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Substitute Version of H.R. 8404 (The Respect for Marriage Act)

An Assessment of the Amendment in the Nature of a Substitute Proposed by Senators Baldwin and Collins (KIN22365)

The House of Representatives passed the Respect for Marriage Act on July 19, 2022, one day after its introduction.

The bill (1) threatens the freedom of faith-based organizations to live out their religious views about marriage; (2) jeopardizes the 501(c)(3) status of non-profits that exercise their belief that marriage is the union of one man and one woman; and (3) would require the federal government to recognize any sort of relationship, polygamous or multi-party or otherwise, deemed "marriage" by any state.

In an effort to convince Senate Republicans to support the bill, Senators Baldwin and Collins have proposed a substitute that purports to address these concerns. We conclude that the substitute's response to these defects fails in each respect.

Identifying the Changes

The amendment in the nature of a substitute makes four changes to the underlying bill:

1) It adds congressional findings.
2) It eliminates the requirement that the federal government recognize multi-party marriages deemed valid by a state.
3) It adds a useless truism about existing constitutional and statutory protections of religious liberty.
4) It adds a rule of construction whose purpose and effect is unclear.

1) Findings

The version of the bill passed by the House had no congressional findings. The substitute adds three.

The first stresses the importance of marriage (without defining it).

The second finding acknowledges that different views about same-sex marriage "are held by reasonable and sincere people based on decent and honorable religious or philosophical premises." The second finding also states that Congress "affirms that such people and their diverse beliefs are due proper respect."

The third finding observes that millions of people, "including interracial and same-sex couples," have entered into marriages and have enjoyed the rights and privileges associated with marriage. It states that married couples "deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children."

This third finding implies that the legal status of interracial and same-sex marriage is in jeopardy, thus justifying the enactment of the bill. Such an implication is unsupported by the facts. The bill is unnecessary.

2) Multi-Party and Polygamous Marriages and Federal Law

Section 4 of the House-passed version of the bill requires the federal government to recognize all marriages deemed valid by a state. It does not limit the obligation to two-person marriages.

Section 5 of the substitute adds such a limitation, and Section 7(b) expressly confirms that the bill shall not be interpreted to require or permit federal recognition of multi-party marriages.[1]

The substitute thereby responds to the valid concern that the House version could require the federal government to recognize multi-party relationships as marriage for purposes of federal law.

However, the House-passed version of the bill may still require the federal government to recognize as valid traditional polygamous relationships, in which one person is married to multiple partners who are not married to each other, if a state has recognized them. The substitute does not address this problem.

3) New Section 6: "No Impact on Religious Liberty and Conscience"

The substitute version of H.R. 8404 adds a new Section 6, entitled "No Impact on Religious Liberty and Conscience." It consists of two subsections, the first entitled "In General," and the second "Goods or Services."

New Section 6(a): "In General"

New Section 6(a) reads as follows:

[1] The title of Section 7(b) of the ANS is "No Federal Recognition of Polygamous Marriages." The language of Section 7(b), however, does *not* address polygamous marriages, in which one person has multiple spouses who are not married to each other. It instead address marriages in which three or more people are all married to each other.

> "Nothing in this Act, or any amendment made by this Act, shall be construed to alter or abrogate a religious liberty or conscience protection otherwise available to an individual or organization under the Constitution of the United States or Federal law."

This new provision does not ameliorate the bill's adverse impact on religious exercise and freedom of conscience.

While tacitly acknowledging the possibility that the bill *will* infringe upon religious and/or conscientious beliefs, this provision merely states that the person whose beliefs are infringed may still invoke existing legal protections, such as the First Amendment or the Religious Freedom Restoration Act (RFRA).

This is meaningless for at least two reasons. First, there is nothing in the original bill that could be construed to alter or abrogate existing protections in the first place. The amendment may be a response to the belief that legislation enacted after RFRA is not subject to it. This belief is erroneous. RFRA applies by its terms to "all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb–3(a).

RFRA further specifies: "Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." *Id.* at § 2000bb–3(b). Nothing in the Respect for Marriage Act "explicitly excludes" application of RFRA. The Religious Freedom Restoration Act therefore applies with or without the affirmation added by new Section 6(a).

Second, congressional legislation cannot abrogate legal protections of liberty and conscience found *in the Constitution*. Section 6(a) declares that the bill *doesn't* do something it *can't* do. This isn't helpful.

New Section 6(b): "Goods and Services"

New Section 6(b) reads as follows:

> "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, and other nonprofit entities whose principal purpose is the study, practice, or advancement of religion, and any employee of such a nonprofit religious 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."

The proposed provision addresses a non-existent problem while ignoring a real problem.

It purports to protect some of those involved in solemnizing marriages. But the House-passed version of the bill does not threaten these organizations. We have been unable to find a case in which someone has argued that religious organizations or their employees act "under color of State law" when they solemnize or celebrate marriages. In addition, a straightforward application of the principles courts use in determining whether a private person is acting "under color of state law" indicates that there is little risk that religious organizations or their employees will be sued for refusing to solemnize same-sex marriages if the RFMA becomes law.

The real problem is that the bill will be used to punish social service organizations like adoption or foster placement agencies that live out their religious belief that marriage is the union of one man and one woman. Proposed new Section 6(b) does nothing to help such organizations.

4) New Section 7: "Statutory Prohibition"

The amended version of H.R. 8404 adds a new Section 7, entitled "Statutory Prohibition." It consists of two subsections, the first entitled "No Impact on Status and Benefits Not Arising from a Marriage," and the second entitled "No Federal Recognition of Polygamous Marriages."

New Section 7(a): "No Impact on Status and Benefits Not Arising from a Marriage"

New Section 7(a) reads as follows:

> "Nothing in this Act, or any amendment made by this Act, shall be construed to deny the grant of or alter any status including tax-exempt status, tax treatment, grant, contract, agreement, guarantee, educational funding, loan, scholarship, license, certification, accreditation, benefit, right, claim, or defense, not arising from a marriage."

The amendment appears to reflect awareness of our concern that the bill will jeopardize the tax-exempt status of non-profits that live out their understanding of marriage as the union of one man and one woman. But it does nothing meaningful to address that concern.

Our argument has never been that the bill itself will directly require or cause the IRS to revoke the 501(c)(3) status of such organizations. When the IRS determines whether an organization is "charitable" under the Internal Revenue Code, it asks whether the entity's conduct is "contrary to public policy" or violates a "national policy." *See Bob Jones Univ. v. U.S.*, 461 U.S. 574, 578 (1983). Our concern is that the IRS will rely upon the RFMA (among other things) to conclude that certain non-profits are not "charitable." The substitute's rule of construction does nothing to prevent this.

New Section 7(b): "No Federal Recognition of Polygamous Marriages"

New Section 7(b) reads as follows:

> "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."

This does address the concern that the RFMA would require the federal government to recognize multi-party marriages in the event a state deemed them valid.

However, as noted above, both the House-passed version of the bill and the substitute require the federal government to recognize a person's multiple two-person marriages if a state has deemed them valid.

Conclusion

The substitute does not adequately address the defects of the House version of the bill.