The Respect for Marriage Act
By Joel R. Brandes

The Defense of Marriage Act which was enacted in 1996, stated that, for the purposes of federal law, the words "marriage" and "spouse" referred to legal unions between one man and one woman. The Defense of Marriage Act was intended to define and protect the institution of marriage. This law allowed individual states to refuse to recognize same-sex marriages that were performed and recognized under other states' laws.

In 2013 the Supreme Court held in United States v. Windsor (570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013)) that its provisions were unconstitutional. The Supreme Court also held that states have the authority to define marital relationships and that the Defense of Marriage Act went against legislative and historical precedent by undermining that authority. The result was that the Defense of Marriage Act denied same-sex couples the rights that come from federal recognition of marriage, which are available to other couples with legal marriages under state law. The Court held that the purpose and effect of the Defense of Marriage Act was to impose a "disadvantage, a separate status, and so a stigma" on same-sex couples in violation of the Fifth Amendment's guarantee of equal protection.

Two years later, on June 26, 2015, the Supreme Court held in Obergefell v. Hodges (576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) state laws barring same-sex marriages were unconstitutional. Parenthetically, we note that in 1967 the Court had held that state laws barring interracial marriages were unconstitutional. (Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)). In Obergefell v. Hodges, the Court ruled that the Fourteenth Amendment requires all states to recognize same-sex marriages. This decision rendered the last remaining provision of the Defense of Marriage Act unenforceable.

Last year, in Dobbs v. Jackson Women's Health Organization, (597 U.S. ___, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022)), the Supreme Court held that the Constitution of the United States does not confer a right to abortion. The court's decision overruled Roe v. Wade (410 U.S. 113 (1973)) where the Court ruled that the Constitution of the United States generally protected a right to have an abortion. It also overruled the plurality opinion in Planned Parenthood v. Casey (505 U.S. 833 (1992)), in which the Court upheld the right to have an abortion as established by the "essential holding" of Roe v. Wade (1973). In its "key judgment," the Court overturned *Roe*'s strict scrutiny standard of review of a state's abortion restrictions with the undue burden standard, under which abortion restrictions would be unconstitutional when they were enacted for "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." The effect of Dobbs was to return to individual states the power to regulate any aspect of abortion not protected by federal law.

The majority decision in Dobbs v. Jackson Women's Health Organization, supra, was written by Justice Samuel Alito and joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. The majority held that abortion is not a constitutional right as the Constitution does not mention it and its substantive right was not "deeply rooted" in the country's history. Justice Alito, writing for the majority, wrote that, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." He based his opinion on Washington v. Glucksberg (521 U.S. 702 (1997)) which held that a right must be "deeply rooted" in the nation's history. Washington v. Glucksberg was a landmark decision of the U.S. Supreme Court, which unanimously held that a right to assisted suicide in the United States was not protected by the Due Process Clause.

In Dobbs v. Jackson Women's Health Organization, Justice Thomas wrote in a concurring opinion that the Court "should reconsider" the Obergefell decision. He expressed his often-stated belief that "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." He referred to "[c]ases like Griswold v. Connecticut, 381 U. S. 479 (1965) (right of married persons to obtain contraceptives); Lawrence v. Texas, 539 U. S. 558 (2003) (right to engage in private, consensual sexual acts); and Obergefell v. Hodges, 576 U. S. 644 (2015) (right to same-sex marriage)", and wrote that: "'[i]n future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is "demonstrably erroneous," ..., we have a duty to "correct the error" established in those precedents." (citations omitted)

The Respect for Marriage Act ("Act") became federal law on December 13, 2022 (PL 117-228, December 13, 2022, 136 Stat 2305, Section 1). It provides federal statutory authority for same-sex and interracial marriages. The Act replaces provisions in the Defense of Marriage Act that defined, for purposes of federal law, marriage as between a man and a woman, and defined a *spouse* as a person of the opposite sex, with provisions that recognize any marriage between two individuals that is valid under state law.

The Respect for Marriage Act received bipartisan support in Congress. It was Congress's response to Justice Thomas's concurring opinion in Dobbs v. Jackson Women's Health Organization. It repealed the Defense of Marriage Act (PL 117-228, December 13, 2022, 136 Stat 2305, Section 3) and requires the federal government to recognize same-sex and interracial marriages, codifying parts of *Obergefell,* the 2013 ruling in United States v. Windsor, and the 1967 ruling in Loving v. Virginia. In addition, it compels all U.S. states and territories to recognize the validity of same-sex and interracial marriages if performed in a jurisdiction where those marriages are legally performed. This extends the recognition of same-sex marriages to American Samoa, the remaining U.S. territory to refuse to perform or recognize same-sex marriages.

The Act replaces provisions that do not require states to recognize same-sex marriages from other states with provisions that prohibit the denial of full faith and credit or any right or claim relating to out-of-state marriages based on sex, race, ethnicity, or national origin.

The Act does not (1) affect religious liberties or conscience protections that are available under the Constitution or federal law, (2) require religious organizations to provide goods or services to formally recognize or celebrate a marriage, (3) affect any benefits or rights that do not arise from a marriage, or (4) recognize under federal law any marriage between more than two individuals. (See https://www.congress.gov/bill/117th-congress/house-bill/8404).

Section 4 of the Respect for Marriage Act is titled Full Faith And Credit Given To Marriage Equality. It adds 28 United States Code Section 1738C. It provides that 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; (Section 4(a)(1)) or 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. (Section 4(a)(2)).

The Attorney General may bring a civil action in the appropriate United States district court against any person who violates subsection (4)(a) for declaratory and injunctive relief. (Section 4(b)). Any person who is harmed by a violation of subsection (4)(a) may bring a civil action for declaratory and injunctive relief in the appropriate United States district court against the person who violated the subsection (Section 4(c)). In this section, the term 'State' has the meaning given to the term under section 7, title 1 of the US Code. (Section 4(d)).

Marriage Recognition.

Section 7 of Title 1, of the United States Code, which defines Marriage, was amended by the Respect for Marriage Act. It provides that: "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. (Section 5 (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 5(c)). 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. (Section 5(b)).

No Impact On Religious Liberty And Conscience

The Respect for Marriage Act codifies the rights of religious nonprofits – including faith-based institutions, mission organizations, religious educational institutions, and others – to not celebrate or, in some instances, recognize a marriage that conflicts with their faith. In doing so, those organizations may refuse to provide "services, accommodations, advantages, facilities, goods, or privileges for the solemnization or

celebration of a marriage." Religious institutions can still refuse to host or officiate wedding ceremonies or to provide services, on the basis of religious liberty. This exemption follows the Supreme Court's 2021 ruling in Fulton v. City of Philadelphia. (593 US _ (2021)). In that case, the court unanimously held that a Christian adoption agency in the city could refuse to work with a same-gender couple.

Nothing in the Respect for Marriage Act, (Section 6) or any amendment made by the Act, may 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. (Section 6(a)).

Consistent with the First Amendment to the Constitution, nonprofit religious organizations are not required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. This includes 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, Any refusal under this provision to provide services, accommodations, advantages, facilities, goods, or privileges will not create any civil claim or cause of action. (Section 6(b)).

Statutory Prohibition

Nothing in the Respect for Marriage Act, or any amendment made by the Respect for Marriage Act may 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. This includes tax-exempt status, tax treatment, educational funding, or a grant, contract, agreement, guarantee, loan, scholarship, license, certification, accreditation, claim, or defense. (Section 7(a)) Nothing in the Act, or any amendment made by the Act, may be construed to require or authorize Federal recognition of marriages between more than 2 individuals. (Section 7(b)).

Severability

The Act contains a severability clause. If any provision of the Act, or any amendment made by the Act, or the application of the Act or amendment to any person, entity, government, or circumstance, is held to be unconstitutional, the remainder of the Act, or amendment, or the application of the provision will not be affected. (Section 8).

Conclusion

Same-sex marriage is legal at the federal level. Thirty-seven states (and the District of Columbia) have legalized same-sex marriage, with restrictions in Kansas, Missouri, and

Alabama. 13 states have not legalized same-sex marriage. They are Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. However, because of Obergefell v. Hodges, these laws are null and void at the federal level. (See https://worldpopulationreview.com/state-rankings/same-sex-marriage-states).

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