex Marriage

Section 3 of the Defense of Marriage Act defined "marriage," for all purposes of federal law, to mean "a legal union between one man and one woman as husband and wife."[131] As already noted, this definition was held unconstitutional in *United States v. Windsor*.[132] Section 5 of the RMA amends that definition by substituting entirely new language, defining marriage for federal purposes to include same-sex marriages as recognized by the law of the place where the marriage was entered into.[133]

Under this new definition, federal law will consider two people married (including same-sex couples) if their marriage meets one of two tests. When a couple is married in the United States, it will be enough to show that the marriage is between two individuals and that it was "valid in the State where the marriage

129. *See* Brief for City Respondents at 24–25, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 4819956, at *24–25.

130. *See infra* Section II.E.

131. Defense of Marriage Act, Pub. L. No 104-199, § 3, 110 Stat. 2419, 2419 (1996) (previously codified at 1 U.S.C. § 7), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

132. 570 U.S. 744, 769–75 (2013).

133. Respect for Marriage Act, Pub. L. No. 117-228, § 5, 136 Stat. 2305, 2306 (2022) (amending 1 U.S.C. § 7).

was entered into"[134] "at the time [it] was entered into."[135] If a marriage was performed outside the United States, it is valid for purposes of federal law if "the marriage is between 2 individuals," it "is valid in the place where entered into," under the law at the time it was entered into, and "the marriage could have been entered into in a State"—any state.[136] In short, whenever marital status is a factor in receiving some benefit or determining some right or obligation under federal law, the federal government will treat a same-sex marriage as valid if it was valid in the state that authorized it, or if it is valid in the foreign jurisdiction that authorized it and at least one U.S. state would have authorized it. This latter requirement protects against drastically divergent norms in some foreign nations, such as child marriages.

This definition in section 5 applies only where marital status matters for purposes of federal law. Critics on the left have complained that the RMA does not also define marriage for the states, and consequently does not require every state to authorize same-sex marriage within its own borders.[137] But substantial constitutional impediments prevented Congress from doing so.

Congress generally relies on one or more of three constitutional provisions to justify federal laws that impose requirements on state governments. None of these provisions would support a national same-sex-marriage mandate if *Obergefell* were overruled. First, Congress can regulate the states under the Commerce Clause,[138] but that clause does not extend to marriage. Justice Holmes long ago observed that "[c]ommerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce."[139] More recent Supreme Court cases reinforce that view.[140]

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134. Respect for Marriage Act § 5(a) (amending 1 U.S.C. § 7(a)).

135. *Id.* § 5(c) (amending 1 U.S.C. § 7(c)).

136. *Id.* § 5(a) (amending 1 U.S.C. § 7(a)).

137. *See, e.g.*, Jonathan Capehart, *Gee, Thanks for This Tiny Step to Protect My Same-Sex Marriage*, WASH. POST (Nov. 29, 2022, 8:15 PM), https://www.washingtonpost.com/opinions/2022/11/29/respect-marriage-act-protections-insufficient/ [https://perma.cc/89DG-HGRJ]:

> What the act does *not* do is require states to issue marriage licenses in contravention of state law; this is (for now) the province of *Obergefell*. So, same-sex couples living in states where they couldn't legally marry post-*Obergefell* would have to go to another state where it is legal if they wanted to marry. What in the second-class-citizenship?

See also Chatelle, *supra* note 8:

> If *Obergefell* were to be overturned, same-sex marriage would likely become illegal in 35 states, the number that currently have same-sex marriage bans on the books. While a couple could theoretically travel to another state to get a marriage license, to later have it recognized by their home state, the Respect for Marriage Act risks creating a two-tier system of marriage equality in lieu of total federal protection.

For another example, see Samuel Lanier Felker & Caitlin S. Colley, *Passage of the Respect for Marriage Act Signals That Same-Sex Marriage Will Remain the Law of the Land*, BAKER DONELSON (Jan. 3, 2023), https://www.bakerdonelson.com/passage-of-the-respect-for-marriage-act-signals-that-same-sex-marriage-will-remain-the-law-of-the-land [https://perma.cc/869C-823E] (statement of James Obergefell) ("[T]he Respect for Marriage Act doesn't respect the LGBTQ+ community, or our marriages, our relationships, our families, because it would allow states once again to refuse to issue marriage licenses to same-sex couples.").

138. U.S. CONST. art. I, § 8, cl. 3.

139. Northern Sec. Co. v. United States, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting).

140. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (resisting an interpretation of the Commerce Clause under which "Congress could regulate . . . family law (including marriage, divorce, and child custody)");

Second, Congress often attaches conditions when it grants money to states under the Spending Clause,[141] but the RMA grants no money to anyone.

And third, section 5 of the Fourteenth Amendment grants Congress "power to enforce, by appropriate legislation" the rights guaranteed by section 1 of that Amendment, including equal protection of law and due process of law.[142] But Congress may not invoke section 5 unless federal courts have recognized the constitutional right that the legislation seeks to enforce.[143] If the RMA had attempted to define marriage for the states, or direct every state to license and perform same-sex marriages under its own laws, it would have section 5 authority to do so for now, under *Obergefell*. But such a statute would not survive the overruling of *Obergefell*. And for many supporters of same-sex marriage, protection that will survive the possible overruling of *Obergefell* is the whole point of the RMA.

In view of these obstacles, Congress did the one thing it clearly does have authority to do. The RMA properly secures access to same-sex marriage through a full-faith-and-credit requirement of interjurisdictional recognition of lawful same-sex marriages.[144] So long as at least one state licenses same-sex marriages, same-sex couples able to travel to that state will be able to freely marry and have their marriages recognized throughout the country by the federal government and by other states. And clearly there will be more than one such state.

Subsection 5(b) is a technical provision to maximize the geographic reach of the RMA.[145] It defines the word "State" to include any State, the District of Columbia, Puerto Rico, and "any other territory or possession of the United States."[146] This subsection specifies the reach of the RMA for purposes of federal law. And subsection 4(d) incorporates this definition into section 4 of the RMA,[147] so that the obligation to give full faith and credit to marriages from other states also extends to territories, possessions, affiliated commonwealths, and the federal district.

Subsection 5(c) is a chronological choice of law rule. When deciding whether a marriage is valid under the law of the place where it was entered into, "only the law of the jurisdiction applicable at the time the marriage was entered into may be considered."[148] This rule ensures that whatever changes in state or foreign law occur in a post-*Obergefell* world, the validity of a marriage under

United States v. Morrison, 529 U.S. 598, 613 (2000) (invalidating civil-remedy provision of the Violence Against Women Act and quoting the same language from *Lopez*).

141. U.S. CONST. art. I, § 8, cl. 1.

142. U.S. CONST. amend. XIV, § 5.

143. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (announcing "congruence and proportionality" test for legislation to enforce Fourteenth Amendment rights).

144. *See supra* Subsections II.C.2–4.

145. Respect for Marriage Act, Pub. L. No. 117-228, § 5(b), 136 Stat. 2305, 2306 (2022) (amending 1 U.S.C. § 7(b)).

146. *Id.*

147. *Id.* § 4(d) (amending 28 U.S.C. § 1738C(d)).

148. *Id.* § 5(c) (amending 1 U.S.C. § 7(c)).

federal law will be determined by the law that existed on the date when, and in the jurisdiction where, the marriage was solemnized.

Assume, for example, that a same-sex couple was married in Louisiana under the protection of *Obergefell* and that the couple has since moved to Texas. Assume further that *Obergefell* is overruled and that Louisiana redefines (or continues to define) marriage as only between a man and a woman. The rule of subsection 5(c) ensures that such changes in state law will not retroactively deprive same-sex couples of federal rights and benefits. For federal purposes, the validity of the marriage would be governed by the law that prevailed in Louisiana on the date of the marriage.

Unfortunately, this timing rule has limited application, which creates some questions. It is part of the definition of marriage for federal purposes, but it does not apply to the subsections on interstate recognition of marriages—the full-faith-and-credit requirements in section 4.[149] Could Texas refuse to recognize a Louisiana same-sex marriage on the ground that Louisiana no longer authorizes such marriages within the state?

Nor does the timing rule apply to a state's recognition of its own marriages. Could Louisiana declare all same-sex marriages performed in Louisiana under the protection of *Obergefell* to now be void? Subsection 4(a) requires recognition of only those marriages entered into in "any other state," not continued recognition of marriages entered into within the state where recognition is at issue.[150]

It seems unlikely that any state would be so aggressively dismissive of reliance interests. Retroactively voiding marriages lawful when performed would raise a host of issues about property rights, spousal support, the legitimacy of children, and more. Couples could challenge the invalidation of their marriages in court on theories of nonretroactivity, vested rights, or substantive due process. A Supreme Court decision overruling *Obergefell* might—and should—expressly address retroactivity and protect all marriages entered into on or before the day of the decision.

But the RMA does not by its terms require a state to recognize its own marriages that were licensed and entered into under the protection of *Obergefell*. The risk here is small, but it is not zero. This is a gap in protection for same-sex couples, and it is a bigger gap than any of the alleged gaps in protection for religious dissenters.

Another possible gap in coverage applies to both federal and interstate recognition of marriages—although here we think it is clear, ultimately, that no gap exists. Suppose a state licensed and performed same-sex marriages only because of *Obergefell* but never repealed its statute or constitutional provision purporting to ban such marriages. No one should succeed in arguing that such a marriage was valid only under federal law and was not valid under the law of the licensing state. Such a marriage was licensed and recorded in the state where performed, and however that came to be, all other states owe full faith and credit

149. *Id.* § 4(a) (amending 28 U.S.C. § 1738C(a)).
150. *Id.*

to the record of that marriage. If the RMA were interpreted any other way, it would fail to protect marriages entered into in the many states that complied with *Obergefell* by issuing marriage licenses but never changed (or changed only after a delay) their statute or constitutional provision defining marriage as only between one man and one woman.

E. *Subsections 6(a), 6(b), and 7(a): Explicit Protections for Religious Liberty and Conscience*

Sections 6 and 7(a) provide explicit protections for religious freedom.[151] These provisions both reinforce and extend the protection inherent in the state-action requirement in subsection 4(a) and in the congressional finding about respecting religious beliefs in subsection 2(2). These protections have immediate effect; they protect religious organizations whether or not *Obergefell* is ever overruled.

1. *Subsection 6(a): No Adverse Inferences from the RMA*

Subsection 6(a) is a rule of construction, providing that nothing in the RMA can be used to support an argument to reduce existing federal protections for religious liberty.[152] The rule is intended to guide government agencies and courts as they determine the scope, application, and impact of the RMA. Congress has no authority to abrogate *constitutionally* protected "religious liberty or conscience" rights in any event, but the word "diminish" tells courts to resist arguments for even marginal infringements or reductions.

Subsection 6(a) also ensures that the RMA, unlike the proposed Equality Act,[153] does not diminish protection under the Religious Freedom Restoration Act (RFRA).[154] Nor does the RMA diminish or override anything in other protections for religious liberty, such as the Religious Land Use and Institutionalized Persons Act,[155] the religious exemption in Title IX's prohibition of sex discrimination in federally assisted educational institutions,[156] or the exemption for

151. *Id.* §§ 6–7(a) (codified as a note to 1 U.S.C. § 7).

152. *Id.* § 6(a) (codified as a note to 1 U.S.C. § 7).

153. *See* H.R. 15, 118th Cong. § 9 (2023) (proposing to add a new § 1107 to Title XI of the Civil Rights Act of 1964). The Equality Act would add sexual orientation and gender identity to all or substantially all federal nondiscrimination statutes. The companion bill in the Senate is S.5.

154. 42 U.S.C. §§ 2000bb–2000bb-4. The Equality Act would state that RFRA "shall not provide" a claim, defense, or challenge in any proceeding involving "a covered title" of the Civil Rights Act—that is, as to any claim alleging discrimination on the basis of race, sex, religion, sexual orientation, or gender identity in public accommodation, federally funded programs, employment, and other settings. H.R. 15, 118th Cong. § 9 (2023).

155. 42 U.S.C. §§ 2000cc–2000cc-5.

156. *See* 20 U.S.C. § 1681(a)(3) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.").

religious employers[157] and the protection for employees' religious practices[158] in Title VII on employment discrimination. Few, if any, such cases should arise, because the protected religious organizations are not state actors, and neither are the protected employees of those organizations. The RMA does apply to government employees who are state actors, but subsection 6(a) says that the RMA does not diminish their existing right to reasonable accommodation of their religious practices.

As with the RMA's congressional finding about diverse beliefs regarding marriage,[159] this provision can be invoked to counter any argument that because Congress has now recognized same-sex marriages, it has also recognized a compelling interest in overriding religious objections to assisting with or participating in such marriages. Subsection 6(a) can be invoked to counter any argument that in any way relies on or draws inferences from the RMA to limit judicial interpretation of existing federal protections for religious liberty.

2. *Subsection 6(b): No Requirement to Assist with Marriages*

Subsection 6(b) adds explicit protections for religious freedom that arguably exceed what federal law currently provides.[160] It provides that "nonprofit religious organizations," and employees of such organizations, "shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage."[161] And further, "[a]ny refusal under this subsection to provide such services, accommodations, advantages, facilities, goods, or privileges shall not create any civil claim or cause of action."[162]

This is not just a rule of construction guarding against misinterpretation of the RMA, but a new statutory right that protects against other sources of law. The protection applies to all "nonprofit religious organizations" and their employees, with an illustrative list of entities within that category, including not only churches and other houses of worship but the full range of religiously affiliated or motivated organizations. Commercial and for-profit entities are not protected, but religious nonprofits of every kind are protected by this provision.

Subsection 6(b) ensures that religious organizations and their employees do not have to participate in the solemnization or celebration of any marriage.

157. *See* 42 U.S.C. § 2000e-1(a) ("This subchapter 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 of its activities.").

158. *See* 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.") The Supreme Court reconsidered its longstanding interpretation of this provision, making it considerably more protective of employees, in *Groff v. DeJoy*. 600 U.S. 447, 456–73 (2023).

159. Respect for Marriage Act, Pub. L. No. 117-228, § 2(2), 136 Stat. 2305, 2305 (2022) (codified as a note to 1 U.S.C. § 7); *see supra* notes 19–29 and accompanying text.

160. Respect for Marriage Act § 6(b) (codified as a note to 1 U.S.C. § 7).

161. *Id.*

162. *Id.*

Protecting a religious organization and its employees from being forced to provide goods, services, or facilities for the solemnization of a marriage contrary to the organization's religious beliefs or practices should be uncontroversial. The Supreme Court has said that "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion."[163]

But marriage *celebrations* raise potentially different considerations. Marriage celebrations include wedding receptions, rehearsal dinners, and anniversary parties. Forms of the word "celebration" are sometimes used to refer to the wedding itself, but to give the word that exclusive meaning here would make it wholly redundant with "solemnization." That would violate the principle that textual interpretation of statutes should "give effect, if possible, to every clause and word of [the] statute."[164] So subsection 6(b) protects religious organizations with respect to celebrations of weddings beyond the wedding itself.

A religious organization may rent out its hall or other facilities to the public for wedding-related festivities but claim the right to limit the offer to celebrations of opposite-sex marriages. Pre-RMA religious liberty protections in these situations may depend upon the nature of the facility (*e.g.*, church sanctuary or other place of worship, college chapel, conference center, lakeside pavilion, summer camp, gymnasium or recreational center), its general use, and its religious significance. Protections may also depend, if no religious liberty statute applies to the case, on whether the applicable nondiscrimination law contains exceptions that cause it to fail the constitutional test of "neutrality and general applicability."[165] However those arguments play out, the RMA broadly exempts nonprofit religious organizations from having to serve, accommodate, or provide facilities not just for the wedding itself, but for marriage celebrations as well.

Demands that religious organizations host events for weddings that violate their religious teachings have not been a major issue. But that could change; social movements often extend their claims as they succeed and gain greater influence, and there have been suggestions that public accommodation laws might sometimes extend to churches or other religious organizations.[166] RMA subsection 6(b) prohibits that extension with respect to weddings and celebrations of

163. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

164. *See, e.g.*, Biden v. Texas, 142 S. Ct. 2528, 2539 (2022) (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000) (bracketed modification by the Court)).

165. For the rule that secular exceptions can make a law less than generally applicable and therefore subject to strict scrutiny, see Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–79 (2021); Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020) (per curiam). For analysis of the same idea in earlier cases, see Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 9–23 (2016).

166. *See* MASS. COMM'N AGAINST DISCRIMINATION, GENDER IDENTITY GUIDANCE 4 (2016), https://www.mass.gov/doc/gender-identity-guidance-0/download?_ga=2.36184544.1122332036.1676674537-1844975524.1676674537 [https://perma.cc/R6QE-WSGG] ("[A] religious organization may be subject to the Commonwealth's public accommodations law if it engages in or its facilities are used for a 'public, secular function.'").

weddings.[167] Thus, unlike the RMA's other religious liberty protections, subsection 6(b) reaches beyond the immediate scope of the RMA to provide substantive protection for religious freedom in lawsuits neither brought under the RMA itself nor relying on the RMA to change the interpretation of some other relevant provision.

Subsection 6(b) appears to apply to state and local law, because there is no federal law to which it could apply. The RMA's mandate that state actors recognize sister-state marriages imposes no requirements on wedding solemnizations or celebrations by religious organizations. Nor does federal public accommodations law interfere with any rights protected by subsection 6(b). Subsection 6(b) protects only religious organizations and their employees, and the federal public accommodations law does not apply to them.[168] Nor does that law apply to sex or sexual orientation.[169] Yet on its face, subsection 6(b) creates a federal defense to any law that would require a nonprofit religious organization to accommodate a same-sex marriage solemnization or celebration: "*Any* refusal under this subsection to provide such services, accommodations [etc.] shall not create *any* civil claim or cause of action."[170]

In part because subsection 6(b) is worded so universally, but principally because there is no federal law to which it could possibly apply, the protection in subsection 6(b) must apply to and preempt state and local law. This subsection is meaningless unless it preempts contrary state and local law.

Preemption occurs when a federal law supplants state or local law. Supreme Court decisions divide preemption into different categories: express, field, and conflict preemption.[171] Each category is governed by a different rule. Express preemption occurs when a federal statute contains a clause expressly denying specified powers to the states.[172] The meaning and scope of that provision depends "on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent."[173] Field preemption occurs when a federal law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."[174] Subsection 6(b) is neither of these.

Instead, it falls into the third category—conflict preemption.[175] Conflict preemption is "ubiquitous. Everyone agrees that even if a federal statute contains no express preemption clause, and even if it does not impliedly occupy a particular field, it preempts state law that 'actually conflicts.'"[176] State law conflicts

167. Respect for Marriage Act, Pub. L. No. 117-228, § 6(b), 136 Stat. 2305, 2306 (2022) (codified as a note to 1 U.S.C. § 7).

168. *See* 42 U.S.C. § 2000a (a "place of public accommodation" under federal law includes only hotels, restaurants, gas stations, and theaters, concert halls, stadiums, and the like).

169. *See id.* (discrimination prohibited only if "on the ground of race, color, religion, or national origin").

170. Respect for Marriage Act § 6(b) (codified as a note to 1 U.S.C. § 7).

171. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–80 (1990) (discussing the three different types of preemption).

172. *Id.* at 78–79.

173. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993).

174. *English*, 496 U.S. at 79 (1990).

175. *Id.* at 79–80.

176. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (quoting *English*, 496 U.S. at 79).

with federal law where: (1) it is impossible for a person to comply with both laws; or (2) where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[177] Conflict preemption is the familiar rule under federal law's preeminent civil rights statute, the Civil Rights Act of 1964.[178] Subsection 6(b), a targeted civil rights protection for religious organizations and their employees, preempts state or local law whenever a state or local law would negate its protections—such as when a public accommodations law requires a church to rent its hall for a same-sex wedding celebration and subsection 6(b) expressly states that the church cannot be required to do so or be sued for not doing so.

Subsection 6(b) can be asserted as a defense, but it does not itself create a private right of action. It does create an explicit federal right for specified entities and against state and local officials. Such a right may be enforceable in a suit for an injunction unless the statutory scheme implicitly excludes such a suit,[179] and there is no sign of such an exclusion here. In addition, section 1983 may create a cause of action to enforce this right, at least with injunctions,[180]and quite possibly with damages as well. Some Supreme Court cases appeared to resist section 1983 damage remedies for statutory violations, but the most recent decision once again finds an individual damage remedy under section 1983 for a statutory violation.[181]

It remains to explain why subsection 6(b) is a valid exercise of congressional authority. There are two relevant powers. First, congressional power to enact laws protecting constitutional rights from state infringement is found in section 5 of the Fourteenth Amendment.[182] The opening clause of subsection 6(b) invokes the First Amendment[183]—and that reference is telling. The Religion Clauses of the First Amendment guarantee the right of religious organizations to maintain their autonomy regarding explicitly religious matters, such as

177. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000) (citation omitted); *see also* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (preemption occurs "where compliance with both federal and state regulations is a physical impossibility").

178. *See* 42 U.S.C. § 2000h-4 (disclaiming field preemption and preempting state law only when "such provision is inconsistent with any of the purposes of this Act, or any provision thereof").

179. *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327–29 (2015).

180. 42 U.S.C. § 1983 applies to federal statutory as well as constitutional violations, but only if the statute allegedly violated creates an enforceable right for a named class of beneficiaries and does not implicitly exclude a remedy under section 1983. *See, e.g.*, Health & Hosp. Corp. v. Talevski, 599 U.S. 166, 180–91 (2023); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 (1990). On its face, § 6(b) of the Respect for Marriage Act appears to meet these criteria.

181. *Compare* Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.") *with id.* at 284–85 ("But the initial inquiry [under section 1983]—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case"), *and Talevski*, 599 U.S. 166 (finding individual rights, enforceable with damages under section 1983, in the Federal Nursing Home Reform Act, but describing the test as "stringent." *Id*. at 186).

182. U.S. CONST. amend. XIV, § 5.

183. Respect for Marriage Act, Pub. L. No. 117-228, § 6(b), 136 Stat. 2305, 2306 (2022) (codified as a note to 1 U.S.C. § 7) ("Consistent with the First Amendment to the Constitution, nonprofit religious organizations . . . shall not be required . . . .").

"'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.'"[184]

This guarantee includes autonomy to decide who serves as a minister and other matters internal to church governance.[185] This autonomy naturally protects the rituals and ceremonies of the faith according to its religious doctrine, and should extend to governing access to and use of sacred properties and religious facilities.[186] This church autonomy doctrine applies to state and local governments under the First and Fourteenth Amendments.[187] And it applies to religious nonprofit service providers as well as to religious congregations.[188]

Consistent with section 5 of the Fourteenth Amendment, the RMA safeguards such rights by preventing state and local government from requiring a religious nonprofit to act contrary to its sincere religious beliefs and practices with respect to solemnizing or celebrating a marriage.[189] Forcing a church (or its clergy) to host, facilitate, or serve the celebration of such a marriage invades its First Amendment autonomy. Subsection 6(b) is an exercise of congressional power to clarify the borders of these rights in ways congruent and proportional to judicial definition of the right.[190] The scope of subsection 6(b) is narrowly targeted—nonprofit religious organizations and accommodations related to marriage solemnizations and celebrations—so it cannot easily be attacked as disproportionate to the underlying right.

Congress should also have authority for subsection 6(b)[191] under the Commerce Clause,[192] certainly as to a conventional marriage "celebration." The invitation, clothing, venue, food, refreshments, flowers, music, and other aspects

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184. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714 (1976) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872)); to similar effect, see Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (citations omitted):

> The Religion Clauses protect the right of churches and other religious institutions to decide matters "of faith and doctrine" without government intrusion. . . . The independence of religious institutions in matters of 'faith and doctrine' is closely linked to independence in what we have termed "matters of church government . . . ." This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission.

185. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–90 (2012).

186. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1184–233 (2014) (analyzing *Hosanna-Tabor* and collecting lower court cases).

187. U.S. CONST. amend. I; U.S. CONST. amend. XIV.

188. *See, e.g.*, *Our Lady*, 140 S. Ct. at 2061 (religious school protected under ministerial exception and under "general principle of church autonomy . . . in matters of faith and doctrine").

189. Respect for Marriage Act, Pub. L. No. 117-228, § 6(b), 136 Stat. 2305, 2306 (2022) (codified as a note to 1 U.S.C. § 7).

190. For the congruence and proportionality test, see City of Boerne v. Flores, 521 U.S. 507, 520 (1997). Subsection 6(b)'s congruence and proportionality to First Amendment protection is further enhanced to the extent that some public accommodations laws may have exceptions for nonreligious conduct that render them not generally applicable. *See supra* note 165 and accompanying text. But the protection for internal church autonomy applies to laws that are generally applicable as well as to those that are not. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) ("[A]n internal church decision that affects the faith and mission of the church itself" is protected even against "a valid and neutral law of general applicability").

191. Respect for Marriage Act § 6(b) (codified as a note to 1 U.S.C. § 7).

192. U.S. CONST. art. 1, § 8, cl. 3.

of a typical wedding celebration all involve goods and services that move through the "channels of interstate commerce" and also cumulatively have a "substantial effect" on commerce.[193] A conclusion of no sufficient connection to commerce would preclude application of all sorts of other federal laws to analogous venues and events, including health and safety regulation, labor regulation, environmental regulation, and more. This is a line federal courts should be loath to cross.

In short, there are sound reasons to interpret subsection 6(b) as preempting any contrary state or local law, and to conclude that Congress has the authority to enact it.

3. *Subsection 7(a): No Using the RMA to Deny or Alter Any Benefit or Right*

The final religious liberty provision is another rule of construction. Subsection 7(a) broadly addresses the concern that the RMA could be used to deny or alter tax-exempt status or other government benefits to persons or organizations.[194] Some critics of the bill argued that congressional recognition of same-sex marriages could lead the IRS or courts, in the spirit of the *Bob Jones* ruling,[195] to conclude that religious organizations with conservative beliefs and practices with respect to marriage conflict with a fundamental national policy, so that they do not qualify as having a charitable purpose meriting tax-exempt status.

Subsection 7(a) forecloses the possibility that RMA could be used in this way. It provides that nothing in the RMA "shall be construed to deny or alter any benefit, status, or right of an otherwise eligible entity or person which does not arise from a marriage, including tax-exempt status, tax treatment, educational funding, or a grant, contract, agreement, guarantee, loan, scholarship, license, certification, accreditation, claim, or defense."[196]

Under subsection 7(a), the RMA has no effect on any legal status or benefit that "does not arise from marriage."[197] Tax-deductible contributions to religious organizations under section 501(c)(3) of the Internal Revenue Code, financial aid to religious schools, participation by faith-based organizations in government grants and contracts, commissioning of military chaplains or licensing of other professionals, accreditation for religious colleges—neither these nor numerous other forms of government-bestowed status and benefits "arise from a marriage." The RMA cannot be used by federal, state, or local officials as a basis for denying or revoking any such government-conferred status or benefit. Nor can it be invoked as collateral support for denying, revoking, or altering such benefits on some other ground.

193. United States v. Lopez, 514 U.S. 549, 558–59 (1995).

194. Respect for Marriage Act § 7(a) (codified as a note to 1 U.S.C. § 7).

195. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *see also supra* notes 19–29 and accompanying text, discussing how the finding in Respect for Marriage Act § 2(2) undercuts application of *Bob Jones* to traditional beliefs in opposite-sex-only marriage.

196. Respect for Marriage Act § 7(a) (codified as a note to 1 U.S.C. § 7).

197. *Id.*

Subsection 7(a) does not prevent government officials from invoking other laws in an attempt to regulate religious organizations or religiously motivated individuals. But it does prevent those officials from arguing that the RMA buttresses their efforts either directly or indirectly. They cannot argue, for example, that a state or federal law should now be more rigorously interpreted, or that they now have a compelling interest in burdening religious liberty, because the RMA declares a national policy in support of same-sex marriage.

The RMA explicitly alters benefits that *do* arise from a marriage by requiring, in sections 4 and 5, state and federal recognition of same-sex marriages and thus assuring that same-sex spouses get all the benefits to which married couples are entitled.[198] Subsection 7(a) protects rights and benefits that do not arise from a marriage, and it protects not just religious organizations, but also individuals such as wedding vendors.[199] Neither organizations nor individuals can lose benefits because of anything in the RMA.

Subsections 6(a) and 7(a) are both rules of construction. They both seek to ensure that the RMA does not disturb the status quo ante in ways other than those that were intended. Subsection 6(a) says that the RMA cannot be invoked to diminish other federal protections for religious liberty.[200] Subsection 7(a) says that the RMA cannot be invoked to diminish eligibility for government benefits or permissions of any kind.[201] The two subsections are mutually reinforcing, because taking away government benefits or permissions on the basis of religiously motivated conduct is a primary way of violating or diminishing religious liberty.

F. Sections 7(b) and 8: Polygamy and Severability

Subsection 7(b) is a rule of construction to address yet another phantom fear.[202] RMA detractors had claimed that the House version of the bill would somehow lead to recognition of polygamous marriages. The RMA addresses that fear in multiple ways. The substantive provisions in section 4, and the definition of marriage in section 5, are both limited to marriages between "2 individuals."[203] And for good measure, subsection 7(b) adds that "[n]othing in this Act, or any amendment made by this Act, shall be construed to require or authorize Federal recognition of marriages between more than 2 individuals."[204]

And lastly, section 8 of the RMA contains a typical severability clause, ensuring that if one provision of the RMA is found unconstitutional, then the remainder of the RMA remains applicable.[205]

198. *See supra* Subsections II.C.2, II.C.4, and Section II.D.
199. Respect for Marriage Act § 7(a) (codified as a note to 1 U.S.C. § 7).
200. *Id.* § 6(a) (codified as a note to 1 U.S.C. § 7).
201. *Id.* § 7(a) (codified as a note to 1 U.S.C. § 7).
202. *Id.* § 7(b) (codified as a note to 1 U.S.C. § 7).
203. *See id.* § 4 (codified at 28 U.S.C. § 1738C); *id.* § 5 (codified at 1 U.S.C. § 7).
204. *Id.* § 7(b) (codified as a note to 1 U.S.C. § 7).
205. *Id.* § 8 (codified as a note to 1 U.S.C. § 7).

III. AN LGBTQ RIGHTS/RELIGIOUS FREEDOM LOGJAM BREAKS

Critics were wrong in their predictions about the RMA's supposedly dire legal consequences. But they were correct that the RMA may portend something politically and culturally significant. The authors of this Article have decades of collective experience in teaching, litigating, and working with legislators on disputes about religious freedom, including in the context of same-sex marriage. Our judgment is that the RMA points the way toward workable compromises that could defuse the endless and destructive conflicts between LGBTQ equality and religious freedom. How we got here and how the RMA attracted bipartisan support shed light on how and why the RMA is a hopeful model for further progress.

Much of the story of the political clash between religious freedom and LGBTQ rights can be told by focusing on a brief period in 2013 and 2014. The authors were involved, sometimes actively and sometimes peripherally, in efforts to enact much of the legislation described in the paragraphs that follow.[206] In March 2013, the Kansas legislature passed a state Religious Freedom Restoration Act (RFRA), with nearly unanimous Republican support and with support of about two-thirds of Democrats.[207] In May 2013, the Kentucky legislature passed a state RFRA with a similar partisan breakdown.[208]

In July 2013, the United States Senate passed the Employment Nondiscrimination Act (ENDA) by a vote of 64-32.[209] ENDA, which would have amended federal civil rights law to ban employment discrimination against LGBTQ people, had been introduced in every Congress for twenty years.[210] On the day before Senate passage, Senator Reid, the Democratic majority leader, introduced an amendment drafted by a group of Republican senators that provided expansive protection for religious organizations.[211] Here too, the protections for

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206. Much of this legislation is surveyed, and letters and testimony urging that state RFRAs be passed and that same-sex marriage bills be amended to protect both same-sex couples and religious dissenters, and then passed, are reprinted in DOUGLAS LAYCOCK, RELIGIOUS LIBERTY VOLUME THREE: RELIGIOUS FREEDOM RESTORATION ACTS, SAME-SEX MARRIAGE LEGISLATION, AND THE CULTURE WARS 477–809 (2018).

207. *HB 2203*, KAN. LEGIS., http://www.kslegislature.org/li_2014/b2013_14/measures/hb2203/ (last visited Feb. 2, 2024) [https://perma.cc/BGM4-XHLK] (showing that the bill passed by votes of 34-4 and 109-12, and with a link to the bill's text); Interview with Tim Schultz, President, 1st Amend. P'ship (Feb. 20, 2023) (reporting the party breakdown of these votes) (hereinafter Schultz Interview). Schultz, who serves as President of the 1st Amendment Partnership, was deeply involved in most of the legislative efforts described in this part of the Article, lobbying for bills that would protect both religious liberty and LGBTQ rights.

208. Jennifer A. Pekman, Note, *The Kentucky Religious Freedom Act: Neither a Savior for the Free Exercise of Religion Nor a Monstrous Threat to Civil Rights*, 103 KY. L.J. 127, 135 (2014) (reporting that the bill passed 29-6 and 82-7 and then was repassed over the governor's veto); Schultz Interview, *supra* note 207 (reporting the party breakdown of these votes). As the veto indicates, there was opposition from some interest groups, but that opposition had not yet deterred most Democrats from voting for a Religious Freedom Restoration Act.

209. *Roll Call Vote 113th Congress—1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1131/vote_113_1_00232.htm (last visited Feb. 2, 2024) [https://perma.cc/Y82B-MEK3] (hereinafter *Roll Call Vote*).

210. Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 278 (2014).

211. 159 CONG. REC. 16727 (Nov. 6, 2013).

religious liberty were criticized,[212] but every Democratic senator voted for the bill with these new protections, and ten Republicans voted for the bill.[213] The bill later died in a House committee.[214]

And in November 2013, the Hawaii legislature passed a same-sex marriage law that included robust religious exemptions.[215] Although the final vote was split, every Democratic legislator voted for the religious protections.[216]

But in the spring of 2014, state Religious Freedom Restoration Acts ("RFRAs") failed around the country, often getting zero Democratic votes.[217] A RFRA bill passed in Mississippi in 2014 and in Arkansas in 2015.[218] But they failed elsewhere. Sponsors pulled the Ohio RFRA bill without a vote,[219] and the Republican governor vetoed an Arizona bill to amend that state's RFRA.[220] The bill would have clarified that the state RFRA protected religiously motivated businesses and that the act applied to suits by private parties—two points previously expressed only in general and somewhat ambiguous language.[221] A RFRA bill in Maine was defeated in both houses on party line votes.[222] RFRA bills in Georgia died without a vote in 2014 and again in 2015.[223] Late in 2014, a bill in Michigan died in the Senate without a vote.[224] In spring 2015, when Indiana

212. *See, e.g.*, Julie Dabrowski, *The Exception that Doesn't Prove the Rule: Why Congress Should Narrow ENDA's Religious Exemption to Protect the Rights of LGBT Employees*, 63 AM. U. L. REV. 1957, 1971–84 (2014).

213. *Roll Call Vote*, *supra* note 209; Schultz Interview, *supra* note 207 (reporting the party breakdown of this vote).

214. *See S. 815—Employment Non-Discrimination Act of 2013*, CONGRESS.GOV, https://www.congress.gov/amendment/113th-congress/senate-amendment/2013/actions?s=1&r=18 (last visited Feb. 2, 2024) [https://perma.cc/F7FV-5MYD].

215. HAW. REV. STAT. ANN. §§ 572-12.1–572-12.2 (West 2013).

216. *See Abercrombie Signs Same-Sex Marriage Bill into Law*, HONOLULU STAR-ADVERTISER (Nov. 13, 2013), https://www.staradvertiser.com/2013/11/13/breaking-news/abercrombie-signs-same-sex-marriage-bill-into-law/ [https://perma.cc/MFH5-8V5Y] (reporting that bill passed 19-4 in the Senate, where the religious liberty protections were broadened, and 30-19 in the House); *see also* LAYCOCK, *supra* note 206, at 809 (briefly describing the progress of marriage legislation in Hawaii); Schultz Interview, *supra* note 207 (reporting the party breakdown of these votes).

217. Schultz Interview, *supra* note 207.

218. MISS. CODE ANN. § 11-61-1 (West 2014); ARK. CODE ANN. §§ 16-123-401 to 16-123-407 (West 2015). For additional background on the Mississippi bill, see LAYCOCK, *supra* note 206, at 588–91.

219. *See* H.B. 376, 130th Gen. Assemb., Reg. Sess. (Ohio 2014), https://legiscan.com/OH/text/HB376/id/900205 [https://perma.cc/JD9M-XZTD]; LAYCOCK, *supra* note 206, at 592–93.

220. Letter from Janice K. Brewer, Governor of Arizona, to Andy Biggs, President of the Arizona State Senate (Feb. 26, 2014) [https://perma.cc/D5GJ-GBJL].

221. *Bill History for SB1062*, ARIZ. STATE LEGIS., https://apps.azleg.gov/BillStatus/BillOverview/32882 (last visited Feb. 2, 2024) [https://perma.cc/VHB2-Z4G8]. For analysis of the bill, see LAYCOCK, *supra* note 206, at 594–98.

222. Eric Russell, *Maine House Follows Senate in Rejecting 'Religious Freedom' Bill*, PORTLAND PRESS HERALD (Feb. 20, 2014), https://www.pressherald.com/2014/02/20/maine_house_follows_senate_in_rejecting__religious_freedom__bill_/ [https://perma.cc/662F-UXUD].

223. *HB 1023*, GA. GEN. ASSEMBLY, https://www.legis.ga.gov/legislation/41530 (last visited Feb. 2, 2024) [https://perma.cc/NZF6-P9RJ] (2014 bill); *HB 29*, GA. GEN. ASSEMBLY, https://www.legis.ga.gov/legislation/42708 (last visited Feb. 2, 2024) [https://perma.cc/U2UE-4FMH] (2015 bill); LAYCOCK, *supra* note 206, at 639–40.

224. *House Bill 5958 (2014)*, MICH. LEGIS., http://legislature.mi.gov/doc.aspx?2014-HB-5958 (last visited Feb. 2, 2024) [https://perma.cc/XM47-8P4F]; Schultz Interview, *supra* note 207 (reporting the party breakdown

passed a state RFRA,[225] it created a national firestorm of controversy.[226] A 2016 bill in West Virginia passed the House but was defeated in the Senate.[227] Georgia passed a RFRA bill in 2016, with an exception so that it would not provide a defense to state or federal civil rights claims, and with additional, more specific provisions protecting religious organizations, but the Republican governor vetoed it.[228]

This was a sea change. What happened between 2013 and 2014? In June 2013, the Supreme Court handed down its decision in *United States v. Windsor*, declaring section 3 of the Defense of Marriage Act unconstitutional and requiring federal recognition of same-sex marriages.[229] Numerous lower court rulings consistent with *Windsor*'s logic soon followed.[230] As a result, 2014 was the first year that part-time legislatures in states that recognized only opposite-sex marriages were forced to grapple with the reality that those laws faced an imminent likelihood of being struck down.

Conservative state legislatures responded in multiple ways. Some sought to revive or amend state RFRAs.[231] The federal RFRA had been at the core of federal lawsuits against the Obama Administration's contraceptive mandate, and the Supreme Court interpreted the federal RFRA expansively in 2014 in *Burwell v. Hobby Lobby Stores, Inc.*[232] Many Republican legislators and social conservatives now attempted to re-brand RFRA as a solution to religious liberty concerns arising from same-sex marriage.[233]

Other states went further, offering sweeping, categorical, and facially absolute religious liberty protections that did not use the RFRA balancing test of substantial burden and compelling government interest and made no provision for any of the rights being sought by the LGBTQ community.[234] These bills were

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of the vote in the House). The original plan in Michigan was to move a RFRA bill and a gay-rights bill together. But the gay-rights bill died in committee, ending the plan for a balanced package. For background and analysis of the RFRA bill, see LAYCOCK, *supra* note 206, at 599–605.

225. IND. CODE ANN. §§ 34-13-9-1 to 34-13-9-11 (West 2014).

226. *See* LAYCOCK, *supra* note 206, at 606–38. In response to all the criticism, Indiana enacted an amendment providing that the state RFRA does not authorize any refusal to provide goods, services, facilities, employment, housing, or public accommodations on the basis of sexual orientation, gender identity, military service, or any of the longer established civil rights categories.

227. *House Bill 4012*, W. VA. LEGIS., https://www.wvlegislature.gov/bill_status/bills_history.cfm?INPUT=4012&year=2016&sessiontype=RS (last visited Feb. 2, 2024) [https://perma.cc/799E-PHUY]; *see* LAYCOCK, *supra* note 206, at 641.

228. *H.B. 757*, GEN. ASSEMB., https://www.legis.ga.gov/legislation/47388 (last visited Feb. 2, 2024) [https://perma.cc/LCJ8-QHJJ]; Governor Nathan Deal, Deal HB 757 Remarks (Mar. 28, 2016), [https://perma.cc/BPP7-F9BD] (veto message). For additional background, see LAYCOCK, *supra* note 206, at 640.

229. 570 U.S. 744, 769–75 (2013).

230. *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352, 373 (4th Cir. 2014) (collecting numerous district court cases, all going the same way); Kitchen v. Herbert, 755 F.3d 1193, 1209–30 (10th Cir. 2014); *In re* Fonberg, 736 F.3d 901, 902–03 (9th Cir. 2013).

231. *See* LAYCOCK, *supra* note 206, at 588–634.

232. 573 U.S. 682, 705–36 (2014).

233. *See* LAYCOCK, *supra* note 206, at 588–634.

234. *See, e.g.*, H.B. 2453, 2013-14 Legis. Sess., (Kan. 2014), http://www.kslegislature.org/li_2014/b2013_14/measures/hb2453/ [https://perma.cc/SV4F-T7FH]; H.B. 2467, 108th Gen. Assemb., Reg. Sess. (Tenn.

precursors to the congressional bill ultimately known as the First Amendment Defense Act (FADA).[235] LGBTQ groups condemned both RFRA bills and FADA bills as the same, and most of the press acted as if they could not tell the difference.[236] The vetoes in Arizona and Georgia responded to pressure from the business community, which feared that state RFRAs were anti-gay and would hurt the state's image and business climate.[237]

The American Civil Liberties Union catalogued many more bills that died in state legislatures in 2015 and 2016, and it did try to distinguish RFRA bills from FADA bills.[238]

In short, when Congress and state legislatures included religious liberty protections alongside LGBTQ equality measures, substantial numbers of Democrats voted yes, at least before 2014. When the measures were one-sided religious liberty protections advanced in response to same-sex marriage, the measures largely failed. The lone exception was a FADA-style bill in Mississippi, one of the deepest of red states, adopted in 2016.[239] Many of the proposals by conservative legislatures were misrepresented by their opponents.[240] But the political strategy on the right of promoting religious freedom as another means by which to oppose gay rights failed.[241]

Congress had experienced the same shift from bipartisan consensus to partisan gridlock on these issues in the 1990s. It enacted the Religious Freedom Restoration Act all but unanimously in 1993, but it could not enact a somewhat narrower replacement bill in 1998 or 1999 after the Supreme Court struck down RFRA as applied to the states in 1997.[242] This gridlock did not spread to the states until much later, because many of the states successfully negotiated

2014), https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2467&GA=108 [https://perma.cc/V9QP-BJ22]. For analysis of the Kansas bill, see LAYCOCK, *supra* note 206, at 594, 596–97.

235. *See* S. 2525, 115th Cong. (2018).

236. *See* LAYCOCK, *supra* note 206, at 594, 596–97.

237. *See* the veto messages cited *supra* notes 220, 228.

238. *Past Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU (June 17, 2015), https://www.aclu.org/other/past-anti-lgbt-religious-exemption-legislation-across-country [https://perma.cc/X73E-SF88]. Many of these were bills that made little progress in the legislative process and got little public attention. We have not attempted to verify the ACLU's categorization of every bill.

239. *See* MISS. CODE ANN. §§ 11-62-1 to 11-62-16 (West 2016).

240. *See* DOUGLAS LAYCOCK, RELIGIOUS LIBERTY VOLUME FOUR: FEDERAL LEGISLATION AFTER THE RELIGIOUS FREEDOM RESTORATION ACT, WITH MORE ON THE CULTURE WARS 804–08 (2018).

241. Conservative states have passed bills restricting the rights of transgender Americans. *See, e.g.*, L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (reversing preliminary injunctions against enforcement of statutes restricting transgender care of minors in Kentucky and Tennessee), *petition for cert. filed*, No. 23-466 (Nov. 2, 2023); Brandt by and through Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (preliminarily enjoining enforcement of similar statute in Arkansas). These laws are in a somewhat different category from those discussed in text: they protect neither gay rights nor religious liberty. They indicate that objections to the transgender movement persist to a greater degree than similar objections with respect to gays and lesbians.

242. This story is very briefly told in Laycock, *supra* note 14, at 411–13. The long-failed effort to pass replacement legislation is reviewed, mostly from the perspective of the author's congressional testimony, in LAYCOCK, *supra* note 240, at 1–295.

provisions that protected both LGBTQ rights and religious liberty.[243] Congress also undertook such negotiations in the late 1990s, but failed to reach agreement.[244]

A review of the bills in state legislatures shows that the inflection point in the states was *Windsor* and then *Hobby Lobby*. From 2008-2013, ten state legislatures and the District of Columbia enacted statutes granting same-sex couples the right to marry.[245] Each of these statutes included religious exemptions, and some were expansive—even in deep blue states like Maryland and Rhode Island.[246] Despite warnings from conservative skeptics that progressives would later rescind their half of the political deal, none of the religious liberty protections has been repealed.[247]

Prior to 2014, twenty-two legislatures (including the District of Columbia) enacted civil rights protections for gays and lesbians.[248] Each of those jurisdictions included religious exemptions for religious organizations.[249] None of these religious protections has since been repealed.[250]

Most of these laws were initiated by Democrats and passed with minority Republican support.[251] But the point is that the norm in American law—both with respect to marriage legislation and with respect to earlier gay-rights statutes—was that the advance of LGBTQ rights need not trample on those with a conservative religious understanding of marriage, family, gender identity, and sexuality.

One state was a bipartisan outlier between 2014 and 2022. In 2015, just months before the *Obergefell* decision, the conservative Utah legislature passed a statute protecting LGBTQ civil rights with robust religious freedom protections.[252] With conservatives leading the way and local LGBTQ equality activists thrilled, this had the potential to be a breakthrough moment that ushered in a common-ground approach to LGBTQ and religious liberty rights.[253] Indeed, all

243. *See supra* notes 207–16 and accompanying text; *infra* notes 248–51 and accompanying text.

244. *See* LAYCOCK, *supra* note 240, at 420–26; Laycock, *supra* note 14, at 412–13.

245. *See* Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1168, 1244–45 tbl. A1 (2014).

246. *See id.* at 1253–54 tbl. A3.

247. *See* E-mail from Tim Schultz (Nov. 13, 2023) (on file with authors) (hereinafter Schultz E-mail).

248. *See* Robin Fretwell Wilson, *Appendix of Laws*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 499 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018) [hereinafter COMMON GROUND]; Robin Fretwell Wilson, *Bathrooms and Bakers: How Sharing the Public Square Is the Key to a Truce in the Culture Wars*, in COMMON GROUND, *supra*, at 406 Fig. 30.2.

249. *See* Wilson, *Appendix of Laws*, *supra* note 248, at 499.

250. Schultz E-mail, *supra* note 247.

251. Schultz Interview, *supra* note 207.

252. S.B. 296, 2015 Leg., Gen. Sess. (Utah 2015) (codified in Utah Labor Code, UTAH CODE ANN. §§ 34A-5-101 to -112 (West 2015), and Utah Fair Housing Act, UTAH CODE ANN. §§ 57-21-1 to -14 (West 2015)); S.B. 297, 2015 Leg., Gen. Sess. (Utah 2015) (codified in UTAH CODE ANN. §§ 30-1-6 (West 2015), and §§ 63G-20-101 to -303 (West 2015)). For analysis and a review of the bill's enactment, see generally Robin Fretwell Wilson, *Common Ground Lawmaking: Lessons for Peaceful Coexistence from* Masterpiece Cakeshop *and the Utah Compromise*, 51 CONN. L. REV. 483 (2019).

253. *See generally* J. Stuart Adams, *Cultivating Common Ground: Lessons from Utah for Living with Our Differences*, *in* COMMON GROUND, *supra* note 248; David N. Saperstein, *Afterword*, *in* COMMON GROUND, *supra*

of us praised this "Utah Compromise."[254] But it did not gain traction elsewhere, and it was often explained away by national-level activists on the right as the product of a rare political moment in a state with a unique socio-religious culture. No other state has a religious entity with influence akin to that of The Church of Jesus Christ of Latter-day Saints in Utah.[255] So, the conventional thinking went, any attempt to duplicate Utah's political outcome would require the support of a much larger and more diverse conservative religious coalition.

Utah's success was also explained away as "unique" and "unrepeatable" by most progressives engaged in LGBTQ issues. While some local LGBTQ-rights organizations pursued the compromise model in their own states, they were typically undermined by influential national organizations that became increasingly committed to describing religious freedom in the civil rights context as a "license to discriminate."[256] Outside Utah, hardliners on both sides successfully opposed any compromise.[257]

Open hostility to religious freedom is baked into the Equality Act,[258] the progressives' leading federal proposal for LGBTQ rights. If passed, the Equality Act would be the first federal law to exempt itself from the 1993 Religious Freedom Restoration Act.[259] The bill treats discrimination against LGBTQ people as akin to racial discrimination, causing even religious communities open to compromise on LGBTQ rights to view the bill as a dire threat to religious liberty. This made the bill a political non-starter. Despite passing in two consecutive Congresses in the House of Representatives, the Equality Act stalled in the Senate.[260]

By mid-2022 it was clear that the Equality Act lacked any appeal to Republicans. Not only did the proposal lose its most powerful Republican patron—Maine Senator Susan Collins[261]—it failed to gain a single Republican co-sponsor

note 248, at 479; Michael Leavitt, *Shared Spaces and Brave Gambles*, *in* COMMON GROUND, *supra* note 248, at 460.

254. Wilson, *supra* note 252, at 556–57; Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50 LOY. U. CHI. L.J. 181, 203–04 (2018); Douglas Laycock, *Dicta: After* Obergefell, 68 VA. L. WKLY. 1 (2015), *reprinted in* LAYCOCK, *supra* note 206, at 875, 877.

255. Bob Bernick, *How Much Influence Does the LDS Church Have on the Legislature? Depends on Who You Ask*, UTAH POL'Y (Apr. 20, 2015), https://utahpolicy.com/archive/5430-how-much-influence-does-the-lds-church-have-on-the-legislature-depends-on-who-you-ask [https://perma.cc/G5RZ-BWVE].

256. *See, e.g.*, Teresa Wiltz, *'Religious Freedom' or a 'License to Discriminate'?*, STATELINE (Dec. 12, 2014, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/12/12/religious-freedom-or-a-license-to-discriminate [https://perma.cc/K2XM-WWW7]. As of November 13, 2023, the phrase "license to discriminate" appears in 451 articles in the Law Reviews and Journals database on Westlaw. Not all of these are about religious freedom legislation, but a great many are, especially in the period under discussion here.

257. Wilson, *supra* note 248, at 489.

258. Equality Act, H.R. 15, 118th Cong. (2023). The companion bill in the Senate is S.5.

259. *Id.* § 9 (proposing to add a new § 1107 to the Civil Rights Act of 1964).

260. Amy Sherman, *Biden Promise to Enact the Equality Act Stalls*, POLITIFACT (Dec. 12, 2022), https://www.politifact.com/truth-o-meter/promises/biden-promise-tracker/promise/1604/enact-equality-act/ [https://perma.cc/7J2S-T3DW].

261. Mike DeBonis, *The Push for LGBTQ Civil Rights Stalls in the Senate as Advocates Search for Republican Support*, WASH. POST (June 20, 2021, 6:00 AM), https://www.washingtonpost.com/politics/senate-lgbtq-equality-act/2021/06/19/887a4134-d038-11eb-a7f1-52b8870bef7c_story.html [https://perma.cc/YJ76-73TJ].

in the 117th Congress[262] or in the 118th Congress.[263] Not since the Clinton Administration has the leading LGBTQ rights measure carried such an unmistakably partisan badge or had such grim prospects in a Congress with Democratic majorities.[264] It was even unclear whether Democratic moderates like Senator Joe Manchin of West Virginia would vote for it.[265] The strategy of proposing only LGBTQ equality, with no protections for religious liberty, was just as much a political loser as the mirror-image FADA strategy of proposing only religious liberty, with no protections for LGBTQ rights. Neither side can make legislative progress unless it is willing to provide some protection for both sides.

As the 117th Congress convened for its lame-duck session in late 2022, no federal religious freedom legislation had become law since the Religious Land Use and Institutionalized Persons Act of 2000.[266] And no federal gay-rights legislation had become law since 2010, with the repeal of the "Don't Ask Don't Tell" ban on open military service.[267] Prospects for compromise in the spirit of the 2015 Utah law appeared unlikely.

But one possibility remained. The Respect for Marriage Act, which sought to codify much of the Supreme Court's same-sex marriage decision in *Obergefell*, had been introduced by Democrats in the House, in part or perhaps principally to force Republicans into a hard vote in an election year. But forty-seven Republicans unexpectedly voted for it, including many from conservative states.[268] That gave the RMA momentum heading into the Senate, but like the Equality Act, the RMA soon stalled there.[269] Yet in the lame-duck session an

262. *See Cosponsors: H.R.5—117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/5/cosponsors (last visited Feb. 2, 2024) [https://perma.cc/8P9A-T68S] (listing the sponsor and 224 cosponsors in the House, none of them Republicans); *Cosponsors: S.393–117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/393/cosponsors?s=3&r=26&q=%7B%22search%22%3A%22s.+393%22%7D (last visited Feb. 2, 2024) [https://perma.cc/4FZR-AJKE] (listing the sponsor and 48 cosponsors in the Senate, none of them Republican). These lists can be sorted by party.

263. *See Cosponsors: H.R.15—118th Congress (2023-2024)*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/house-bill/15/cosponsors?q=%7B%22search%22%3A%22hr15%22%7D&s=1&r=1&overview=closed#tabs (last visited Feb. 2, 2024) [https://perma.cc/9XM3-QL4T]; *Cosponsors: S.5—118th Congress (2023-2024)*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/senate-bill/5/cosponsors?q=%7B%22search%22%3A%22s5%22%7D&s=2&r=1&overview=closed#tabs (last visited Feb. 2, 2024) [https://perma.cc/WF6G-KHLD].

264. For an account of the political atmosphere surrounding DOMA, see Sasha Issenberg, *Bill Clinton Tried to Avoid the DOMA Trap Republicans Set. Instead, He Trapped Himself*, POLITICO (Sept. 18, 2021, 9:40 AM), https://www.politico.com/news/magazine/2021/09/18/doma-anniversary-bill-clinton-book-excerpt-512686 [https://perma.cc/3K8C-C2U7].

265. *See Cosponsors: S.393—117th Congress (2021-2022)*, *supra* note 262 (listing the sponsor and 48 cosponsors in the Senate); *Cosponsors: S.5—118th Congress (2023-2024)*, *supra* note 263 (listing the sponsor and 48 cosponsors in the Senate). Senator Manchin was not among the cosponsors in either Congress.

266. 42 U.S.C. §§ 2000cc–2000cc-5.

267. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified as a note to 10 U.S.C. § 654).

268. *See* 168 CONG. REC. H6859 (daily ed. July 19, 2022) (reporting the yeas and nays); Karni, *supra* note 5 (reporting the vote by party affiliation).

269. Annie Karni, *Same-Sex Marriage Rights Bill Clears a Crucial Senate Hurdle*, N.Y. TIMES, https://www.nytimes.com/2022/11/16/us/politics/same-sex-marriage-bill-senate.html (Dec. 5, 2022) [https://perma.cc/AS5V-BBGP] (reporting on the bill's earlier difficulties in the Senate as well as on the vote to break the filibuster).

unlikely center-left/center-right coalition formed to add religious freedom guarantees to the original House bill and break a Republican filibuster. With the clock running out, and to the surprise of most, a bipartisan Congress enacted protections for both same-sex marriage and religious freedom.[270]

As described above, the legal ramifications of the RMA are modest and mostly preserve the status quo under *Obergefell*.[271] The RMA's protections for same-sex marriage will become legally significant only if *Obergefell* is overruled. But the political and cultural implications could be immense no matter what happens with *Obergefell*. The RMA marks the return, at least for a moment, to a pluralism model of resolving tensions between LGBTQ protections and religious freedom. Congress—as well as interest groups on the right and left—have demonstrated once again that compromise is possible in this fraught area of law and politics.

The example set by the RMA should make future compromises more possible and politically viable, especially for those who share our strong conviction that civil rights for LGBTQ Americans need not be incompatible with the free exercise of religion. Since enactment of the RMA, West Virginia has passed its Equal Protection for Religion Act, which tracks the federal RFRA with some qualifications.[272] This may have been more a result of Republican dominance than of a new spirit of compromise, but the Act does avoid some of the hot-button issues that increase resistance to religious liberty legislation.[273] Professor Appleton points to the RMA as a model for potential congressional intervention and compromise on the bitter issue of interstate travel to obtain abortions.[274] These are the tiniest of signs at this point. But they are hopeful signs.

IV. CONCLUSION

Like any good compromise, the Respect for Marriage Act left both sides somewhat unhappy. For the LGBTQ side, it does not guarantee a right to marry within each state, and for hardliners, it does not stamp out all religious resistance. For religious conservatives, it does not protect wedding vendors from state and local regulation, and for hardliners, it effectively secures same-sex marriage nationwide even if *Obergefell* is overruled.

But like most good compromises, it does give each side what it needs most. Same-sex couples will be able to marry, and have their marriages recognized

270. *See* 168 CONG. REC. H8837–38 (daily ed. Dec. 8, 2022) (reporting the yeas and nays); Annie Karni, *Bill to Protect Same-Sex Marriage Rights Clears Congress*, N.Y. TIMES, https://www.nytimes.com/2022/12/08/us/politics/same-sex-marriage-congress.html (Dec. 9, 2022) [https://perma.cc/FVH4-B9DY].

271. *See supra* Part II.

272. H.B. 3042, 2023 Leg., Reg. Sess. (W. Va. 2023) (to be codified at W. VA. CODE ANN. § 35-1A-1 (West 2023)).

273. The new law excludes any claim for damages, any claim by an employee against a private employer, and any right to refuse to provide emergency medical treatment. W. VA. CODE ANN. §§ 35-1A-1(b)(1)–(2) (West 2023).

274. *See* Susan Frelich Appleton, *Out of Bounds?: Abortion, Choice of Law, and a Modest Role for Congress*, 35 J. AM. ACAD. MATRIM. L. 461, 462, 502–04 (2023).

throughout the nation, even if *Obergefell* is overruled. And nonprofit religious organizations will be able to decide for themselves, according to their own theology and moral teachings, when and whether to provide venues, goods, or services for same-sex weddings and celebrations of same-sex marriages, all without fear of losing tax exemptions or other government benefits. These religious liberty provisions have immediate effect, whether or not *Obergefell* is ever overruled.

The RMA does not solve all the problems arising from the conflict between LGBTQ equality and conservative religious understandings of marriage. But it does solve all the problems that it creates—it successfully addresses all the risks to religious liberty that could arguably arise from its provisions protecting LGBTQ equality. Subsection 6(b) even adds new substantive protection for religious nonprofits.

And the RMA provides a model of pluralism and mutual tolerance for future legislation. Perhaps nothing will come of it. The pessimistic view is that only the pressure created by Justice Thomas's express threat to overrule *Obergefell* made this compromise possible. But the optimistic view is that the hardliners on each side need not be accorded a veto over all efforts at civic peace—that legislators on both sides of the aisle can come together in ways that protect the essential interests of both the LGBTQ community and the conservative religious community. America's constitutional commitment to pluralism and individual rights should enable each side in our ongoing culture wars to live by its own deepest values.

For any further success going forward, both sides must abandon maximalist claims that deny respect, dignity, and legal or moral legitimacy to the other side and that pose existential risks to the other side's core legal and social interests. The way forward cannot be drawn exclusively either from civil rights imperatives that equate conservative religious beliefs with Jim Crow, or from religious-freedom libertarianism that dismisses the equality of LGBTQ Americans. But for men and woman of good will, there is a way forward. And the Respect for Marriage Act provides a guide for how to proceed.

APPENDIX

Public Law 117-228, 136 Stat. 2305
[HR 8404]
December 13, 2022

RESPECT FOR MARRIAGE ACT

An Act To repeal the Defense of Marriage Act and ensure respect for State regulation of marriage, and for other purposes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title (codified as a note to 1 U.S.C.A. § 1).

This Act may be cited as the "Respect for Marriage Act".

Section 2. Findings (codified as a note to 1 U.S.C.A. § 7).

Congress finds the following:

(1) No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.

(2) Diverse beliefs about the role of gender in marriage are held by reasonable and sincere people based on decent and honorable religious or philosophical premises. Therefore, Congress affirms that such people and their diverse beliefs are due proper respect.

(3) Millions of people, including interracial and same-sex couples, have entered into marriages and have enjoyed the rights and privileges associated with marriage. Couples joining in marriage deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children.

Section 3. Repeal of Section Added to Title 28, United States Code, by Section 2 of the Defense of Marriage Act (codified as a note to 28 U.S.C.A. § 1738C).

Section 1738C of title 28, United States Code, is repealed.

Section 4. Full Faith and Credit Given to Marriage Equality (codified at 28 U.S.C.A. § 1738C).

Chapter 115 of title 28, United States Code, as amended by this Act, is further amended by inserting after section 1738B the following:

§ 1738C. Certain acts, records, and proceedings and the effect thereof

(a) IN GENERAL.—No person acting under color of State law may deny—

(1) full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race,

ethnicity, or national origin of those individuals; or

(2) a right or claim arising from such a marriage on the basis that such marriage would not be recognized under the law of that State on the basis of the sex, race, ethnicity, or national origin of those individuals.

(b) ENFORCEMENT BY ATTORNEY GENERAL.—The Attorney General may bring a civil action in the appropriate United States district court against any person who violates subsection (a) for declaratory and injunctive relief.

(c) PRIVATE RIGHT OF ACTION.—Any person who is harmed by a violation of subsection (a) may bring a civil action in the appropriate United States district court against the person who violated such subsection for declaratory and injunctive relief.

(d) STATE DEFINED.—In this section, the term 'State' has the meaning given such term under section 7 of title 1.".

Section 5. Marriage Recognition (codified at 1 U.S.C.A. § 7).

Section 7 of title 1, United States Code, is amended to read as follows:

§ 7. Marriage

(a) For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State.

(b) In this section, the term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

(c) For purposes of subsection (a), in determining whether a marriage is valid in a State or the place where entered into, if outside of any State, only the law of the jurisdiction applicable at the time the marriage was entered into may be considered.".

Section 6. No Impact on Religious Liberty and Conscience (codified as a note to 1 U.S.C.A. § 7).

(a) IN GENERAL.—Nothing in this Act, or any amendment made by this Act, shall be construed to diminish 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.

(b) GOODS OR SERVICES.—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. Any refusal under this subsection to provide such services, accommodations, advantages, facilities, goods, or privileges shall not create any civil claim or cause of action.

Section 7. Statutory Prohibition (codified as a note to 1 U.S.C.A. § 7).

(a) NO IMPACT ON STATUS AND BENEFITS NOT ARISING FROM A MARRIAGE.—Nothing in this Act, or any amendment made by this Act, shall be construed to deny or alter any benefit, status, or right of an otherwise eligible entity or person which does not arise from a marriage, including tax-exempt status, tax treatment, educational funding, or a grant, contract, agreement, guarantee, loan, scholarship, license, certification, accreditation, claim, or defense.

(b) NO FEDERAL RECOGNITION OF POLYGAMOUS MARRIAGES.—Nothing in this Act, or any amendment made by this Act, shall be construed to require or authorize Federal recognition of marriages between more than 2 individuals.

Section 8. Severability (codified as a note to 1 U.S.C.A. § 7).

If any provision of this Act, or any amendment made by this Act, or the application of such provision to any person, entity, government, or circumstance, is held to be unconstitutional, the remainder of this Act, or any amendment made thereby, or the application of such provision to all other persons, entities, governments, or circumstances, shall not be affected thereby.

* * *

Finding These Provisions

In printed volumes of statutes, sections codified as notes are printed below the main body of the statutory text.

To find sections codified as notes on Westlaw, go to the statutory section to which the section you are looking for has been appended as a note. Near the top of the screen, and towards the left (but not all the way to either the top or the left), click on “History.” This will reveal a menu, and one item on the menu will be “Editor’s and Reviser’s Notes.” Click on that and you will find the statutory sections codified as notes. You may have to scroll down to find

them. Of course Westlaw could change the structure of its screens at any time, but any new structure is likely to be similar.

You can also find these sections in Statutes at Large, where they are printed as part of the main body of the statutes. The Respect for Marriage Act appears at 136 Stat. 2305.

Despite their odd codification, the sections codified as notes are fully enacted as part of the law of the United States. They are all printed in statutory text in the Statutes at Large, which is fully authoritative. "The United States Statutes at Large shall be legal evidence of laws … therein contained, in all the courts of the United States, the several states, and the Territories and insular possessions of the United States."[275] The Statutes at Large are actually more authoritative than the United States Code. As the Court has explained:

> Though the appearance of a provision in the current edition of the United States Code is "prima facie" evidence that the provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the "legal evidence of laws," § 112, and despite its omission from the Code section 92 remains on the books if the Statutes at Large so dictates.[276]

275. 1 U.S.C. § 112 (2018).

276. U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993) (enforcing a provision from the Statutes at Large that had been omitted from the United States Code for many years because the codifiers mistakenly thought that it had been repealed).