



ACSI Memo to School Leaders  
Christian Schools and the New Federal Marriage Law  
December 20, 2022

President Joe Biden signed H.R. 8404 into law on December 13, 2022. The controversial legislation carried the name “Respect for Marriage Act” (RFMA).

**What happened.** The legislation began its journey in the House of Representatives where it was rushed through without committee hearings and passed on July 19, 2022, by a vote of [267 – 157](#). The bill next went to the Senate where more time led to additional analysis, which the House evaded. This led a group of 12 Senators to negotiate an amendment to respond to religious liberty concerns. That amendment gave uncertain Senators permission to vote for the bill. The Senate rejected three other religious liberty amendments meant to clarify the weaker one in the bill and ultimately passed the newly worded legislation on November 29, 2022, by a vote of [61 – 36](#). The bill then returned to the House for approval of the Senate’s new language. There, the House Rules Committee issued a rule disallowing amendments, including a religious liberty amendment by Rep. Chip Roy (R-Texas) that was like Sen. Mike Lee’s (R-Utah) Senate amendment. On December 8, 2022, the House passed the updated bill [258 - 169](#) having lost votes in part due to the failure to secure an amendment like Rep. Roy’s.

**What the law does.** The RFMA repeals the federal Defense of Marriage Act (DOMA), requires anyone operating under color of state law to provide full faith and credit to any marriage recognized by the state in which it was performed, including same-sex marriages. It provides for enforcement by the Attorney General and a private right of action. It has no positive defense for those who believe in, live by, or have conduct standards that reflect Christian marriage.

**Missing Protections.** Sen. Mike Lee (R-Utah) and Rep. Chip Roy (R-Texas) attempted to introduce a religious liberty amendment in their respective chambers which sought to provide a positive defense for religious institutions. The Lee amendment failed by [48 Yeas – 49 Nays](#) (and required 60). The House Rules Committee did not allow Rep. Roy to offer his amendment.

The Lee amendment stated that *“the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person speaks, or acts, in accordance with a sincerely held religious belief, or moral conviction, that marriage is or should be recognized as a union of (1) one man and one woman; or (2) two individuals as recognized under Federal law.”*

It defined “discriminatory action” as including any action by the Federal government to revoke tax exemptions, deny charitable deductions, eliminate federal grants, licenses, certifications, loans, scholarships, accreditation and much more. Sen. Lee’s amendment would also have provided for compensatory damages against the federal government for those whose rights were violated.

The amendment answered the questions and concerns of opponents of the law. Two other Senate amendments by Sen. James Lankford (R-Oklahoma) and Sen. Marco Rubio (R-Florida) were also defeated. All three may be found [here](#).

The failure of the Senate to agree to Sen. Lee’s amendment in particular drove home the concern that the bill would be used eventually to bully those who hold to Christian marriage. In this case, advocates of the bill seemed to argue the changes already in the bill rendered the Lee amendment unnecessary. And, while perhaps not the strongest response, one still must ask “why not just give Lee his amendment” if it made no difference *and would potentially increase the number of favorable votes?*

**Religious Liberty Protections Added.** Advocates did indeed amend the legislation to provide what they felt offered more protection for religious institutions. The protections do not go far enough, but what they do provide are:

- The bill as passed now protects “religious educational institutions” or their employees from any requirement “to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any refusal under this subsection ... shall not create any civil claim or cause of action.”

Thus, Christian schools should not be required to participate in or support with their resources a non-Christian marriage. They should be able to rely upon that language if and when they are sued under the private right of action in the law or are the target of an Attorney General’s prosecution.

- The bill as passed also asserts that nothing in the statute “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.”

Here again, Christian schools should be able to rely upon this language in those cases, but again, when, for example, the Internal Revenue Service (IRS) is evaluating what is national policy as to marriage and whether a Christian school abides by it, this language may or may not help since the RFMA itself helps define national policy on marriage, namely, that states must recognize the marriages of other states.

Some advocates have indicated that opponents who rely upon the RFMA to *help* them based on the religious liberty amendment that *did* get into the statute will somehow be hypocritical for taking advantage of that language. For our purposes, please be assured that Christian schools

should use every legal tool at their disposal to defend against attacks upon them based on the RFMA, including any protections available in the RFMA itself.

Much has been made of Section 6(a) which says that “nothing in this act ... shall be construed to diminish or abrogate a religious liberty or conscience protection otherwise available ... under the Constitution or Federal law.” However, *no* statute may “diminish or abrogate” *any* liberty under the Constitution. It is nice that the RFMA makes this note about protections found in the First Amendment or the Religious Freedom Restoration Act (RFRA), but a clearer statement like Sen. Lee’s amendment would have given real legal strength to the sentiment *and* gone a long way to protecting religious institutions from years of potential lawsuits which are often punishment in themselves.

**Impact going forward.** One of the challenging aspects of this legislative battle was the division over legislative strategy within the Christian community. ACSI had to make an evaluation of the best approach and we were not convinced by advocates of the amended bill that its new Senate religious liberty language alleviated our concerns. We supported clarifying amendments which, in the end, were defeated.

The RFMA is significant in that this is the first time Congress has passed a law instituting same-sex marriage as a right and a policy in federal statute. Every federal effort before this has been in the courts and in the executive branch through policy and agency action. Every law Congress has passed, to this point, was in the opposite direction: supporting and buttressing traditional marriage. This legislative shift is significant. That is true even if one views the new law itself in its most positive light – namely that the religious liberty amendments in RFMA will be as effective as advocates say. Because the Supreme Court had already invented a right to same-sex marriage, RFMA was, [in the words](#) of the Alliance Defending Freedom (ADF), “dangerously cynical and completely unnecessary... It does nothing to change the legal status of same-sex marriage anywhere. But it undermines religious freedom everywhere and exposes Americans throughout the country to predatory lawsuits by activists...”

Notice, too, that RFMA repealed the Defense of Marriage Act (DOMA). Whether DOMA was already mostly or completely dead due to Supreme Court decisions, it was still stated law and policy by Congress. RFMA, by contrast, is itself a normative negative in society calling evil good while also removing DOMA. If for no other reason than its role in enshrining same-sex marriage as a normative standard in society, RFMA deserved opposition and effective, clarifying amendments for religious liberty.

Finally, advocates regularly state that passage of the RFMA is only the beginning. So, there will likely be more to come, and the law’s religious liberty protections will be asked to do some very heavy lifting. Sen. Brian Schatz (D-Hawaii) [told](#) one gathering, “I think this is an enormously important *first step* ... to protect the rights of same-sex couples across the country.” [Emphasis added]. At the RFMA bill signing at the White House, Rep. Nancy Pelosi (D-California), Speaker of the House, [said](#) that “... our work isn’t done, and we won’t rest until the Equality Act ... is passed into law.” And according to [Roll Call](#) (12/13/2022), “The president also expressed a desire to go

further than the legislation signed into law Tuesday, particularly for federal protections against discrimination.”

ACSI opposes the Equality Act and the alternative Fairness for All Act. For more information on those legislative initiatives, please see the ACSI Equality Act Community Resources webpage.

**What should a school do?** ACSI repeats its ongoing recommendation to ensure the school’s documents reflect a thoroughly Christian perspective on marriage and sexuality. Further, schools should have a regular review of conduct standards and statements of faith. Schools should consistently uphold and apply those standards.

ACSI again recommends that schools consider keeping culturally controversial statements about marriage and sexuality off their website or available only to “members only,” such as current parents or staff. Schools will want to share their beliefs and standards with serious prospective parents and to make those documents available to them as appropriate. Too many schools have been subjected to negative media coverage simply because a document was publicly accessible.

ACSI recommends joining the Alliance Defending Freedom (ADF) Ministry Alliance, an ACSI Strategic Partner, at a discounted ACSI member school rate. ADF can help your schools prepare in detail in advance.

It may be worth giving some thought to reviewing how a school might respond to the loss of its tax exemption. This threat will not materialize tomorrow, but it’s not out of the question that it could happen at some point in the future. The RFMA legislative battle featured this concern (as noted above) though, obviously, the law does not mandate removal of tax exemptions. Who can say what a court or the IRS may do over time? Further, in 2022, for example, two court decisions in Maryland and California concluded the schools in those cases were recipients of federal financial assistance (FFA) merely because they were tax-exempt. That took the legal world by surprise to say the least. It is hoped that courts will act more responsibly as those cases proceed, but the RFMA is yet another straw on the camel’s back that trends in the wrong direction as to tax exemptions. There may be many more straws to go before the camel goes into traction, but it gives one pause – not panic – and perhaps reason to begin thinking about strategy.