

PUBLICATION

Passage of the Respect for Marriage Act Signals That Same-Sex Marriage Will Remain the Law of the Land

Authors: Samuel Lanier Felker

Originally published December 9, 2022; Updated on January 3, 2023

The Respect for Marriage Act, recently passed by Congress and signed by President Biden, has received mixed reviews from the LGBTQ community. Some argue that the RFMA did not go far enough and should have included a broad provision requiring all states to recognize same-sex marriage, mirroring the historic Supreme Court ruling in *Obergefell v. Hodges*. Others consider RFMA an important and crucial backstop, given the conservative leanings of the Supreme Court, and they applaud this incremental progress born of legislative compromise.

Jim Obergefell, the lead plaintiff in the 2015 Supreme Court decision, explained his mixed feelings about the law in an interview with Katie Couric: "I'm happy that the respect for Marriage Act has passed because at least it does give us a partial solution should marriage equality be overturned by the Supreme Court...The reason I'm not really celebrating all that much is in my opinion the 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." Some 30 states still have same-sex marriage bans on the books.

On the other hand, the Human Rights Campaign (HRC) — the nation's largest LGBTQ civil rights organization — celebrated the bipartisan passage of the RFMA, calling it a historic landmark for steps toward equality. HRC President Kelley Robinson said, "We won. This is a historic day marking a much-needed victory for our community...we are closing this discriminatory chapter in our history —marriage equality is here to stay."

Why was the RFMA Passed?

The RFMA was initially introduced in summer 2022 in reaction to the Supreme Court's overturn of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Org.* Lawmakers were concerned that same-sex marriage protections would be revoked next, and those fears were stoked by Justice Clarence Thomas's concurring opinion in *Dobbs*, suggesting that the Court revisit its historic 2015 decision in *Obergefell v. Hodges* that legalized and mandated recognition of same-sex marriage nationwide. Supporters of the RFMA felt they needed to act quickly after the mid-term elections — before control of the House flipped to the Republican Party.

Still, passage of the RFMA was a bi-partisan effort. The Senate passed the bill on November 29, 2022, with a vote of 61 to 36, with 12 Republicans joining their Democratic colleagues in support of the proposal. After passage by the Senate, President Biden said, "For millions of Americans, this legislation will safeguard the rights and protections to which LGBTQI+ and interracial couples and their children are entitled. . . [A]fter the House passes this legislation and sends it to my desk, [...] I will promptly and proudly sign it into law." On Tuesday night, the House approved the RFMA with a 258 – 169 vote, including 39 Republicans, and it now heads to President Joe Biden's desk to be signed into law.

Bi-partisan support for the RFMA reflects how a vast majority of Americans now feel about same-sex marriages. In a May 2022 Gallup poll, 71 percent of Americans said they support same-sex marriage with the

same rights as traditional marriage. Only 27 percent were supportive of same-sex marriage when the poll was first taken in 1996.

What Does the RFMA do?

The RFMA codifies the definition of marriage to include same-sex couples for the first time under a federal statute and repeals the Clinton-era Defense of Marriage Act (DOMA), which defined a spouse only as a person of the opposite sex and provides statutory authority for same-sex and interracial marriages. The Act requires states and the federal government to recognize and "give full faith and credit" to same-sex and interracial marriages conducted in other states.

Although passage of the RFMA is highly symbolic, the legal importance of the RFMA is as a preventive measure in the wake of *Dobbs*. Should the Supreme Court overturn its *Obergefell* decision, a state could ban same-sex marriages from occurring in that state; however, under the new RFMA, that state is still required to recognize any marriage of another state. The federal protections are similarly significant should the Supreme Court erode legal protections to married same-sex and interracial couples. Distinctly, the RFMA does not require all states to allow same-sex marriage as *Obergefell* does, nor does it prohibit states from banning or restricting same-sex marriage if *Obergefell* were overturned.

What About Religious Exemptions?

There was great debate in the Senate over amendments providing religious liberty protections. These amendments clarify the responsibilities of for-profit religious groups and eliminate uncertainty, for for-profit and nonprofit religious groups alike. Under the RFMA, nonprofit religious organizations are not required to "provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage."

This protection covers churches, mosques, synagogues, temples, nondenominational ministries, mission organizations, religious education institutions, and faith-based social agencies, including their respective employees. Any refusal to provide marriage advantages or services, as listed above, "shall not create any civil claim or cause of action" against such a nonprofit.

How Does This Affect Employee Rights and Benefits?

This certainty, and reassurance in the event of an overturn of *Obergefell*, are the main takeaways from the RFMA: Same-sex families still enjoy the same company benefits and protections as before passage of the Act.

Under the Supreme Court decisions in *Windsor and Obergefell*, employment and benefits are secure for same-sex couples. By example, same-sex spouses will continue to receive the same deference as an opposite-sex spouse when it comes to requiring their consent to change their spouse's tax-qualified retirement plan beneficiaries. By marriage, any spouse will remain the default beneficiary of a participant without an affirmative designation.

Employer health plans governed by the Employee Retirement Income Security Act (ERISA) must encompass spousal benefit coverage for same-sex spouses. By further example, adoption tax-benefits are afforded to same-sex families.

Employees from same-sex families remain protected under Title VII of the Civil Rights Act from discrimination based on sexual orientation or gender identity, regardless of state or local laws.

Although the RFMA is not perfect, it demonstrates that incremental progress can be achieved with compromise in the legislative process. And, passage of a bipartisan bill expanding LGBTQ rights is alone cause for celebration.

