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July 11, 2004

Ms. Margaret A. Gallagher  
President  
Institute for Marriage and Public Policy  
1413 K St. NW  
Suite 1000  
Washington D.C. 20005

Dear Ms Gallagher:

Your Institute and others have asked us to examine whether the proposed Federal Marriage Amendment (“FMA”) would violate the principle of religious liberty. In particular, you have first asked whether the FMA would reach private action in light of the fact that the FMA contains no express provision limiting its reach to state action only. Second, you have asked us to consider what the practical consequences for religious liberty would be should the FMA become law. That is, you have asked us whether it will trigger a “witch hunt” against religious organizations and individuals that choose to conduct or participate in religious ceremonies which they refer to as weddings.

You have provided us with an opinion letter by David Remes (the “Remes Letter”) which answers both questions in the affirmative. Our strong belief is that the Remes Letter is mistaken on both counts. The FMA would not reach private action, and the parade of horrors it posits is unlikely in the extreme.<sup>1</sup>

At the outset we wish to emphasize that the Becket Fund is a nonpartisan, interfaith, public-interest law firm that protects the free expression of all religious traditions. We have represented religious congregations that have come down on both sides of the debate over the FMA. We have for example represented Unitarians, who do not support the FMA, and more conservative congregations who do. We have represented a wide assortment of faiths, including a variety of Jewish and Christian congregations, Buddhists, Muslims, Native Americans, Sikhs, Hindus, and Zoroastrians, whose views on the FMA are unknown to us. We have also represented religious congregations who take opposing positions on the moral issue of homosexual

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<sup>1</sup> The Remes Letter raises an assortment of other objections to the FMA that are beyond the scope of this letter.

behavior itself. We have on the one hand represented congregations that condemn not only gay marriage but also gay sex, and on the other, at least one congregation (the Come As You Are Fellowship in Reidsville, Georgia) that openly welcomes gays. Had we concluded that the FMA would violate the principle of religious liberty we would have been at the forefront of the effort against it. We have, however, concluded otherwise.

### **The Federal Marriage Amendment Will Not Reach Private Action**

The Remes Letter argues that the FMA “by its own terms” reaches private action. The Remes Letter concludes this simply from the fact that the FMA does not state otherwise. But more than 100 years ago the Supreme Court settled the point that constitutional provisions that do not facially restrict themselves to state action cannot be assumed to reach private action. In *United States v. Cruikshank*, 92 U.S. 542 (1875), the United States attempted to prosecute one group of private citizens for “banding and conspiring” together to deprive another group of citizens of, among other things, the “right to keep and bear arms for a lawful purpose.” *Id.*, 92 U.S. at 545. The government’s indictment was based on the argument made by the Remes Letter—because the Second Amendment did not limit itself facially to state action, but simply stated that “[a] well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed[,]” private actors could be indicted for attempting to deprive others of those rights. U.S. CONST. amend. II; *Cruikshank* at 548. The Supreme Court rejected that reasoning out of hand:

The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look [to the state police power] for their protection against any violation by their fellow-citizens of the rights it recognizes.

*United States v. Cruikshank*, 92 U.S. at 553. Had the Court ruled otherwise and applied to the Second Amendment the strained interpretation that the Remes Letter applies to the FMA, much mischief would have resulted. Churches, synagogues, and mosques for example, could not prevent persons from wearing firearms on the premises without thereby violating the Constitution.

The Remes Letter theory, if true, would lead to equally strange interpretations of other Amendments. The Third Amendment, which prohibits the quartering of troops in private homes during time of peace without the consent of the owner—but which does not explicitly limit its scope to state action—would make it unconstitutional for a tenant to sublease his apartment to a military officer whom his landlord found objectionable. Every petty theft would constitute a violation of the Fourth Amendment because that Amendment does not explicitly limit its condemnation of unreasonable seizures to state actors. Excessive spanking would arguably violate not only child abuse laws but the constitution itself, because it might be construed to be cruel and unusual punishment under the Eighth Amendment, which also does not expressly limit its scope to state action. None of these examples are the law, precisely because it has long been settled that constitutional provisions that do not expressly limit themselves to state action nevertheless do not

ordinarily reach private action.<sup>2</sup>

The sole exception—and curiously the only example the Remes Letter cites—is the Thirteenth Amendment, which bans slavery. To remove that evil root and branch, it was necessary to take the extraordinary step of a constitutional provision that reached both public and private action. *See, e.g., United States v. Nelson*, 277 F.3d 164, 175 (2d. Cir. 2002) (history shows that unlike other amendments, the Thirteenth Amendment “eliminates slavery and involuntary servitude *generally*, and without any reference to the source of the imposition of slavery or servitude” and therefore “reaches purely private conduct.” (emphasis added)).<sup>3</sup>

By contrast, to achieve the FMA’s objective, it is not necessary to reach private action. The FMA is occasioned by the interplay among state court decisions requiring that civil marriage be available to same-sex couples and the Full Faith and Credit Clause of the federal constitution. That Clause requires in general that civil marriages performed in one state be recognized in all other states. Thus, without the FMA, the argument goes, same-sex couples civilly married in Massachusetts must be considered civilly married in Alaska as well. However, the Full Faith and Credit Clause simply does not apply to purely religious ceremonies. Unlike uprooting slavery, therefore, preventing civil same-sex marriage from spreading via the Full Faith and Credit Clause does not require reaching private action. The general rule of the Second, Third, Fourth, and Eighth Amendments therefore applies, and not the exception of the Thirteenth.

Put differently, the historical context of the FMA informs its construction, just as the historical context of the adoption of the Bill of Rights informs construction of the Second, Third, Fourth, and Eighth Amendments, and the Civil War and Reconstruction provide the historical context that informs construction of the Thirteenth Amendment. Indeed, the FMA refers in its second sentence to state and federal constitutions—an unmistakable allusion to the actions of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) and other courts which have engendered the confusion to which the FMA is addressed.

In sum, it strikes us as past fanciful that courts construing the FMA would abandon the general rule adhered to in the Second, Third, Fourth and Eighth Amendments, and grasp at the exception of the Thirteenth. The FMA thus causes us no anxiety for the religious liberty of those of our clients who might wish to conduct ceremonies for gay couples.

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<sup>2</sup> *See, e.g., Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (“The Third Amendment’s prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from *governmental* intrusion.” (emphasis added)); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (“wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable *governmental* intrusion” (emphasis added)); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (Eighth Amendment designed “to limit the power of those entrusted with the criminal-law function of *government*” (emphasis added)).

<sup>3</sup> The same was true of Prohibition, enacted by the Eighteenth Amendment, until it was repealed by the Twenty-first Amendment.

## The FMA Will Protect Religious Liberty More Than It Will Threaten It

We next examine the Remes Letter's suggestion that should the FMA become law, it would occasion a witch hunt against those congregations and individuals who might seek to hold or participate in religious ceremonies for gay couples. The short answer to this fear is that the FMA does nothing but restore the status quo that has until very recently obtained in all 50 states since the Founding. We are aware of no such witch hunt ever being conducted against Unitarians or other groups who support same-sex marriage, whose tax exemptions seem to us as secure today as they ever have been. In those instances (overlooked by the Remes Letter) where same-sex marriage ceremonies have become the subject of litigation, the prosecutors have been clear that the crucial distinction lies between a purely religious ceremony, which the law will not disturb, and those ceremonies that purport to invoke state law and confer state benefits ("By the authority vested in me . . ."), which would be illegal. *See* Thomas Crampton, *Two Ministers are Charged in Gay Nuptials*, N.Y. TIMES, March 16, 2004, at B1 (charges based on fact that ministers "have publicly proclaimed their intent to perform civil marriages under the authority vested in them by New York state law, rather than performing purely religious ceremonies.")<sup>4</sup> That seems to us to be the appropriate line to draw.

By contrast, in the short time since the Massachusetts Supreme Judicial Court handed down *Goodridge*, ordering gay marriage in the Commonwealth, a large number of serious questions have emerged about the rights of religious organizations who are conscientious objectors to that ruling. For example, Catholic colleges and universities there have started examining whether the schools must now provide married student housing to legally married gay couples.<sup>5</sup> Similarly, religious employers that provide health and retirement benefits to the spouses of married employees may risk liability for withholding those benefits from same-sex spouses.

On top of these liability risks, resisting churches are more likely to face selective exclusion from public facilities, public funding streams, and other government benefits. The Boy Scouts, whose right to exclude openly gay scouts from leadership was confirmed in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), have been the target of state and local governments who have sought to exclude the Scouts from public benefits they have long enjoyed. Throughout Connecticut, for example, the Boy Scouts were denied participation in the state's payroll deduction charitable giving program. *See Boy Scouts v. Wyman*, 335 F.3d 80 (2d Cir. 2003). Similarly, the New York City Council recently passed a law to exclude any contractor from doing more than \$100,000 worth of business with the City, if the contractor refuses to extend health benefits to same-sex domestic partners. As a result of their religious convictions, groups like the Salvation Army—which has provided the City with millions of dollars in contract services for the needy—will be excluded from participation in government contracts. Such sanctions can only be expected to increase under a regime of same-sex marriage.

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4 The case the Remes Letter does cite is idiosyncratic. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) involved a lawyer recruited to join the office of Georgia Attorney General Michael J. Bowers (of *Bowers v. Hardwick* fame) who publicly championed her lesbian relationship at a time that sodomy was still illegal in Georgia. In its essence this was not a case about religious ceremony, so much as it was a case about demonstrated poor judgment. *Id.* at 1106, 1110. The outcome in *Shahar* would in any event have not been affected by the FMA becoming law.

5 Rhonda Stewart, "Catholic Schools Studying Gay Unions," *The Boston Globe* (May 16, 2004).

Moreover, the *Goodridge* decision is having an impact on individuals as well. One Massachusetts Justice of the Peace has already resigned, because she could not perform same-sex marriages in good conscience and Massachusetts refuses to provide an opt-out for conscientious objectors. Thus we are concerned that, whatever religious liberty problems there might be at the margins should the FMA become law, there will be far more problems if it does not.

## **Conclusion**

For the reasons set forth above, it is our opinion that the FMA would not reach private action and would sufficiently protect religious liberty from unwarranted state intrusion.

Very truly yours,

**THE BECKET FUND FOR  
RELIGIOUS LIBERTY**

A handwritten signature in black ink, appearing to read 'K. Hasson', is written over a horizontal line.

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