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THE EQUALITY ACT (H.R. 5): ENSURING THE RIGHT TO LEARN AND WORK FREE FROM DISCRIMINATION

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, APRIL 9, 2019

Serial No. 116–16

Printed for the use of the Committee on Education and Labor

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THE EQUALITY ACT (H.R. 5): ENSURING THE RIGHT TO LEARN AND WORK FREE FROM DISCRIMINATION

Tuesday, April 9, 2019
House of Representatives
Committee on Education and Labor,
Subcommittee on Civil Rights and Human Services
Washington, DC.

The subcommittees met, pursuant to notice, at 2:02 p.m., in room 2175, Rayburn House Office Building. Hon. Suzanne Bonamici [chairwoman of the subcommittee] presiding.

Present: Representatives Bonamici, Schrier, Hayes, Trone, Lee, Comer, Thompson, and Johnson.

Also present: Representatives Takano, Castro, Davis, Scott, and Foxx.

Staff present: Nekea Brown, Deputy Clerk; David Dailey, Senior Counsel; Emma Eatman, Press Aide; Daniel Foster, Health and Labor Counsel; Christian Haines, General Counsel Education; Alison Hard, Professional Staff Member; Eli Hovland, Staff Assistant; Eunice Ikene, Labor Policy Advisor; Stephanie Lalle, Deputy Communications Director; Richard Miller, Director of Labor Policy; Max Moore, Office Aid; Veronique Pluviose, Staff Director; Carolyn Ronis, Civil Rights Counsel; Loredana Valtierra, Education Policy Fellow; Banyon Vassar, Deputy Director of Information Technology; Cyrus Artz, Minority Parliamentarian; Marty Boughton, Minority Press Secretary; Courtney Butcher, Minority Director of Coalitions and Members Services; Rob Green, Minority Director of Workforce Policy; Amy Raaf Jones, Minority Director of Education and Human Resources Policy; John Martin, Minority Workforce Policy Counsel; Sarah Martin, Professional Staff Member; Hannah Matesic, Minority Legislative Operations Manager; Kelley McNabb, Minority Communications Director; Brandon Renz, Minority Staff Director; Alex Ricci, Minority Professional Staff Member; Ben Ridder, Minority Legislative Assistant; Meredith Schellin, Minority Deputy Press Secretary and Digital Advisor; and Heather Wadyka, Minority Staff Assistant.

Chairwoman BONAMICI. The Committee on Education and Labor will come to order. Welcome, everyone.

I note that a quorum is present, and I ask unanimous consent that committee members, Congressman Mark Takano of California, Congresswoman Susan Davis of California, and Congresswoman

Lori Trahan of Massachusetts, be permitted to participate in today's hearing with the understanding that their questions will come only after all members of the Civil Rights and Human Services Subcommittee on both sides of the aisle who are present have had an opportunity to question the witnesses.

I also ask unanimous consent that Congressman David Cicilline of Rhode Island be permitted to participate in today's hearing with the understanding that his questions will come only after all members of the Civil Rights and Human Services Subcommittee, and members of the full committee on both sides of the aisle who are present, have had an opportunity to question the witnesses.

Without objection, so ordered.

The committee is meeting today for a legislative hearing to hear testimony on the Equality Act, H.R. 5, ensuring the right to learn and work free from discrimination.

Pursuant to Committee Rule 7C, opening statements are limited to the chair and ranking member. This allows us to hear from our witnesses sooner and provides all members with adequate time to ask questions. And I do want to note that at some point in the next probably half an hour we will be breaking to vote and we will be coming back.

I recognize myself now for the purpose of making an opening statement.

Today, we are holding a legislative hearing on H.R. 5, the Equality Act legislation to guarantee and expand civil rights protections for LGBTQ Americans. And I want to thank our witnesses for being here today.

The struggle against discrimination in the United States is as old as the country itself. For generations marginalized people have fought and sacrificed for the inalienable rights of life, liberty, and the pursuit of happiness to all Americans.

The Equality Act is the next chapter in this story.

From the raid on Stonewall in 1969 to the victory of marriage equality in 2015, we have made significant progress toward becoming a more inclusive country for the LGBTQ population.

But we are still far from equality for all. In fact, in a majority of States today there are no clear, comprehensive protections for LGBTQ individuals in education, employment, housing, health, and other everyday opportunities and services.

Instead, we rely on a patchwork of State laws that leave millions of LGBTQ Americans uncertain about whether their rights in humanity will be recognized in the State where they happen to be living, working, or visiting.

In many parts of the country, an LGBTQ worker can get married on a Saturday, post photos of their wedding to social media on Sunday, and be fired on Monday because of who they love. Because of who they are.

This scenario is a reality for millions of LGBTQ Americans. In fact, 63 percent of LGBTQ people in this country have experienced discrimination in their everyday lives.

Victims include workers, nearly half of whom have been subjected to discrimination in the workplace. They include the nearly one quarter of all LGBTQ Americans who forgo medical care to avoid the discrimination in the health care system. And they in-

clude students and parents and families of LGBTQ individuals, like Kimberly Shappley, who will testify today about her struggle to protect her 8-year-old transgender daughter, Kai, from discrimination at school. And we welcome Kai to the hearing today.

We cannot ignore stories like Kai's or pretend that they are isolated incidents. We cannot accept the status quo in which an individual's basic civil rights are recognized in one State, but then potentially cease to exist when they cross State lines. And we cannot address the widespread discrimination affecting the LGBTQ community, especially transgender people of color, without recognizing and protecting their full identity. We must see people for who they are and for all they are. We must not diminish their humanity or their potential.

That is why we are discussing the Equality Act today. This legislation, introduced by Representative David Cicilline and supported by 240 bipartisan members of the House of Representatives, is our opportunity to affirm that this country's landmark civil rights guarantee all people the right to be safe, secure, and free from discrimination.

The Equality Act will amend longstanding civil rights laws, including the Civil Rights Act of 1964, to clarify the prohibitions against discrimination on the basis of sex includes gender identity and sexual orientation.

Specifically, the bill simply adds the words: sex, including sexual orientation and gender identity, as a protected characteristic. Where sex is already included as a protected characteristic, it adds: including sexual orientation and gender identity.

This language is to explicitly prohibit discrimination in federally assisted programs, and it will make clear that federally supported schools cannot discriminate against students and employees.

And it will also make clear that LGBTQ adults and children cannot be denied a medical checkup, counseling, therapy, or other primary care services because of their sexual orientation or gender identity.

Today, we may hear excuses about why Congress cannot or should not guarantee protections for LGBTQ Americans. We may hear claims that the Equality Act will endanger religious freedom or put women's rights and safety at risk.

But we can look to the 20 States already providing these explicit protections and know that such claims are unfounded. In States like my home State of Oregon, where the Oregon Equality Act passed in 2008 with my support as a then State legislator, the predictions based on fear have not happened, and in fact, women have experienced expanded rights and protections.

We cannot let fear impede progress. The American story is one of expanding equality for marginalized people. Today, we are writing an important passage in its latest chapter.

I am going to recognize the ranking member, but I want to before I do that echo Judiciary Committee Chairman Jerry Nadler, who convened a hearing on this bill last week. To the LGBTQ and gender nonconforming people who are watching this hearing today, you may be told that you are not welcome. You may hear that your identity is only "temporary confusion," and you may have your humanity questioned.

To these individuals, we see you. We affirm you. And we are here to fight alongside you to make sure that all Americans have the freedom to be who we are.

With that, I thank the witnesses, again, for being with us, and I recognize Ranking Member Comer for his opening statement.

[The statement of Chairwoman Bonamici follows:]

Prepared Statement of Hon. Suzanne Bonamici, Chairwoman, Subcommittee on Civil Rights and Human Services

Today, we are holding a legislative hearing on H.R. 5, the Equality Act—legislation to guarantee and expand civil rights protections for LGBTQ Americans. I want to thank our witnesses for being with us today.

The struggle against discrimination in the United States is as old as the country itself. For generations, marginalized people have fought and sacrificed for the inalienable rights of life, liberty, and the pursuit of happiness to all Americans.

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From the raid on Stonewall in 1969 to the victory of marriage equality in 2015, we have made significant progress toward becoming a more inclusive country for the LGBTQ population.

But we are still far from equality for all. In fact, in a majority of States today, there are no clear, comprehensive protections for LGBTQ individuals in education, employment, housing, health, and other everyday services and opportunities.

Instead, we rely on a patchwork of State laws that leaves millions of LGBTQ Americans uncertain about whether their rights and humanity will be recognized in the State where they happen to be living, working, or visiting.

In many parts of the country, an LGBTQ worker can get married on Saturday, post photos of their wedding to social media on Sunday, and be fired on Monday because of who they love. Because of who they are.

This scenario is a reality for millions of LGBTQ Americans. In fact, 63 percent of LGBTQ people in this country have experienced discrimination in their everyday lives.

Victims include workers, nearly half of whom have been subjected to discrimination in the workplace. They include the nearly one quarter of all LGBTQ Americans who forgo medical care to avoid the discrimination in the health care system. And they include students and parents and families of LGBTQ individuals like Kimberly Shappley, who will testify today about her struggle to protect her 8-year-old transgender daughter, Kai, from discrimination at school.

We cannot ignore stories like Kai's or pretend that they are isolated incidents. We cannot accept the status quo, in which an individual's basic civil rights are recognized in one State, but then potentially cease to exist when they cross State lines. And we cannot address the widespread discrimination affecting the LGBTQ community especially transgender people of color—without recognizing and protecting their full identity. We must see people for who they are and for all they are. We must not diminish their humanity or their potential.

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where the Oregon Equality Act passed in 2008 with my support as a then State legislator, the predictions based on fear have not happened and in fact, women have experienced expanded rights and protections.

We cannot let fear impede progress. The American story is one of expanding equality for marginalized people and, today, we are writing an important passage in its latest chapter.

Before I recognize the Ranking Member, I want to echo Judiciary Chairman Nadler, who convened a hearing on this bill last week. To all the LGBTQ and gender nonconforming people watching this hearing today, you may:

* Be told that you are not welcome,
* You may hear that your identity is only—quote—"temporary confusion,"
* And you may have your humanity questioned.

To those individuals, we see you. We affirm you. And we are here to fight alongside you to make sure that all Americans have the freedom to be who we are.

With that, I thank the witnesses, again, for being with us and I now recognize Ranking Member Comer for his opening statement.

Mr. COMER. Thank you, Madam Chairman, for yielding. And I want to add my welcome to the witnesses for being here today. You have quite a task ahead of you.

This is the first hearing of this committee, which has a referral on H.R. 5 that is scheduled on the bill, and it is being considered a legislative hearing. That means we are supposed to talk about the bill itself.

However, we skipped the step of holding a hearing on the underlying issues of the bill. I am sure there are reasons for that, but that means our members have not had the opportunity to participate in a hearing focused on information gathering on these issues and how they intersect with American schools and workplaces until now.

So you have signed up for a huge task. A bill with a name like the Equality Act sounds like a bill that in some way advocates for all people. That is what we strive for in this country, equality before the law. That is why over the more than two centuries this country has existed we have thankfully updated our laws to right past wrongs and bring us closer to treating all people with the dignity they deserve.

But as I look at H.R. 5 and learn more about what is in the bill, I am deeply troubled, and I believe most Americans would be deeply troubled by what is really there. This bill is following in the tradition of others we have seen so far throughout Congress, a clever name and allegedly noble purpose, but a vehicle for serious harmful consequences. It is completely unacceptable that this bill today totally guts the Religious Freedom Restoration Act of 1993, this country's flagship law in defense of individual religious freedom.

H.R. 5 professes to protect Americans by prohibiting discrimination based on a "perception or belief even if inaccurate." This alters Federal nondiscrimination law in ways that will have unintended effects we cannot know sitting here today.

Furthermore, the bill carries clear mandates for sweeping changes and accommodations that will prove costly, burdensome, and problematic for small businesses and schools.

I am concerned about the future ramifications of codifying ill-defined concepts into our Nation's civil rights laws and the harm this could bring to already vulnerable populations.

I am fortunate to represent the people of Central and Western Kentucky, folks who believe in human dignity and fair treatment

for their fellow citizens. The poor execution of this bill, I am afraid, will result in certain persecution for millions of innocent Americans who are still under the impression that religious freedom is a fundamental American right.

Equality and freedom must coexist. H.R. 5 totally redefines one and delivers a serious blow to the other.

Thank you, Madam Chairman, and I yield back.

[The statement of Mr. Comer follows:]

Prepared Statement of Hon. James Comer, Ranking Member, Subcommittee on Civil Rights and Human Services

Thank you for yielding.

I want to add my welcome to all the witnesses for being here today. You have quite the task ahead of you. This is the first hearing this Committee, which has a referral on H.R. 5, has scheduled on the bill, and it's being considered a legislative hearing. That means we're supposed to talk about the bill itself. However, we skipped the step of holding a hearing on the underlying issues of the bill. I'm sure there are reasons for that, but that means our members haven't had the opportunity to participate in a hearing focused on information gathering on these issues and how they intersect with American schools and workplaces until now. So, you've signed up for a huge task.

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I'm fortunate to represent the people of central and western Kentucky—folks who believe in human dignity and fair treatment for their fellow citizens. Some of the things I see in the Equality Act go beyond the pale of anything I've heard—from anyone. The poor execution of this bill, I'm afraid, will result in certain persecution for millions of innocent Americans who are still under the impression that religious freedom is a fundamental American right.

Equality and freedom must coexist. H.R. 5 totally redefines one and delivers a serious blow to the other.

I yield back.

Chairwoman BONAMICI. Without objection, all other members who wish to insert written statements into the record may do so by submitting them to the committee clerk electronically in Microsoft Word format by 5 p.m. on April 22, 2019.

I am pleased to recognize my colleague and a member of the Full Committee on Education and Labor, Congressman Joaquin Castro of Texas to introduce the first witness.

Mr. CASTRO. Thank you, Chairwoman.

I would like to introduce a fellow Texan, Kimberly Shappley. In Texas, we have seen a backlash, especially among some of our politicians, against movements toward equality. But as Kimberly and her daughter, Kai, show, our State is changing in a positive and amazing direction.

Kimberly was propelled into advocacy by her 8-year-old daughter, her 8-year-old transgender daughter, Kai. With Kimberly's support, Kai socially transitioned at the age of 4. In her position as faith outreach coordinator for Equality Texas, she has worked with and educated universities, Christian congregations, and church leaders. In 2017, Kimberly testified before the Texas State Senate in opposition to S.B. 3, a bill that would have prohibited transgender individuals from using the restroom that aligns with their gender identity. Her family story has appeared on the Today Show, HBO, the Huffington Post, and Good Housekeeping, among others, and we are very proud to welcome Kimberly here today to testify. Thank you for being here.

Chairwoman BONAMICI. Thank you, Mr. Castro. And welcome, Ms. Shappley.

And I will now introduce the remaining three witnesses.

Patrick Hedren is vice president for Labor, Legal, and Regulatory Policy at the National Association of Manufacturers. Mr. Hedren leads NAM's advocacy before Congress and the executive branch and previously served as senior counsel for a Fortune 15 manufacturing company.

Lawrence Lorber—did I get it right? Is senior counsel at Seyfarth Shaw LLP. He is an experienced employment law practitioner who counsels and represents employers in connection with all aspects of labor and employment law. He was appointed by congressional leadership as one of the five original directors of the Office of Compliance charged with implementing the congressional Account Ability Act applying 11 labor and employment laws to the Congress and congressional entities.

Sarah Warbelow serves as legal director for the Human Rights Campaign (HRC), leading the organization's team focused on Federal, State, and municipal policy. She also coordinates HRC's advocacy efforts as amicus curiae, or friend of the court, in litigation affecting the LGBTQ community. She previously served as HRC's State legislative director, working with State and local legislators and LGBTQ advocacy organizations in pursuing their LGBTQ-related legislative priorities.

I have a couple of instructions for the witnesses. We appreciate you for being here today and look forward to your testimony.

Let me remind the witnesses that we have read your written statements. They will appear in full in the hearing record.

Pursuant to Committee Rule 7d and committee practice, each of you is asked to limit your oral presentation to a 5 minute summary of your written statement. Also, let me remind the witnesses that pursuant to Title 18 of the U.S. Code Section 1001, it is illegal to knowingly and willfully falsify any statement representation, writing, document, or material fact presented to Congress or otherwise conceal or cover up a material fact.

Before you begin your testimony, please reminder to press the button on the microphone in front of you so it will turn the micro-

phone on and members can hear you. And as you begin to speak the light in front of you will turn green. After 4 minutes it will turn yellow to signal that you have 1 minute remaining. When the light turns red, your 5 minutes have expired and we ask you to please wrap up.

We are going to let the entire panel make their presentations before we move to member questions. When answering a question, please again remember to turn your microphone on.

I will first recognize Kimberly Shappley.

STATEMENT OF KIMBERLY SHAPPLEY, RN, SCHOOL NURSE, OJEDA MIDDLE SCHOOL, DEL VALLE ISD, FAITH OUTREACH COORDINATOR, EQUALITY TEXAS

Ms. SHAPPLEY. Good afternoon, Chairwoman Bonamici, Ranking Member Comer, and members of the committee. My name is Kimberly Shappley. I was born and raised in the south. I am a school nurse, an ordained evangelical minister, and the proud mother of a beautiful transgender 8-year-old girl named Kai.

My family and I used to live in Pearland, Texas, an ultra-conservative area that was once a great fit for my strong evangelical faith and tea party ideology until we moved 2 years ago. You see, because of my faith and background, I was not always accepting of the fact that my daughter is transgender, nor did my heart and mind change overnight about lesbian, gay, bisexual and transgender people. It has been a years' long process that only happened because of Kai.

Even before the age of 2, Kai's mannerisms were notably feminine. She chose traditionally female roles and toys traditionally for girls. Immediately, I intervened. I requested that the daycare put away the girl toys so Kai could not play with them. But by 3 years old, Kai was telling anyone who would listen that she is a girl. That is when I implemented a home-remedy version of conversion therapy. I hated it, but I felt responsible to save my child's soul. Things changed for me when I overheard Kai praying for Jesus to take her home to be with him forever. That is when my knowledge of science finally overrode my poor theology. I remembered the data on suicide risk for transgender youth whose gender identity is not supported by their families. So Kai socially transitioned at 4–1/2.

Around that time, President Obama issued guidance for schools to let transgender children use the bathrooms that matched their gender identity, a hopeful development. At first, I thought no one had to know that Kai was transgender. I spoke to Kai's school principal about respecting that privacy and allowing her to use the girl's restroom before she started school. But that could not remain a secret in our town, nor was it authentic to who Kai is. Our district superintendent compared transgender people to pedophiles and polygamists in a public statement. The Lieutenant Governor told district superintendents not to follow the Obama guidance.

The result for my daughter was a terrible school environment. Kai was frequently locked out of the only restroom she had access to, leaving her to have accidents in front of her peers. She was frequently reminded of her birth name by staff members and even by teachers. Peers bullied her with little or no intervention from school staff, until 1 day she came home and told me that she could

not take it anymore. I relocated my family 2 weeks later to Austin, leaving the area that I had known for more than 25 years to save her. To this day, I have friends and family who I do not communicate with because I accept my daughter.

When I enrolled her in Austin ISD, we were welcomed by a sign that read, "We are proud to be a safe, supportive, and inclusive campus." And I wept. For the first time in a long time I felt that she would be safe. Her first day of school she ran home to write in her diary because she had the best day ever. She had freely used the appropriate restroom at school. In Austin ISD, parents do not complain, and her classmates invite her for sleepovers. District leadership has set a standard to be kind and truly inclusive, and the staff has made note of Kai's gifted intelligence. Her former school had been too focused on her identity that they never even noticed her IQ.

I currently work with Equality Texas as faith outreach coordinator and I frequently speak in conservative spaces. I consider my philosophy as an activist one of the most important things that I have learned as a nurse. Educate people by meeting them right where they are. Because of this mindset and the mindset that I overcame, I am uniquely qualified to do this.

But I will not always be here to protect my daughter. She, trans kids like her, and LGB kids need the Equality Act because they deserve a future where they will not experience discrimination at school, when they apply for a job, or rent an apartment. Our country had determined long ago that discrimination is wrong. Choosing to exclude people for how they were born is not an American value. We must do better.

I welcome questions, and I appreciate dialog, even if we disagree. And I thank you for inviting me to share our story.

[The statement of Ms. Shappley follows:]

U.S. House of Representatives
Education and Labor Committee
Civil Rights and Human Services Subcommittee Testimony
"The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination"
April 9, 2019

My name is Kimberly Shappley. I was born an army brat in Alabama and raised in the south, am a middle school nurse, an ordained evangelical minister, and the proud mother of a beautiful transgender eight-year-old girl named Kai. I grew up in northeast Mississippi on the land my great grandparents settled when they came to America. As an adult, I relocated to Brazoria County Texas. My family and I lived in Pearland, an ultra-conservative area that was once a great fit for my strong evangelical faith and tea-party ideology, until we moved two years ago.

You see, because of my faith and background, I was not always accepting of the fact that my daughter is transgender. Nor did my heart and mind change overnight about lesbian, gay, bisexual, and transgender people. It has been a years-long process that only happened because of Kai.

Before the age of two, Kai's mannerisms were notably feminine. When she was two, Kai chose female playmates, traditionally female roles while playing, and toys traditionally for girls. Immediately, I intervened. I requested that the daycare put away the girl toys so Kai couldn't play with them. But by three years old Kai was telling anyone who would listen that she is a girl. That's when I implemented a home-remedy version of conversion therapy based on counsel I had received from my family and friends, who are also devoutly religious. I hated every minute of it but felt a responsibility to save my child's soul from hell. Things changed for me when I overheard Kai praying for Jesus to take her home to be with him forever. That's when I allowed my knowledge of science and psychology to finally override my poor theology. I remembered the data on suicide risk for transgender youth whose gender identity is not supported by their families. So Kai socially transitioned at four and a half. For Members who may not know: transition for a child means they pick out clothes they feel comfortable in and we use pronouns that validate her. It does not mean that a child has surgery or takes medication.

Around the time Kai socially transitioned, President Obama issued guidance for schools to let transgender children use the bathrooms that match their gender identity, a hopeful development. At first, I thought nobody had to know Kai was transgender. I spoke to Kai's school principal about respecting that privacy and allowing her to use the girl's restroom before she started school. But that could not remain a secret in a small town. Nor was it authentic to who Kai is. Our district superintendent compared transgender people to pedophiles and polygamists in a statement he gave to the Pearland Journal. Texas Lt. Gov. Dan Patrick told district superintendents not to follow the Obama guidance. Can you imagine being the parent of a child that was referred to in this manner by the leaders appointed to serve and protect her?

The result, for my daughter, was a terrible school environment. At 5 and 6 years old, Kai was frequently locked out of the only restroom she had access to, leaving her to have accidents in front of her peers. It also taught her that the adults around her at school were going to consistently fail her. She was frequently reminded of her birth name by certain staff members, even by one of her teachers. This was obviously intentional and cruel behavior. Peers bullied her and called her a boy with little or no intervention from school staff, until one day she came home and told me she couldn't take it anymore. I relocated my family two weeks later to Austin, leaving the area I had known for more than 25 years to save my daughter. To this day, I have friends and family who I do not communicate with because I accept my daughter.

When I entered the office to enroll my children in school in Austin ISD we were welcomed by a sign tacked to the office bulletin board that read: "We are proud to be a safe, supportive and inclusive campus!". I began to weep. For the first time in a long time, I felt my daughter was safe with the adults I was leaving her with. Her first day of school she came home and ran upstairs to write in her diary because she "had the best day ever." She had freely used the appropriate restroom at school. In Austin ISD, parents don't complain. Classmates invite her for sleepovers and their parents allow them to have slumber parties at our home. The school district leadership has set a standard that has shaped an entire campus to be kind and truly inclusive of all children. Almost immediately, the teachers and principal made note of Kai's gifted intelligence. Her

former school district had been so focused on her gender identity that they never noticed, nor cared to notice her high IQ.

I currently work with Equality Texas as Faith Outreach Coordinator and frequently speak at press conferences, give interviews, and have speaking engagements in conservative spaces. I consider my philosophy as an activist one of the most important things I've learned as a nurse. I advocate for children who depend on my knowledge and skill set to educate people by meeting them right where they are. Because of the mindset I overcame, I am uniquely qualified to do this. This philosophy has made me a successful advocate and mom.

But I won't always be here to protect my daughter. She, trans kids like her, and LGB kids, need the Equality Act because they deserve a future where they won't experience discrimination at school, when they apply for a job, or rent an apartment. Our country had determined long ago that discrimination is wrong. Choosing to exclude people for how they were born is not an American value. We must do better. I welcome sincere questions and appreciate open dialogue, even if we may disagree. Thank you for inviting me to share our story.

Chairwoman BONAMICI. Thank you very much, Ms. Shappley, for your testimony and for participating. And thank you, Kai, for being here today.

Next, I recognize Mr. Hedren for 5 minutes for your testimony.

STATEMENT OF PATRICK HEDREN, JD, VICE PRESIDENT OF LABOR, LEGAL AND REGULATORY POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. HEDREN. Chair Bonamici, Ranking Member Comer, and members of the subcommittee, it is an honor to testify in front of you today on the workplace provisions in H.R. 5, the Equality Act.

My name is Patrick Hedren, and I am the vice president of labor, legal, and regulatory policy for the National Association of Manufacturers (NAM).

The NAM is the Nation's largest industrial trade association and the voice for more than 12.8 million men and women who make things in America. We represent more than 14,000 manufacturers, of which upwards of 90 percent are small or medium-sized.

The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. We also believe that equal opportunity is a key pillar of our great democracy, one that allows every individual to pursue the American dream based on his or her own talents and qualifications.

Manufacturers and the business community have made great strides already in providing nondiscrimination protections for our LGBT employees. There is still further to go, however, and manufacturers believe now is the right time for Congress to act to help our country get there.

That is why in March the NAM joined with now 46 other industry associations representing a stunning breadth of the American economy in support of the Equality Act. In our view, amending the Civil Rights Act of 1964 to include explicit nondiscrimination protections based on sexual orientation and gender identity is a smart approach. It is less burdensome from a business or economic perspective than other methods. In fact, we believe a Federal standard will help manufacturers better attract and retain a talented work force which is greatly needed as we face a major skills gap.

According to the NAM's most recent quarterly outlook survey, 71.3 percent of manufacturers expressed worry about their ability to attract and retain the work force they will need moving forward. There are nearly half a million unfilled jobs in a sector already and about 2.4 million jobs could go unfilled by 2028.

Attracting talented employees is a multifaceted effort but manufacturers have known for years that an inclusive workplace with meaningful LGBT protections helps them hire and retain the best possible work force.

Manufacturers have been some of the strongest leaders in creating a more welcoming workplace as outlined in my written testimony. The Equality Act would assist our efforts by helping manufacturers ensure that every employee knows they have a right to feel safe from discrimination, harassment, or worse on the manufacturing floor.

Many States and hundreds of localities have already explicitly protected residents from sexual orientation and gender identity-

based discrimination in the workplace, all with slightly different requirements and definitions. A uniformed Federal approach will help business by providing a clear basic level of nondiscrimination protection across the States. This consistent approach would give certainty to employees who may wish to move from one facility to another, and it would establish predictable baseline rules for employers, making it more cost-effective to educate employees and enforce these protections.

The framework of Title VII brings with it two important pragmatic features—a basic applicability threshold of 15 or more employees, and a religious exemption that allows employers to differentiate between employees based on a bona fide occupational qualification. The 15 employee applicability threshold serves principally to protect smaller firms from the burden of compliance and oversight or red tape that applies to larger employers. Businesses with 15 or more employees already must understand and comply with Title VII.

This fact is a key benefit of the Equality Act. The BFOQ defense allows religious employers to maintain their religious values and teachings in making hiring decisions for specific positions that require it.

By amending Title VII in this manner, the Equality Act would also draw upon current case law regarding sex dissemination. Employers and employees' rights would not need to be established as issues of first impression through decades of litigation and court opinions, these cases and EEOC enforcement guidance to an extent already exist. The Equality Act puts sexual orientation and gender identity on a level playing field with other sex-based nondiscrimination protections.

In conclusion, manufacturers have been at the forefront in providing their employees with fair and meaningful protections against sexual orientation and gender-identity based discrimination. Partly, this is because talented employees demand it. Partly, this is because employers understand the importance of creating an environment in which the very best people can succeed based on merit.

There is, however, also a much broader side to this discussion, namely manufacturers believe that discrimination of any kind is antithetical to the values we work to uphold every day. Free enterprise, competitiveness, individual liberty, and equal opportunity. These are the four pillars that underpin what makes manufacturing strong. These are the values that help make our country great. They are also the animating rationale behind our support of the legislation. We can do this.

Thank you, and I look forward to answering any questions you may have.

[The statement of Mr. Hedren follows:]

COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

U.S. HOUSE OF REPRESENTATIVES

APRIL 9, 2019

Chair Bonamici, Ranking Member Comer, and members of the Subcommittee, it is an honor to testify in front of you today on the workplace provisions in H.R.5, the Equality Act. My name is Patrick Hedren, and I am the vice president of labor, legal and regulatory policy for the National Association of Manufacturers (NAM).

The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers very much appreciate your interest in, and support of, the manufacturing economy. We also believe that equal opportunity is a key pillar of our great democracy—one that allows every individual to pursue his or her own American Dream based on his or her talents and qualifications. Manufacturers and the business community have made great strides already in providing non-discrimination protections for our LGBT employees, even in places where state law may not otherwise require them. There is still further to go, however, and manufacturers believe now is the right time for Congress to act to help our country get there.

In our view, amending the Civil Rights Act of 1964 to include explicit protections based on sexual orientation and gender identity is the right approach. It is sensible and would be less burdensome from a business or economic perspective than other alternative methods. Indeed, a federal standard would actually help manufacturers—many of which already provide these protections—by changing public expectations, enabling manufacturers to better attract and retain a talented workforce.

Moreover, prohibiting this discrimination is simply the right thing to do.

Overview

The NAM is the nation's largest industrial trade association and the voice for more than 12.8 million men and women who make things in America. We represent more than 14,000 manufacturers, of which upwards of 90 percent are small or medium-sized. Indeed, 98.6 percent of manufacturers have 500 or fewer employees, and three-quarters of manufacturing firms have fewer than 20.

Manufacturing has long been the backbone of the American economy. This remains true today. According to the most recent data, manufacturers in the United States contribute $2.35 trillion to the economy annually (which equates to 11.4 percent of GDP). For every $1.00 spent in manufacturing, another $1.89 is added to the economy, the highest multiplier effect of any economic sector. Moreover, the average manufacturing worker in the United States earned $84,832 annually in total compensation, compared to $66,847 for all non-farm workers.

According to the NAM's most recent quarterly outlook survey, from Q1 of 2019, today's manufacturing sector is strong, confident, and optimistic. For the ninth quarter in a row, manufacturers reported record optimism—with an average of 91.8 percent saying they were positive about their own company's outlook, compared to an average of 68.6 percent across 2015 and 2016. Thanks to this optimism, manufacturers are growing, investing, and creating jobs. Paradoxically, however, they are also finding that a longstanding problem affecting the industry—namely, the ability to attract the right talent for unfilled jobs—has grown even more difficult. The same survey I mentioned showing record optimism also found 71.3 percent of manufacturers expressing worry about their ability to attract and retain the workforce they'll need moving forward. There are nearly half a million unfilled jobs in the sector today and, according to a recent study undertaken by the Manufacturing Institute (the education and workforce partner of the NAM) and Deloitte, about 2.4 million jobs could go unfilled by 2028.

At the same time, the needs and demographics of the American workforce continue to change. Today's world is one where talent has many choices, and manufacturers can only benefit by making the sector a more welcoming, equitable and

attractive place to work. The good news is, they are. As explored in another recent Manufacturing Institute study, a white paper released jointly with PwC late last year, manufacturers are working hard to lead the way in creating a more welcoming and accommodating workplace. For manufacturers of all sizes, diversity and inclusion (D&I) programs are no longer viewed as a "nice to have" but rather as a top priority for their businesses.

Attracting talented employees is a multi-faceted effort, but manufacturers have known for years that an inclusive workplace with meaningful LGBT protections helps them hire and retain the best possible workforce. To be fully effective, however, non-discrimination protections must extend beyond the employer-employee relationship. For example, many of our members operate programs that rotate their best employees through various roles in different parts of the country. We have heard repeatedly from our members that their best and brightest LGBT employees are likely to decline roles in areas where they feel unsafe because of their orientation or identity. Even *non*-LGBT employees are often reluctant to relocate to areas that lack meaningful and complete protections, particularly when their children or other family members might not feel accepted or protected from bias.

The NAM has for years recognized the importance of talent to the success of our sector, as well as the value of clear and affirmative protections for LGBT individuals under federal law. To that end, the NAM Board of Directors voted unanimously in 2016 to affirm manufacturers' support for the principle of equal treatment in all personnel matters without regard to sexual orientation or gender identity as part of our official policy positions—in addition to support for the positive, responsible, and consistent efforts of government to support equal opportunity. Creating fair and equal conditions in the workplace is quite literally part of our mission.

In short, manufacturers have led the way already in providing their employees with fair and meaningful protections against sexual orientation- and gender identity-based discrimination. Partly, this is because talented employees demand it. Partly, this is because employers understand the importance of creating an environment in which the very best people can succeed based on merit.

There is, however, also a much broader side to this discussion. Namely, manufacturers believe that discrimination of any kind is antithetical to the values we work to uphold every day: free enterprise, competitiveness, individual liberty and equal opportunity. These are the four pillars that underpin what makes manufacturing strong. These are the values that help make our country great. They are also the animating rationale behind our support of this legislation.

In March, the NAM joined with over 40 other industry associations—representing a truly stunning breadth of the American economy—in supporting the Equality Act. And the number of industry associations in support continues to grow. As the letter states:

> *The undersigned trade and professional associations support provisions in the Equality Act that amend Title VII of the Civil Rights Act to provide employment non-discrimination protections based on sexual orientation and gender identity. Equality of opportunity is a key pillar of our great democracy—one that allows all people to pursue their American Dream—and part of what makes our nation exceptional. Our industries, representing tens of millions of Americans, understand this basic fact and have been at the forefront of efforts to combat discrimination based on sexual orientation and gender identity in the workplace.*

It continues:

> *We believe an appropriately-tailored federal standard would complement our members' ongoing work to promote equal opportunity in the workplace. A clear federal standard would better enable individuals to succeed based on their abilities and qualifications to perform a job. Our members recognize the value of equal opportunity because it enables them to attract and retain the most talented employees. Title VII of the Civil Rights Act provides a well-understood legal framework for preventing and addressing discrimination. Amending the Act to include protections based on sexual orientation and gender identity is a sensible approach to ensure consistency with other protected classes.*

Allow me to explain further why that is.

Including Sexual Orientation and Gender Identity in Title VII

Section 7 of the Equality Act amends Title VII of the Civil Rights Act of 1964 to clarify that the definition of sex *includes* discrimination on the basis of sexual orientation and gender identity. In other words, the bill would codify once and for all the position long-held by manufacturers as well as the independent agency charged with enforcing Title VII. As such, employers may not take an individual's LGBT affiliation into consideration in any aspect of employment. This includes hiring, firing, benefits, promotions, job assignments, pay, and many other terms and conditions of employment. The NAM supports this method of including sexual orientation and gender identity in federal law, in particular Title VII.

Guarding Against a Patchwork

Many states and hundreds of localities explicitly protect residents from discrimination in the workplace based on their sexual orientation and gender identity. In addition, the United States Equal Employment Opportunity Commission (EEOC) has consistently argued that the Civil Rights Act already protects against LGBT-related discrimination as a form of sex discrimination. Several federal circuit courts have agreed, although a circuit split remains.

Each year additional jurisdictions pass protections for LGBT individuals—contributing to a patchwork of different laws. Some laws protect individuals only from discrimination based on their sexual orientation. Other laws extend further and include gender identity protections as well. Some jurisdictions only protect individuals in the workplace, while others protect them from discrimination in public spaces as well. Laws covering the workplace may exempt small employers and provide for religious exemptions, or they may not. Protections may come in the form of explicit statutory provisions, or by way of judicial interpretations.

These protections are obviously not universal, and the conditions under which employers provide benefits to their employees can vary. In general, however, the employer community has made remarkable strides toward supporting LGBT employees

even in the last ten years, as evidenced by annual reports on corporate equality efforts. States and localities are in motion; manufacturers are in motion too.

A uniform federal approach would help our sector by providing a clear basic level of non-discrimination protection across the states. This consistent approach would give certainty to employees who may wish to move from one facility location to another, as well as reliable rules for employers, making it more cost-effective to educate employees and enforce these protections.

Accommodating Small and Religiously-Owned Businesses

The framework of Title VII brings with it two important pragmatic protections for smaller employers: a basic applicability threshold of 15 or more employees, and a religious exemption contained in Section 703(e) of Title VII that allows employers to differentiate between employees based on a bona fide occupational qualification, also known as a BFOQ.

Rather than enabling or incentivizing discrimination for smaller firms, this 15-employee applicability threshold serves principally to protect smaller firms from the burden of compliance and oversight (or "red tape") that applies to larger employers. As mentioned earlier, large and small employers experience the burden of legal and regulatory requirements differently. For example, the NAM issued a report in 2014 that found that manufacturers in 2012 spent on average $19,564 per employee to comply with regulations, nearly double the amount per employee for all U.S. businesses in general. The smallest manufacturers—those with fewer than 50 employees—incurred regulatory costs of $34,671 per employee per year. This is more than triple that of the average U.S. business. Businesses with 15 or more employees already must understand and comply with Title VII. This fact is a key benefit of the Equality Act.

By amending Title VII, the Equality Act would also draw upon current case law with regard to sex discrimination. Employers' and employees' rights would not need to be established through decades of litigation and court opinions—these cases and EEOC enforcement guidance, to an extent, already exist. By putting sexual orientation and gender identity on a level playing field with other sex-based non-discrimination

protections, the Equality Act merely maintains a consistent and sensible threshold for compliance.

Conclusion

Manufacturers can only attract talented employees when they feel safe from discrimination, harassment, or worse at work and in their communities. This legislation would help us do so. It would also actually establish a solid federal framework to help manufacturers prevent and address discrimination in the future. Above all, manufacturers believe that passing this bill is simply the right thing to do.

No bill is ever flawless on introduction, and the Equality Act is no different in this regard. That's what this hearing is for. We expect that Congress will amend the bill to address items that otherwise could become interpretive problems down the road, both within and outside the Title VII provisions that I am here to discuss today.

Individual characteristics like sex, color, race, national origin, religion, sexual orientation, or gender identity are some of the core elements at the root of who a person is. The ways in which we are all different make our country stronger and should not be used to make one individual legally inferior to another. We look forward to working with members of the Committee as you consider this important legislation.

Thank you for your consideration today. I look forward to answering any questions you may have.

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Chairwoman BONAMICI. Thank you for your testimony, Mr. Hedren.

And now they are calling the votes on the House floor. So when we come back after votes we will hear from Mr. Lorber and Ms. Warbelow, and then we will move into questions.

So the committee is temporarily in recess until immediately after votes.

[Recess]

Chairwoman BONAMICI. The Subcommittee on Civil Rights and Human Services hearing on the Equality Act, H.R. 5, will resume. And I appreciate the patience of everyone waiting during the vote series.

We are now moving to the testimony of Mr. Lorber. And you are recognized for 5 minutes for your testimony.

STATEMENT OF LAWRENCE LORBER, JD, SENIOR COUNSEL, SEYFARTH SHAW LLP

Mr. LORBER. Thank you. Chair Bonamici, Ranking Member Comer, members of the Subcommittee, my name is Lawrence Lorber, and I am pleased to be able to present this testimony at this most important hearing.

As I set forth in greater detail in my testimony, I have had a long career as an employment and labor lawyer both in government positions, in private practice, and with respect to major legislative actions.

I must note that my purpose here today is not to recommend whether this committee or the Congress should ultimately decide to pass H.R. 5, but rather to offer comments on this legislation and to highlight issues which may warrant the attention of this committee. I am not testifying today on behalf of my law firm, clients, or other affiliations.

I begin by noting that H.R. 5 differs significantly from the prior version of the Employment Non-Discrimination Act (ENDA). ENDA dealt primarily with employment issues and has evolved to thoughtfully deal with those issues. H.R. 5, however, deals with a host of issues and existing statutes. H.R. 5 does little other than incorporate sexual orientation and gender identity into the definitional provisions of those statutes without addressing any of the implementation or interpretation issues which should be the subject of some focus.

In particular, H.R. 5 merely includes new protected classes into Title VII with no explanation. While it should be noted that there are probably more statutory provisions impacting employment with different administrative and remedial schemes, this has been caused in part by the fact that each new protected class brought certain issues which have to be specifically addressed. So, when Congress passed the Civil Rights Act in 1964, it kept equal pay separate. When Congress addressed the issue of age discrimination shortly after the Civil Rights Act was passed, it decided not to include age in Title VII but created a different statutory framework. The same decision occurred with disability issues when the ADA was not included in Title VII with respect to employment and when GINA was not included in the ADA.

So simply including sexual orientation and gender identity into Title VII without the provisions on protections included in all of the various versions of ENDA will leave employers and members of the protected class unable to understand their obligations or rights.

For example, ENDA prohibited the collection of data showing the status of employees or applicants, as does GINA, the ADEA, and the ADA. H.R. 5 has no such protection. And by including the employment provisions of H.R. 5 into Title VII, it is unclear at least as to whether the EO on data collection form will have to now include sexual orientation or gender identity. Prior versions of ENDA did not require employers to build new or additional facilities. H.R. 5 is silent as to those obligations. Prior versions of ENDA permitted employers to require reasonable dress and grooming standards as long as they were neutral and permitted employees to notify their employer that they were undergoing or had undergone gender transition and therefore, could assume the identity of their transition gender. H.R. 5 is silent. ENDA prohibited the establishment of preferences granted to individuals because of the individual's sexual orientation or professed gender identity. H.R. 5 is silent.

And there should be one other point emphasized. H.R. 5 seeks to deal with employment by simply amending Title VII. It does not recognize that Title VII does not permit the EEOC to issue regulations. Therefore, these issues will be dealt with in litigation and the certainty asked for by proponents will not be available. Two, it is suggested that provisions of H.R. 5 will somehow provide a degree of uniformity and consistency in the interpretation of all these obligations, but as we well know, there is no preemption of State or local, whereby Title VII or indeed the other employment laws so that H.R. 5 will offer no uniformity or consistency. It will just add another layer of legal obligations to the already towering degree of legal obligations and restrictions in the employment area.

I do discuss the issue of the implications of the Religious Freedom Restoration Act (RFRA) and how it will coincide with H.R. 5. It has been Stated that RFRA, which was overwhelmingly passed to deal with serious concerns of religious discrimination and which was introduced by leaders of Congress, including Senator Kennedy and then Representative Schumer, perhaps no longer merits consideration or enforcement. While Congress can certainly amend or revoke statutes, it seems strange that it will undermine the implications of one statute for the purpose of another. It certainly should be possible to address the issues raised by the Restoration Act without denigrating its importance. RFRA has not faded from the statute books.

I have addressed other issues in my testimony but remain willing and anxious to answer your questions. Thank you very much.

[The statement of Mr. Lorber follows:]

Testimony of
Lawrence Z. Lorber

before the U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Civil Rights and Human Services

Hearing on H.R. 5—The Equality Act

April 9, 2019

Introduction

Chair Bonamici, Ranking Member Comer, members of the Subcommittee, I am pleased to be invited to testify before you today on H.R. 5, the Equality Act.

My own background may be relevant to my comments on this legislation. I have been a labor law practitioner for over 40 years starting in the Solicitor's Office at the Department of Labor. I am currently a Counsel in the law firm of Seyfarth Shaw LLP. In 1975 I was appointed by Secretary of Labor John Dunlop as a Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs, OFCCP, which enforces the various non-discrimination and affirmative action laws applicable to government contractors. In that capacity, the first regulations enforcing section 503 of the Rehabilitation Act were issued as well as the first comprehensive review of the E.O. 11246 regulations was undertaken. In private practice, I have represented and counseled employers on various issues relating to equal employment matters. In 1989 I was asked to represent various employer groups with respect to the consideration and ultimate passage of the Americans with Disabilities Act, and in 1991 I was counsel to the Business Roundtable during the consideration of the Civil Rights Act of 1991. In 1995 I was honored to be appointed as a Member of the first Board of Directors of the Office of Compliance, which enforces the Congressional Accountability Act, applying 11 employment and labor laws to the Congress. I was counsel to the employer coalition which engaged in the unique process of negotiating and recommending what became the Americans with Disabilities Act Amendments Act in 2008. I have been management co-chair of the federal legislation committee of the Labor Section of the ABA. Over the years I have been asked to testify on various employment issues being considered by the Congress.

H.R. 5

My purpose here today is not to recommend whether this Committee or the Congress should ultimately decide to pass this legislation but rather to offer comments on the latest version, and highlight issues which may warrant the attention of this Committee as it examines the legislation. While I do bring extensive experience as an employment

law practitioner, I am not testifying today on behalf of my law firm, clients or other affiliations.

At the outset, it should be noted that prior to the introduction of H.R. 5, several congresses considered the Employment Non-Discrimination Act ("ENDA") which addressed the issues raised by the Equality Act as they pertained more specifically to employment. Insofar as I am an employment attorney, I will generally restrict my comments to the employment portions of the Equality Act although because of its breath, some provisions not specifically directed at employment will nevertheless implicate employment issues.

As I will highlight, H.R. 5 does contain several significant changes from prior versions of the Employment Non-Discrimination Act ("ENDA") which should be closely examined as they represent potentially far reaching changes in accepted employment law and may well have significant impact upon employers and employees. And as I will discuss, H.R. 5 seems to be a sparsely drafted legislation which essentially adds further protected classes into various laws without describing with any specificity how these amended statutes are to be interpreted. This represents a significant and unfortunate change from the previous versions of ENDA.

As a preliminary matter, it should be noted that without categorizing one or another of the laws as necessary or superfluous, there are probably more and different employment laws impacting upon the workplace, including federal, state and local than apply in other regulated areas. Some cover the same areas but have different administrative or enforcement procedures. Others include overlapping federal, state and local requirements but differ in scope, procedure or administration. And still others overlap within the same jurisdiction, so that one federal law implicates another. And it should be noted that the greatest single area of growth in federal civil litigation involves employment and labor law. While this plethora of employment related laws does cause some confusion, it also represents a conclusion that different characteristics of protected groups may require different responses. So as early as 1964 when Congress passed the Civil Rights Act, it understood that the Equal Pay Act, passed one year before should remain an independent statute with its own procedures and remedies. And Congress debated whether simply to include age as an additional protected classification under Title VII but instead decided that the rules and developing procedures under Title VII may not have been appropriate to include age discrimination so the ADEA was passed. Similarly, in 1989 Congressed addressed the unique intricacies impacting discrimination on the basis of disability and passed the ADA rather than amending Title VII and it also considered discrimination on the basis of genetic discrimination and passed GINA rather than amending either Title VII or the ADA.

Therefore the Congress should be cautious in simply adding additional protected classifications to Title VII without closely examining how the new law will interact with existing laws so that newly designated individuals in protected classifications and employers who must implement these new protections fully understand their rights and responsibilities. And as I will note in this testimony, there are sections in H.R. 5 which

themselves implicate other federal laws and can serve to create a degree of confusion or lead to contrary interpretations. To that end, I would note that it was the lack of specificity and definition in the original Americans with Disabilities Act which led to confusing judicial and regulatory results and which resulted in the ADAAA which had to clarify definitions of disability and related sections of that law. Thus may I suggest that the Committee carefully weigh the impact of H.R. 5 and its requirements on how the regulated community must adopt to its proscriptions and how the protected community will understand their rights.

Section 7

Section 7 of H.R. 5 would amend Title VII of the Civil Rights Act of 1964. Unlike the various versions of ENDA which had been previously introduced[1], H.R. 5 and Section 7 merely adds additional protected classifications to Title VII including sexual orientation and gender identity without discussing how the amended act should be interpreted. Title VII is a complex statute which has evolved with statutory amendment, judicial decision and regulatory enhancement. For example, protected groups covered by Title VII are included in an annual report filed by employers designated as the EEO-1. This form requires that employees be categorized by race, gender and ethnicity and included in various designated job groups. H.R. 5 is silent as to whether employers may request employees to set forth their sexual orientation or gender identity or in fact whether the EEOC will require that such record keeping commence. It would seem to be an imperative that the legislation address the issue of record keeping and reporting of an individual employees in the new protected category. To this end, ENDA specifically prohibited the EEOC from requiring employers to collect statistics on the sexual orientation or gender identity of employees.[2]

Another key factor is whether claims under H.R. 5 can be brought under the disparate impact theory of discrimination. Title VII was amended in 1991 to include disparate impact, or unintentional discrimination as a cognizable theory of discrimination.[3] Disparate impact, otherwise described as unintentional discrimination occurs when a policy or practice of an employer may be deemed to detrimentally impact an applicant or employee. This is in contrast with disparate treatment theory of discrimination where it is shown that the employer intentionally treated an applicant or employee adversely because of their protected classification. There are also two different remedial responses. Disparate treatment can trigger compensatory or punitive damage relief as well as back pay. Disparate impact does not include compensatory or punitive damages.[4] Previous versions of ENDA did not include a disparate impact cause of action. [5] And it was not only the previous versions of ENDA which excluded disparate impact causes of action. The Genetic Information Nondiscrimination Act expressly

[1] See e.g. S.811 (2012), H.R. 3017 (2009),
[2] Section 9, S. 815 (2013)
[3] 42 U.S.C.§ 2000e-2(k).
[4] 42 U.S.C. § 1981a
[5] S. 811, § 8(a)(1) (2011)

excluded the theory of disparate impact from being cognizable under that law.[6] This was not done to denigrate genetic non-discrimination protections but rather because the law prohibited the collection or retention of genetic information[7] and without such information it was not possible to bring a disparate impact case. Insofar as disparate impact discrimination requires significant records of individuals who are members of the protected class to compare with the general employee or applicant population, the added protected categories in H.R. 5 will not lend themselves to support a disparate impact analysis. Thus, the simple inclusion of the new protected categories into Title VII without explaining the disparate impact will not apply raises significant issues.

Consistent with this comparison to Title VII protections, H.R. 5 establishes as a new protected category Gender Identity. Gender Identity is defined as "the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth." [8] While gender identity may be viewed as a manifestation of an individual's sexual orientation as set forth in section 1101(a)(5), gender-identity, as defined in the bill does not seem to relate to any discernable innate characteristic or sexual orientation. Rather, as used in section (a)(2) it appears to relate to actions or representations of an individual perhaps related to sexual orientation or perhaps not. Nor is there a requirement that an individual who establishes a different gender identity maintain that selection. So that gender identity may describe a condition, it does not describe an innate or immutable characteristic. Indeed, title VII now prohibits discrimination against an individual based upon mannerisms or sexual characteristics[9]. And there is a host of cases and statutes which prohibit discrimination on the basis of appearance. Thus gender identity, as contrasted with sexual orientation stands as an independent protected classification not grounded in any discernable characteristic or status which is the basis for all of the non-discrimination legislation. And in particular, the discussion regarding disparate impact applies with great force to the inclusion of gender identity as a protected characteristic.

The discussion of gender identity leads to a much larger issue with respect to implications H.R. 5 would have with respect to employment law and the obligations of employers to comply with the law and the notice to the members of the newly created protected class to understand their rights. When Congress previously considered the issues related to covering sexual orientation in the workplace, the draft legislation was clear as to what was required and what was not required. In the absence of such clarity in H.R. 5, perhaps these examples would serve to raise issues for the consideration of this Committee and the Congress:

● Prior versions of ENDA in both the House and the Senate do not require or permit employers to grant preferential treatment to an individual because of the

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[6] 42 U.S.C. § 2000ff-7(a).
[7] 42 U.S.C. § 2000ff-2(b)
[8] H.R. 5. § 1101(a)(2)
[9] *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989)

individual's sexual orientation or gender identity.[10] H.R. 5 is silent as to whether there can be preferences with respect to the new protected class.

● Prior versions of ENDA in both the House and the Senate did not require employers to build new or additional facilities[11]. H.R. 5 is silent as to any obligation of an employer to construct such facilities. However, section 9 of H.R. 5, section 1101 (b)(2) provides that individuals shall not be denied access to shared facilities in accordance with their sexual identity.[12] As noted above, unlike sexual orientation or even individuals who have under taken gender transition procedures, sexual identity as defined is exceedingly amorphous and absent notification as to that status it would be exceedingly difficult for an employer to understand its obligations with respect to access to certain facilities.

● Prior versions of ENDA expressly prohibited the EEOC or the Department of Labor from requiring employers to collect statistics on the sexual orientation or gender identity of employees. H.R. 5 is silent as to whether employers will be compelled to collect this data.

● Prior versions of ENDA permitted employers to require reasonable dress and grooming standards so long as an employee who has notified their employer that they have undergone or are undergoing gender transition is allowed the opportunity to follow the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning. H.R. 5 is silent as to whether employers can establish reasonable dress and grooming standards.

Other Considerations

These and other instances involving lack of clarity or unworkability should be further examined. In addition to the instances where the blanket amendment of Title VII to include sexual orientation and gender identity does need clarification and perhaps reconsideration, there are other aspects of H.R. 5 which also raise issues. As noted in this testimony and elsewhere, H.R. 5 not only simply amends Title VII, it also undertakes to amend other laws to include the categories listed in H.R. 5. While perhaps understandable to reflect the intent to make clear that these new protected classes should be recognized, this legislative effort is not being written on a clean slate and some consideration should be made to not further encumber the understanding and precedent of exiting law. So for example, Section 6 would amend Title VI of the Civil Rights Act to include sex (including sexual orientation and gender identity). While it is well known that the only section of the 1964 Civil Rights Act which prohibited discrimination on the basis of sex was Title VII, it is also known that in 1972 Congress attempted to remedy this by passing Title IX of the Education Amendments of 1972[13]. The question must be addressed as to whether the precedents long established under Title IX will apply to this

[10] H.R. 3017 § 4(f)(1) 2009, S.811 § 4(f)(1) 2011
[11] H.R. 3017 § 8(a)((4) 2009, S. 811 § 8(a)(4) 2011
[12] Section 9, S. 815 (2013)
[13] 20 U.S.C. §§ 1681-1689

new section of Title VI. How will the laws be interpreted. This is a critical question since Title IX has long been the source of precedential changes. And as with other questions, addressing gender identity in the context of federal programs and grants is vitally important.

So too, section 1107 of H.R. 5 provides that the Religious Freedom Restoration Act[14] ("RFRA") will not serve as a defense to a claim under H.R.5. While clarity is important in drafting legislation, it is also important to understand the purposes of related legislation so that the interplay between statutes is not unnecessarily complicated. RFRA was introduced as HR 1308 in 1993 with 170 bipartisan co-sponsors. Then Representative Schumer was the chief House sponsor and the chief sponsor in the Senate was Senator Kennedy. The bill passed 97-3 in the Senate and by voice vote in the House. It was clearly designed to ensure that there was no governmental impediment placed on the free exercise of religious beliefs and was a legislative counterpoint to the First Amendment. However, H.R.5 does not seem to recognize the purposes of RFRA insofar as it effectively strikes RFRA in consideration of all of the provisions of H.R. 5. In fact, H.R. 5 simply incorporates these new protected classes into Title VII and summarily relegates RFRA into a footnote without any application. It should be noted however, that while Title VII itself has contained exemptions for religious organizations and permits such organizations to prefer co-religionists with respect to hiring and certain other employment decisions,[15] and expressly permits religious educational institutions at all levels to prefer co-religionists when hiring [16], recent case law seems to severely reduced the reach of these exemptions without reference to RFRA.[17] Thus, there are two federal statutes, both in effect except that one will be in effect unless it is not. Rather than attempting to rationalize these statutes, H.R. 5 seems to create a preference for one over the other.

Conclusion

I believe that the issues I have raised are appropriate as this Committee works its way through this legislation. I would note that my own experience in dealing with employers is that the concern is to attract and retain the most competent, efficient and productive employees without regard to personal characteristics and which do not have anything to do with a person's sexual orientation It is hoped that the Committee will focus on this and work constructively to craft a statute consistent with sound employment policy and sound public policy.

Thank you.

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[14] 49 U.S.C. § 2000bb
[15] 42 U.S.C. § 2000e-1(a)
[16] 42 U.S.C. § 2000e-2e(2)
[17] *Hively v. Ivy Tech* 853 F.3d 339 (7th Cir 2017); *Zarda v Altitude Express* 883 F.3d 100 (2nd Cir 2018);

Chairwoman BONAMICI. I thank you for your testimony.

We now recognize Ms. Warbelow for 5 minutes for your testimony.

STATEMENT OF SARAH GALLAGHER WARBELOW, JD, LEGAL DIRECTOR, HUMAN RIGHTS CAMPAIGN

Ms. WARBELOW. Thank you, Chair Bonamici, Ranking Member Comer, and members of the committee for welcoming me here today.

My name is Sarah Warbelow. I am the legal director for the Human Rights Campaign, our Nation's largest civil rights advocacy organization working toward full equality for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community. I am honored to provide this testimony on behalf of our more than 3 million members and supporters nationwide.

In addition to testifying today before you, as a legal expert on nondiscrimination laws, I do so as a bisexual woman who is a proud parent of a transgender daughter and a sister and sister-in-law to married lesbian mothers who are beloved by their community.

A system that relies on a patchwork of law to protect LGBTQ people facilitates unequal treatment across State lines and from city to city. In 28 States there are no explicit, nondiscrimination protections on the basis of sexual orientation, and in 29 there are none on the basis of gender identity.

While courts and agencies have increasingly interpreted sex nondiscrimination laws in our discrimination protections in our civil rights laws to include LGBTQ people, enforcing these judicially crafted protections requires legal awareness, coupled with the financial or other resources necessary to bring the case where the question of whether you are even covered by law is often contested. This is a luxury that is far out of reach for the majority of our community.

The Equality Act builds upon the legacy of landmark civil rights statutes that have made this country a stronger Nation that recognizes diversity as an asset and not a liability. It is essential that these foundational statutes continue to be vigorously enforced by the courts and respected by this body.

Congress adopted the 1964 Civil Rights Act in an effort to dismantle the racist, sexist infrastructure that framed the daily lives of people of color and women in this country. Recognizing that absent these protections, ordinary people were denied the ability to fully participate in public life.

The Equality Act serves an analogous purpose by providing critical protections from discrimination across key areas of life, not only for the LGBTQ community but also for all women, communities of color, and people of faith. Everyone must have the right to fully participate and contribute to public life.

The Equality Act amends existing civil rights laws, including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and several laws regarding employment with the Federal Government to explicitly include sexual orientation and gender identity as protected characteristics. The legislation also amends the Civil Rights Act of

1964 to prohibit discrimination and public accommodations in federally funded programs on the basis of sex, including sexual orientation and gender identity.

Additionally, the Equality Act modernizes Title II of the Civil Rights Act to provide protections comparable to those under many State laws and the Americans with Disabilities Act, which would strengthen protections for everyone and more accurately reflect the services we rely upon and the places we move through in the 21st century. The Equality Act reflects the development of sex discrimination jurisprudence to protect LGBTQ people.

Following the Supreme Court's decision in Price Waterhouse versus Hopkins, courts and the Federal Government have extended the theory of sex stereotyping to develop a clear, legal trajectory affirming these protections for LGBTQ people.

These judicial advances provide LGBTQ plaintiffs with meaningful legal recourse. However, they have not provided the broad and clear uniform explicit Federal statutory protections would bring. The Equality Act would equip individuals with more knowledge of their rights to be free from discrimination and I am sure that business owners, employers, landlords, and other covered entities are aware of their obligations under law. Incorporating these protections within the U.S. code would make it possible for individuals and businesses to know their rights by reading a sign posted in the breakroom instead of heading to the courtroom.

Now is the time to pass the Equality Act. LGBTQ people live in every State in virtually every county coast to coast. We are your neighbors, coworkers, friends, and family. We are a part of the diverse and dynamic fabric of our country. No one should be subjected to discrimination based on who they are, whether at work, in school, seeking emergency services, or picking up the groceries. At its core, the Equality Act would deliver on the promise of equal opportunity for all.

[The statement of Ms. Warbelow follows:]

United States House of Representatives
Committee on Education and Labor
Subcommittee on Civil Rights and Human Services
The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination
April 9, 2019
Testimony of Sarah Warbelow, Legal Director of the Human Rights Campaign

Thank you for the opportunity to submit testimony to the Subcommittee on Civil Rights and Human Services on the Equality Act, H.R. 5. My name is Sarah Warbelow, and I am the legal director at the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality. It is both an honor and a privilege to submit this testimony on behalf of our over 3 million members and supporters nationwide. In addition to submitting this testimony as a legal expert on nondiscrimination law, I do so as a bisexual woman who is the proud parent of my transgender daughter and sister and sister-in-law of married lesbian mothers who are engaged and beloved members of their community.

Despite recent advancements in LGBTQ civil rights, millions of Americans still lack guaranteed, explicit basic protections from discrimination on the basis of sexual orientation and gender identity. Although marriage equality is the law of the land, LGBTQ people remain at risk of losing their job, being kicked out of their apartment, or being denied important services because of their sexual orientation or gender identity. The Human Rights Campaign is proud to support the Equality Act as a critical step towards ensuring civil rights for all people, regardless of who they are or who they love.

The Equality Act is Necessary to Address Discrimination and is Widely Supported

What the Equality Act Does

The Equality Act builds upon the legacy of the landmark civil rights statutes that have made this country a stronger nation that recognizes diversity as an asset, not a liability. It is essential that these foundational statutes continue to be vigorously enforced by the courts and respected by this body. When adopted, the 1964 Civil Rights Act was crafted in an effort to dismantle the racist, sexist infrastructure that framed the daily lives of people of color and women in this country, recognizing that absent these protections, ordinary people were denied the ability to fully participate in public life. The Equality Act serves an analogous purpose by providing critical protections from discrimination across key aspects of life not only for the LGBTQ community but also for all women, communities of color, and people of faith. Everyone must have the right to fully participate and contribute to public life.

The Equality Act amends existing civil rights law—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and several laws regarding employment with the federal government—to explicitly include sexual orientation and gender identity as protected characteristics. The legislation also amends the Civil Rights Act of 1964 to prohibit discrimination in public spaces and services and federally funded programs on the basis of sex.

Additionally, the Equality Act modernizes Title II of the Civil Rights Act to update the public spaces and services covered in current law to include retail stores, services such as banks, legal services, and transportation services. These important updates, comparable to protections under many state laws and the Americans with Disabilities Act, would strengthen existing protections for everyone and more accurately reflect the services we rely upon and places we move through in the 21st century.

Broad Support for the Equality Act

Importantly, the Equality Act would ensure our laws more accurately reflect the attitude of the American public. LGBTQ nondiscrimination protections are supported by nearly 70% of American citizens, including democrats, republicans, and independents.[1] In every state, a majority of residents favor extending civil rights to LGBTQ individuals in the areas of employment, housing, and public accommodations.

Business leaders and employers across the country have also voiced support for a nationwide standard for all workers, regardless of their sexual orientation or gender identity. HRC's Business Coalition for the Equality Act is joined by 185 companies across the country who are responsible for the employment of over 9.8 million people. The Equality Act is also backed by organizations like the National Association of Manufacturers, the largest manufacturing association in the United States, and the Business Roundtable, whose members employ more than 15 million workers. A national standard for LGBTQ protections ensures that these companies can better support a growing and diversified workforce.

In addition, a diverse group of 325 organizations and associations support the Equality Act including the National Women's Law Center, the Anti-Defamation League, the Child Welfare League, the American Medical Association, the NAACP, the National Alliance to End Sexual Violence, UnidosUS, and the National Association of Secondary School Principals.

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[1] DANIEL GREENBERG ET AL., *AMERICANS SHOW BROAD SUPPORT FOR LGBT NONDISCRIMINATION PROTECTIONS*, PRRI (MARCH 12, 2019), Available at: https://www.prri.org/research/americans-support-protections-lgbt-people/.

The Need for the Equality Act

A system that relies on a patchwork of laws to guarantee protection for LGBTQ people facilitates unequal treatment across state lines and even from city to city. While courts and agencies have increasingly interpreted existing sex discrimination protections in our civil rights laws to include LGBTQ people, enforcing these judicially-crafted protections requires a legal awareness coupled with the financial or other resources to bring a case, where the question of whether you are even covered by the law is often contested. This is a luxury that is far out of reach for a majority in our community. Explicit, statutory protections can vary state to state and city to city. In 28 states there are no explicit statutory nondiscrimination protections on the basis of sexual orientation and in 29 there are none on the basis of gender identity. As a result, LGBTQ people facing serious discrimination in employment, including being fired, being denied a promotion, experiencing harassment on the job, and being denied health benefits, may not have access to legal recourse.

Trista and Tracey are a lesbian couple who live in a small town in Kentucky more than a two hour drive from any large city. Trista worked successfully at loan service provider until a mutual friend accidentally outed her to her employer. Afterward, Trista's manager would keep her after work for extended periods of time telling her she needed to attend church and change her "lifestyle". Nine months later she was let go for differences in "ethics and morals." Two years later, in 2015, Tracey put Trista as a spousal beneficiary on her life insurance policy through work. Tracey was approached and asked if it was a mistake. After confirming the information was correct, Tracey was terminated within three days. Tracey and Trista have struggled financially since that time and fear being out about their relationship.

Lack of clarity regarding access to basic rights also means that LGBTQ people face disparities in education and other key areas of life. This was the case for Gavin Grimm, a Virginia public high-school student who received permission from school administrators to use the boys' restroom when he informed his school that he is a boy. When some parents and community members complained, in a public hearing in which his life, body and experiences were discussed, the school board adopted a policy requiring students to use restrooms corresponding to their sex assigned at birth, barring Gavin from using boys' restrooms solely because he is transgender and was designated female at birth. Rather than use the facilitates available to all other boys, he was forced to use a janitor's closet converted to a single user restroom, effectively segregating him from his classmates.

LGBTQ people who live in states without explicit nondiscrimination laws may also discover that they lack local-level protections as well. While some businesses and organizations operating in these states advise their staff and members against discrimination on the basis of sexual

orientation or gender-identity, that guidance is not regularly adhered to. I am reminded of a phone call we received from Lindsay a service member who was stationed along with her wife at a base in rural Missouri. The couple had been stationed separately for years and now united hoped to start a family. However, after initially being told that they could receive fertility treatments on the base the doctor available to do the procedure refused. Lindsay and her wife completed paperwork to have the treatments done off base only to find that no provider in the area would serve them. They finally found a doctor who would provide treatment -- a five hour drive each way from their home.

Transgender people are routinely turned away from care simply because of who they are. Transgender patients report being told that certain hospitals or doctors just don't serve transgender people, including in emergencies completely unrelated to gender transition. Cecilia Chung, a transgender woman living in San Francisco knows the life-threatening impact this discrimination can have on an individual. Cecilia visited the emergency room with severe stomach pain, but was abruptly turned away because she is a transgender. After struggling with pain and vomiting for two weeks she returned and was diagnosed with severe bowel obstruction and gangrene. She had to undergo emergency surgery that could have been avoided with earlier treatment.

The stories of Trista and Tracy, Gavin, Lindsay and Cecilia are far from unique. Rather, they reflect the humiliation, economic damage, physical harm and loss of opportunity experienced by so many LGBTQ people across our country. While the Equality Act covers many facets of life particularly for LGBTQ people and all women, this testimony will focus on the areas of the Act for which this subcommittee has jurisdiction.

Employment

Every day qualified, hardworking lesbian, gay, bisexual, transgender, and queer (LGBTQ) Americans are denied job opportunities, fired or otherwise discriminated against just because of who they are or who they love. Recent surveys have shown that 42% of lesbian, gay, and bisexual people, and 78% of transgender people, have experienced mistreatment on the job because of who they are.[2] In addition, studies show significant wage disparities between LGBTQ and heterosexual people, with one analysis showing gay men make 10 to 32% less than their straight male counterparts.[3] 1 in 5 LGBTQ workers reported that they had been passed over for a promotion because of their sexual orientation or gender identity and almost half of LGBTQ

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[2] BRAD SEARS AND CHRISTY MALLORY. *DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE.* THE WILLIAMS INSTITUTE (July 2011). Available at: https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf

[3] M.V. LEE BADGETT ET AL., *BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 1998–2008*, 84 CHI.-KENT L. REV. 599 (2009). Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol84/iss2/7

workers are completely closeted on the job.[4] Discrimination on the job -- whether it be in hiring, termination, or promotion -- has very real impacts on the financial and emotional well-being of LGBTQ individuals and their families.

Benefits

The denial of equal access to healthcare and retirement benefits for LGBTQ people is also common and has very real impacts on LGBTQ workers and their families. Jacqueline Cote and her wife Diana Smithson know the cost of this discrimination too well. Jackie had been a long time Walmart employee in Massachusetts when she married Diana in 2004. Beginning in 2008, Jackie continually tried to add Diana as her spouse to her company-provided health insurance plan like other married couples. She was repeatedly denied on the grounds that she was married to a woman. In 2012 Diana was diagnosed with ovarian cancer. Without insurance, the couple was forced to take on hundreds of thousands of dollars of medical debt for Diana's treatments.

Transgender employees, including those who work for state or local government entities, are regularly forced to shoulder costly medical debt for gender-affirming medical care that frequently goes uncovered by employer health plans. These discriminatory exclusions save companies little, if any, resources, but often drain an individual employee's savings and paying out of pocket for maintenance medication can stand in the way of achieving long term financial stability. For many people, without the coverage, the care remains altogether out of reach leading to other physical and psychological harm, which are then borne by the employer and the employee.

While courts and agencies have increasingly interpreted existing sex discrimination protections in our civil rights laws to include LGBTQ people, enforcing these judicially-crafted protections requires a legal awareness coupled with the financial or other resources to bring a case, where the question of whether you are even covered by the law is often contested. This is a luxury that is far out of reach for a majority in our community. Explicit, statutory protections can vary state to state and city to city. In 28 states there are no explicit statutory nondiscrimination protections on the basis of sexual orientation and in 29 there are none on the basis of gender identity. As a result, LGBTQ people facing serious discrimination in employment, including being fired, being denied a promotion, experiencing harassment on the job, and being denied health benefits, may not have access to legal recourse.

Implementation

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[4] DEENA FIDAS & LIZ COOPER, HUMAN RIGHTS CAMPAIGN FOUNDATION, *A WORKPLACE DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS NATIONWIDE*, 10, 17 (2018).

The Equality Act would ensure that our existing sex discrimination protections in workplace discrimination laws include protections from discrimination on the basis of sexual orientation or gender identity, affording LGBTQ workers the security they need to provide for themselves and their families. The Equality Act amends Title VII of the Civil Rights Act of 1964, the Government Employees Rights Act, the Congressional Accountability Act, and the Civil Service Reform Act to ensure that candidates and employees who are otherwise qualified will not be discriminated against in any terms or conditions of employment. Title VII exempts small businesses and the military, as well as provides an accommodation for religious organizations. The Equality Act treats protections based on sexual orientation and gender identity the same as other protected personal characteristics such as race, sex, and national origin.

The implementation of state and municipal level nondiscrimination laws reveals that these essential protections can transform the lives of LGBTQ people and their families, and do not lead to excessive and costly litigation for companies. A 2013 GAO study found that "relatively few employment discrimination complaints based on sexual orientation and gender identity" have been filed in those states.[5] The New York City Bar's Labor and Employment Committee has also studied the impact of nondiscrimination laws on litigation rates, and concluded that that since New York City amended its laws less than 1 percent of total claims to the New York City Commission on Human Rights from 2002 to 2010 were related to sexual orientation or gender identity.[6] A 2011 study conducted by the Williams Institute also found that in states with protections for lesbian, gay, and bisexual workers complaint filing rates for sexual orientation discrimination were slightly lower than but similar to, complaints made by other protected classes including sex discrimination complaints by female workers and race discrimination complaints.[7]

The Equality Act ensures the same litigation standards regarding burden of proof under existing law apply to sexual orientation and gender identity discrimination. Individuals claiming discrimination bear the burden of proving that discrimination based on sexual orientation or gender identity occurred and that they were otherwise qualified for the opportunity. The employer can present evidence to show the adverse action was taken because of a legitimate, non-discriminatory reason. For example, it is acceptable differential treatment for a company to refuse hire a lesbian teenager for a full-time position based on her age and experience level.

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[5] LETTER FROM THE U.S. GEN. ACCOUNTABILITY OFFICE TO THE U.S. SENATE, *UPDATE ON STATE STATUTES AND ADMINISTRATIVE COMPLAINT DATA ON EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY* (July 31, 2013). Available at: http://www.gao.gov/assets/660/656443.pdf

[6] NEW YORK CITY BAR LABOR AND EMPLOYMENT COMMITTEE. *THE EMPLOYMENT NONDISCRIMINATION ACT* (APRIL 2011).

[7] BRAD SEARS & CHRISTY MALLORY, *EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN STATE AND LOCAL GOVERNMENT: COMPLAINTS FILED WITH THE STATE ENFORCEMENT AGENCIES 2003-2007*, 8 (Williams Institute ed., 2011).

However, it is impermissible discrimination for a company to refuse to hire a woman simply because she is married to another woman.

Education

The Equality Act addresses education through Title IV and Title VI of the Civil Rights Act of 1964, but leaves Title IX of the Education Amendments of 1972 unamended. Title IV prohibits discrimination in public elementary and secondary schools in addition to public institutions of higher education. The Equality Act clarifies that the sex discrimination prohibition in Title IV also prohibits discrimination on the basis of sexual orientation and gender identity. The Equality Act's protections under Title VI from exclusion from participation in, denial of benefits, and discrimination under federally assisted programs on the basis of sex, sexual orientation, and gender identity extend to federally assisted schools. Any school receiving federal funding would not be able to discriminate against students or prospective or current employees (please see the exceptions addressed later in the religious exemptions section).

The Equality Act codifies protections that the Department of Education has already put in place through case law and guidance, including protection from harassment on the basis of sex stereotyping. The Equality Act broadly prohibits discrimination against any LGBTQ youth. Discrimination can take many forms including exclusion from programs and facilities in addition to harassment by other youth or by teachers and staff. The Equality Act codifies current case law ensuring that transgender students are treated consistent with their gender identity, including when accessing locker rooms and restroom facilities.

For LGBTQ students, inclusion and equal treatment at school is important to both academic success and safety. Research suggests that LGBTQ students are twice as likely as non-LGBTQ students to be verbally harassed, physically attacked, or excluded at school.[8] LGBT students who experience higher levels of victimization have higher levels of depression and lower self-esteem than those who experience lower levels of victimization.[9] Academic performance is also acutely affected. Thirty percent of LGBT students reported skipping a class, or an entire day of school in the month prior to the survey because they felt unsafe or uncomfortable at school.[10] Those students who experience higher levels of victimization were more than twice as likely to miss class or school as those who experience lower levels.[11] Overall, LGBT students who experience higher levels of victimization have lower GPAs and are twice as likely to report that they do not

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[8] HUMAN RIGHTS CAMPAIGN FOUNDATION, *GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS*, 16 (2012).
[9] JOSEPH G. KOSCIW ET AL., *GAY, LESBIAN, & STRAIGHT EDUCA. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS*, 68-70 (2012).
[10] *Id.* at 122.
[11] *Id.* at 68-70, 122.

plan to pursue postsecondary education as those students who experience lower levels.[12] Permitting the inclusion of LGBTQ students in all areas of academic life, including access to restrooms and locker rooms, encourages acceptance of LGBTQ people and promotes a more welcoming environment.[13]

The Equality Act would also equip teachers and staff with strong employment protections. This means that schools will be prohibited from discriminating against a teacher on the basis of sexual orientation or gender identity in the context of hiring, firing, promotion or benefits. This protection is critical to our nation's educators who should be able to devote time to their students not to fears of termination unrelated to their job performance. However, Stacy Bailey knows first hand what it means to work at a school that believes it has a right to terminate teachers because of their sexual orientation or transgender status. A two-time teacher of the year in Texas, Stacy was put on administrative leave and removed from her elementary art class room after she showed her class an age-appropriate photo of herself with her wife dressed as Dory and Nemo as was a standard practice among by her straight colleagues. A parent complained that Stacy was "promoting the homosexual agenda" and Stacy was not allowed to return to the school where she has taught for a decade.

Single-Sex Spaces

Policies and practices that exclude transgender students from access to single-sex spaces and activities have devastating consequences for the health and well-being of transgender young people. When students who are transgender are prohibited from using restrooms and locker rooms that align with their gender identity it impairs their ability to attend school and receive an education at all. Not only do these policies physically exclude transgender students from spaces available to their peers, they cast transgender students as outsiders contributing to isolation and shame in the educational setting and beyond. When forced to use facilities corresponding to their sex at birth, many transgender students have reported feeling unsafe and therefore avoid going into locker rooms or restrooms altogether.[14] Avoiding restroom use contributes to a range of physical health problems including urinary tract infections.

The suggestion that inclusion of transgender students in single-sex spaces that accord with who they are will pose a threat to the privacy or safety of non-transgender students is not supported by the experience of schools across the country that protect transgender students from discrimination. Indeed, as school administrators representing inclusive school districts in 33 states and the District of Columbia responsible for educating 1.7 million students explain: "In the rare instances that amici have needed to address locker room misbehavior issues, it has been to

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[12] *Id.* at 39-44.
[13] *Id.* at 62-70.
[14] ELLEN KAHN ET AL., HUMAN RIGHTS CAMPAIGN FOUNDATION, *2018 LGBTQ YOUTH REPORT 14* (2018).

ensure the safety of the transgender students. The sad truth is that our transgender children are significantly more likely to be the targets of student misconduct, rather than the perpetrators of it." [Judy] Chiasson Interview.[15]

Often the protection of cisgender girls is used as a justification for excluding transgender students from restrooms and locker rooms that match who they are. But as the National Women's Law Center has explained: "This stated goal of protecting women—specifically, white women—similarly served as justification for segregationist policies, many of which were rooted in anti-miscegenation sentiment… Thus, restrooms and similar spaces were at the center of the effort to entrench racial segregation… [T]he arguments here against transgender students using shared facilities echo those made in efforts to sustain racially segregated bathrooms in various kinds of institutions, and are rooted in unfounded fears and stereotypes."[16]

It is simply untrue that including girls and women who are transgender in women's spaces pose safety risks to non-transgender girls and women. In the words of a statement by a coalition of more than 300 sexual assault and domestic violence organizations, led by the National Task Force to End Sexual and Domestic Violence Against Women: "States across the country have introduced harmful legislation or initiatives that seek to repeal nondiscrimination protections or restrict transgender people's access to gender-specific facilities like restrooms. Those who are pushing these proposals have claimed that these proposals are necessary for public safety and to prevent sexual violence against women and children. As rape crisis centers, shelters, and other service providers who work each and every day to meet the needs of all survivors and reduce sexual assault and domestic violence throughout society, we speak from experience and expertise when we state that these claims are false... Non-discrimination laws do not allow men to go into women's restrooms—period. The claim that allowing transgender people to use the facilities that match the gender they live every day allows men into women's bathrooms or women into men's is based either on a flawed understanding of what it means to be transgender or a misrepresentation of the law."[17]

Athletics

Transgender students are often excluded from participation in single-sex activities consistent with who they are. This can be extremely harmful to their social, emotional and educational

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[15] BRIEF FOR SCHOOL ADMINISTRATORS FROM THIRTY STATES AND THE DISTRICT OF COLUMBIA AS AMICUS CURIAE, *PARENTS FOR PRIVACY, ET AL. V. DALLAS SCHOOL DISTRICT NO. 2, ET AL.*, CASE NO. 18-35708 (9TH CIR. MARCH 11, 2019). Available at: https://www.aclu.org/sites/default/files/field_document/states_amicus.pdf

[16] BRIEF FOR WOMEN'S LAW PROJECT, ET AL., *DOE, ET AL. V. BOYER AREA SCHOOL DISTRICT, ET AL.*, CASE NO. 17-3113 (3RD CIR. JANUARY 23, 2018).
Available at: https://www.aclu.org/sites/default/files/field_document/womens_law_project.pdf

[17] STATEMENT OF WOMEN'S RIGHTS AND GENDER JUSTICE ORGANIZATIONS IN SUPPORT OF FULL AND EQUAL ACCESS TO PARTICIPATION IN ATHLETICS FOR TRANSGENDER PEOPLE.
Available at: https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.1.19.pdf

development. School athletic programs foster a sense of teamwork and promote the improvement of physical health and wellness. When transgender students cannot participate in athletics consistent with their gender, many find themselves completely excluded from sports.[18]

Similarly, policies that bar transgender students from locker rooms that match their gender compound discrimination experienced by transgender students who participate in school athletics.Exclusion from the locker room does more than force transgender athletes to use facilities that do not correspond to their gender, it isolates them from their teammates. Other members of their team will have spent additional time together in the locker room, forming and cultivating important relationships.

Opponents of equality in athletics for transgender athletes have argued that girls who are transgender have unfair physiological advantages over cisgender girls and as a result, will dominate women's competitive sports. Some have also suggested that girls who are transgender pose a threat to their cisgender teammates both on the field and in shared locker rooms. None of these arguments are rooted in fact. Existing evidence shows that denying opportunities and access to students based on their gender identity causes actual harm to those students, while there is no data to suggest that girls who are transgender are dominating athletics or posing a harm to their cisgender counterparts.[19]

As leading women's sports and rights groups explain: "As organizations that fight every day for equal opportunities for all women and girls, we speak from experience and expertise when we say that nondiscrimination protections for transgender people—including women and girls who are transgender—are not at odds with women's equality or well-being, but advance them. Equal participation in athletics for transgender people does not mean an end to women's sports. The idea that allowing girls who are transgender to compete in girls' sports leads to male domination of female sports is based on a flawed understanding of what it means to be transgender and a misrepresentation of nondiscrimination laws. Transgender girls are girls and transgender women are women. They are not and should not be referred to as boys or men, biological or otherwise. And when transgender people are excluded from participation on teams that align with their gender identity, the result is often that they are excluded from participating altogether."[20]

By expanding current civil rights laws to include "sexual orientation" and "gender identity" in education, the Equality Act ensures that all students have equal access and opportunity in the classroom and on the field.

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[18] *Id.*
[19] *Id.*
[20] *Id.*

Federally Funded Programs

The Equality Act amends Title VI of the Civil Rights Act of 1964 by adding sex, sexual orientation, and gender identity to the existing protected categories of race, color, and national origin. It explicitly prohibits exclusion from participation in, denial of benefits, and discrimination under federally assisted programs on these bases. This would provide equal access to programs directly conducted by federal agencies, like supplemental nutrition programs, as well as those administered by private organizations receiving federal funding, as grantees. The Equality Act would ensure that any federally-funded program would be open to all eligible beneficiaries regardless of sexual orientation, gender identity, or sex.

Federal programs and services are implemented through regulation and guidance documents published by individual agencies. Like state level nondiscrimination statutes, nondiscrimination provisions incorporated in federal regulations vary by program, service, and administering agency. While some federal agencies have incorporated prohibitions on discrimination across all agency-funded programs to include sexual orientation, sex, and gender identity, others, like the Department of Health and Human Services have not. For example, in a broad rule governing many HHS programs published in 2004, the Department expressly declined to adopt explicit protections for LGBTQ people.[21] Implementation of this rule over the past 15 years has revealed that the federally mandated and administratively created protections outlined in this rule have failed to adequately address and prevent discrimination against beneficiaries due to sexual orientation and gender identity.

Protection for LGBTQ beneficiaries is crucial to ensure that every person has equal access to the services funded by federal agencies as intended by Congress. The consequences of discrimination in federally funded programs and activities are far reaching, particularly for LGBTQ individuals. Given the expansive web of federal programs and services --spanning from unincorporated townships to major urban areas—the extension of this protections would be life changing. As a result of systemic discrimination, LGBTQ people are at an increased risk for poverty and homelessness, making access to safety net programs like TANF, Social Security, and Medicare/Medicaid critical. In addition to these federal programs, billions of taxpayer dollars are directed to organizations and state and local governments to provide services directly to their communities.

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[21] HEALTH AND HUMAN SERVICES DEPARTMENT, *PARTICIPATION IN DEPARTMENT OF HEALTH AND HUMAN SERVICES PROGRAMS BY RELIGIOUS ORGANIZATIONS*, 69 FR 42586 (July 16, 2004). Available at: https://www.federalregister.gov/documents/2004/07/16/04-16130/participation-in-department-of-health-and-human-services-programs-by-religious-organizations

Twenty-six federal grant-dispensing agencies disperse approximately $500 billion annually to fund over 1,000 grant programs that provide a myriad of services.[22] These grant programs are most often run by state and local governments and nonprofit organizations to serve diverse missions and populations across the country. These include public welfare agencies and programs, housing and nutrition assistance programs, and public safety services. These organizations, in turn, rely on thousands of employees to carry out the federal grant programs. Some federal agencies, including the Department of Housing and Urban Development, have incorporated nondiscrimination provisions within their grant-making process, however these protections are far from universal across federal programs.[23] LGBTQ people seeking crisis intervention services or job training from a federally funded grantee are at risk of discrimination and may find themselves without legal recourse. A recent waiver from the Department of Health and Human Services granting a child placement agency an exception from existing nondiscrimination requirements on the basis of religion opens the door to possible anti-LGBTQ discrimination in the future.[24]

Discrimination on the Basis of Gender Identity and Sexual Orientation Is Unlawful Sex Discrimination

Modern sex discrimination jurisprudence has been shaped by the landmark 1989 Supreme Court case, *Price Waterhouse v. Hopkins*.[25] In *Price Waterhouse*, the Court held that "remarks at work that are based on sex stereotypes" may be evidence of sex discrimination in violation of Title VII.[26] "[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be," has acted on the basis of sex the Court explained.[27] Following this decision, courts and the federal government have extended this sex stereotyping logic to develop a clear legal trajectory affirming these protections for LGBTQ people. As a result, federal courts and the EEOC have clearly found that discrimination on the basis of gender identity and sexual orientation is illegal under Title VII of the 1964 Civil Rights Act, the Fair Housing Act, Title IX of the Education Amendments of 1972, and for gender identity under the Equal Credit

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[22] VERONIQUE DE RUGY, ET AL. *FEDERAL GRANT AID STATE AND LOCAL CHART ANALYSIS.* GEORGE MASON UNIVERSITY, MERCATUS CENTER. Available at: https://www.mercatus.org/system/files/Federal-grant-aid-state-and-local-chart-analysis-pdf.pdf

[23] *See, e.g.*, HOUSING AND URBAN DEVELOPMENT DEPARTMENT, *EQUAL ACCESS TO HOUSING IN HUD PROGRAMS REGARDLESS OF SEXUAL ORIENTATION OR GENDER IDENTITY*, 77 FR 5661 (Feb. 3, 2012). Available at: https://www.federalregister.gov/documents/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity

[24] MECKLER, LAURA. "TRUMP ADMINISTRATION GRANTS WAIVER TO AGENCY THAT WORKS ONLY WITH CHRISTIAN FAMILIES." *THE WASHINGTON POST* (January 23, 2019). Available at: https://www.washingtonpost.com/local/education/trump-administration-grants-waiver-to-agency-that-works-only-with-christian-families/2019/01/23/5beafed0-1f30-11e9-8b59-0a28f2191131_story.html?utm_term=.d36d9c3abbe0

[25] 490 U.S. 228 (1989).

[26] *Id.* at 251.

[27] *Id.* at 250.

Opportunity Act and Affordable Care Act as well.[28] In addition to these explicit decisions, long standing legal interpretation and precedent dictate that these interpretations be transferred when deciphering the scope of protections under other similar statutes and regulations.

The EEOC Has Established Gender Identity Discrimination and Sexual Orientation Discrimination as Unlawful Sex Discrimination

In 2011 the EEOC decided *Macy v. Holder*, holding that transgender employees were protected from discrimination based on gender identity under Title VII's prohibition on sex discrimination.[29] In that case, the complainant alleged that she was not hired for a position due to her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."[30] The complainant used each of these classifications to state a claim of sex discrimination because at that time the EEOC only recognized Title VII claims based on sex as "biological differences between men and women—and gender."[31] Relying on *Price Waterhouse* and its progeny, including *Glenn v. Brumby* -- discussed in more detail below-- the Commission held:

> Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort . . . Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.[32]

The principle announced by the EEOC in *Macy*, includes protections for transgender individuals in single-sex spaces, the Commission explained in *Lusardi v. McHugh*. In *Lusardi*, the EEOC held that an employer's refusal to allow a transgender individual access to the restroom that matched their gender identity constituted sex discrimination under Title VII.[33] Since these rulings, several complaints alleging gender identity discrimination have been taken up by the

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[28] *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that a man who was denied a loan because he dressed femininely could bring a claim of sex discrimination under the Equal Credit Opportunity Act).
[29] E.E.O.C. Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2010).
[30] *Id.* at 14.
[31] *Id.* at 15.
[32] *Id.* at 30-32. This position has been affirmed by subsequent EEOC decisions. *See, e.g., Lusardi v. McHugh*, E.E.O.C. Appeal No. 0120133395 (Mar. 27, 2015); *EEOC v. Deluxe Financial Services Corp.*, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled January 20, 2016); and *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla., Civ. No. 8:14-cv-2421-T35 AEP, filed Sept. 25, 2014, settled April 9, 2015).
[33] E.E.O.C. Appeal No. 0120133395 (Mar. 27, 2015) (relying on *Macy v. Holder* in finding that "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort").

EEOC.[34] Two complaints were settled in favor of transgender complainants after *Macy* and consent decrees have been issued against the employers.[35]

Four years later the EEOC determined in *Baldwin v. Foxx*, that a claim of sexual orientation discrimination is "necessarily" a claim of sex discrimination for the purposes of Title VII.[36] In *Baldwin*, the Commission found that an employer had unlawfully relied on "sex-based-considerations" when denying an employee a promotion based on his sexual orientation. The Commission recognized that "'sexual orientation' as a concept cannot be defined or understood without reference to sex."[37] Because of the inextricable way in which sexual orientation and sex are tied, they must be looked at through the same legal lens.

The EEOC adopted the gender stereotype theory of sexual-orientation-as-sex discrimination, building off *Price Waterhouse v. Hopkins* and subsequent cases.[38] The Commission explained that the expectation of heterosexuality, i.e., the expectation that men will only date women and women will only date men, is itself a sex stereotype, and to rely on in it employment decisions is evidence of sex discrimination.[39]

The EEOC took the same position in *Cote v. Wal-Mart*, where it found that the refusal to enroll an employee's same-sex spouse in employer-sponsored health care benefits constituted sex discrimination under Title VII.[40] In March 2016, the EEOC filed Title VII sex discrimination lawsuits in two cases where employees were subjected to harassment based on their sexual orientation.[41]

Federal Case Law Reinforces the EEOC's Application of Sex Stereotyping Theory and Reflects a Clear Legal Trajectory

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[34] *EEOC v. Bojangles Restaurants, Inc.*, (E.D. N.C., Civ. No. 5:16-cv-00654-BO, filed July 6, 2016); *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (E.D. Mich., Civ. No. 2:14-cv-13710-SFC-DRG, filed Sept. 25, 2014); and *Broussard v. First Tower Loan LLC* (E.D. La., Civ. No. 2:15-cv-01161-CJB-SS) (court granted EEOC's Motion to intervene on September 17, 2015).

[35] *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla., Civ. No. 8:14-cv-2421-T35 AEP, filed Sept. 25, 2014, settled April 9, 2015) (finding that the employer had improperly dismissed complainant in violation of Title VII, the consent decree included injunctive relief and damages); *EEOC v. Deluxe Financial Services Corp.*, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled January 20, 2016) (finding that the employer had created a hostile work environment and violated Title VII by not allowing complainant to use the restroom that matched her gender identity, the consent decree included damages, competency training, and a change in employer's health care and workplace policies).

[36] *Baldwin v. Foxx*, E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015).

[37] *Id.*

[38] 490 U.S. 228 (1989).

[39] E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *10.

[40] No. 15-cv-12945-WGY (D. Mass. 2016).

[41] *EEOC v. Scott Med. Health Ctr.*, P.C., No. CV 16-225, 2017 WL 5493975 (W.D. Pa. Nov. 16, 2017)(finding that a man who had been harassed at his place of employment for his sexual orientation was entitled to damages and injunctive relief); *EEOC v. Pallet Companies*, No. 1:16-cv-00595-CCB (D. Md., filed Mar. 1, 2016, settled June 28, 2016).

Discrimination Against Transgender People Based on Gender Identity as Impermissible Sex Stereotyping

The overwhelming majority of courts to consider claims of discrimination by transgender people have held that discrimination against someone based on gender identity is impermissible sex stereotyping in violation of prohibitions on sex discrimination under federal law.

In the employment context, the Eleventh Circuit held in *Glenn v. Brumby* decision that the Georgia General Assembly's Office of Legislative Counsel violated the Equal Protection Clause by firing a transgender employee because she was transgender .[42] The *Glenn* court reasoned that discriminating against someone on the basis of their gender identity constitutes sex-based discrimination under the Equal Protection Clause, relying on *Price Waterhouse.* [43] Under *Price Waterhouse*, the court explained, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[44]

In addition to the Eleventh Circuit, the First, Sixth, Seventh and Ninth Circuits[45] and many district courts[46] have all likewise recognized that claims of discrimination on the basis of gender identity is per se sex discrimination under Title VII and other federal civil rights laws based on *Price Waterhouse*. Even before the EEOC's ruling, several district courts had followed this reasoning under Title VII[47] and under the Equal Protection Clause of the United States Constitution.[48] Courts have also held that under Title VII limiting access to facilities based different restrictive notions of "biological sex" is "too narrow."[49]

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[42] *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); The Circuits have developed this interpretation in a long series of decisions prior to Glenn. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1198-1203 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); and *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008).
[43] *Id.* (relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).
[44] *Id.* at 1317.
[45] *See, e.g., Smith*, 378 F.3d 566; and *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-50 (7th Cir. 2017).
[46] *See, e.g., Valentine Ge v. Dun & Bradstreet, Inc.*, No. 6:15-CV-1029-ORL-41GJK, 2017 U.S. Dist. LEXIS 9497, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, (D. Nev. Nov. 28, 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Schroer*, 577 F. Supp. 2d at 305; *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015); and *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008).
[47] *See, e.g., Rene*, 305 F.3d at 1068; Smith, 378 F.3d at 573; and Schwenk, 204 F.3d at 1201.
[48] *See, e.g., Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); and *Barnes*, 401 F.3d at 739.
[49] *Whitaker*, 858 F.3d at 1046-50 (7th Cir. 2017) (relying on *Price Waterhouse*, *Oncale*, *Hively*, and *Glenn* to establish gender identity as sex discrimination under Title VII).

In May 2017, the Seventh Circuit in *Whitaker v. Kenosha School District* recognized that discrimination against a transgender person because of their gender identity is sex discrimination under Title IX and Equal Protection.[50] The Seventh Circuit relied on *Price Waterhouse* and its progeny holding in determining that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[51] In distinguishing contrary circuit precedent, the Seventh Circuit found that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[52] The circuit took a broad view of sex discrimination, stating that it "encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[53]

In 2017, the Colorado District Court ruled in favor of a woman who is transgender in a same-sex relationship who was denied housing by a landowner who feared her low-profile in the community would be ruined by the "uniqueness" and "unique relationship" of the couple.[54] The court found that the Fair Housing Act's sex discrimination provisions apply to stereotypes about gender identity, marking the first time a federal court has applied the FHA to LGBTQ discrimination.[55] [56] The *Smith* court similarly relied on Price Waterhouse and held that "discrimination against women (like [Smith]) for failure to conform to stereotype norms concerning to or with whom a woman should be attracted, should marry, and/or should have children is discrimination on the basis of sex under the FHA."[57] The ruling reaffirms the legal trajectory courts are following in extending federal sex discrimination protections to discrimination based on gender identity.

Courts have also included discrimination against transgender people within the ACA's prohibition on sex discrimination. In 2015, the Minnesota District Court ruled in favor of a transgender man who alleged that he received poor care from a health-care organization because of his gender identity.[58] The court relied on *Price Waterhouse* and found that "[b]ecause the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."[59] In 2017, the California District Court found that discrimination based on

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[50] *Whitaker*, 858 F.3d at 1050.
[51] *Id.* at 1048.
[52] *Id.* (quoting *Glenn*, 663 F.3d at 1316).
[53] *Id.* at 1049 (quoting *Smith*, 378 F.3d at 566).
[54] *See Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017) (holding that a defendant unlawfully relied on "stereotypes of to or with whom a woman (or man) should be attracted, should marry, or should have a family" in denying plaintiff's housing).
[55] *Id.* at 1200.
[56] *Price Waterhouse*, 490 U.S. 228 (1989).
[57] 249 F. Supp. 3d 1194 (D. Colo. 2017).
[58] *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).
[59] 523 U.S. 75 (1998).

gender identity is sex discrimination for purposes of the Affordable Care Act "[b]ecause Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex."[60] The court cited the *Glenn* decision from the 11th Circuit and *Whitaker* from the 7th Circuit for guidance on its reasoning. These decisions reflect a clear legal trajectory of including gender identity discrimination as a form of sex discrimination.

Sexual Orientation and Sex Stereotyping

Several federal district courts have recognized the ability of plaintiffs to bring claims of sexual orientation discrimination under the prohibition on sex discrimination in Title VII.[61] Notably, both the Second [62] and Seventh[63] Circuits have ruled *en banc* that sexual orientation discrimination is covered by Title VII's prohibition on sex discrimination.

In 2017, the Seventh Circuit agreed to rehear *en banc* the case on Kimberly Hively, a lesbian woman who claimed she was denied full-time employment at her work because of her sexual orientation.[64] Hively brought a claim of sex discrimination against her employer under Title VII and received a right to sue letter from the EEOC, but her claims in district court were ultimately dismissed on the grounds that Seventh Circuit precedent did not acknowledge sexual orientation as a protected classification under Title VII.[65] In its *en banc* decision, the circuit court relied on the EEOC's decision in *Baldwin* as well as recent shifts in the Supreme Court Title VII jurisprudence to overturn its own precedent and rule in Hively's favor.

The Seventh Circuit used the comparative method, the gender stereotype method, and the associational method to validate Hively's claim. First, under the comparative method, the circuit court compared Hively's treatment to a similarly-situated male (one who also dates women) and found that the logical explanation for the disparity in treatment was that "Ivy Tech is disadvantaging [Hively] because she is a woman."[66] The court then examined Hively's claim "through the lens of the gender nonconformity line of cases," and found that she "represents the ultimate case of failure to conform to the female stereotype … which views heterosexuality as the norm.[67] The court then concluded that "the line between a gender nonconformity claim and one based on sexual orientation … does not exist at all."[68] Finally, under the associational theory,

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[60] *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017).
[61] *See Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255 (D. Conn. 2016); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'r*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *United States EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016).
[62] *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).
[63] *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).
[64] *Id.* at 339.
[65] *Id.* at 341.
[66] *Id.* at 345.
[67] *Id.* at 346.
[68] *Id.*

the court found that "to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of ... the sex of the associate."[69] Because each theory led the court to determine that Hively's negative treatment was in some way because of her sex, the Seventh Circuit ruled that her sexual orientation claim was actionable under Title VII.

The Second Circuit took a similar approach months later when it overturned its own precedent and ruled in favor of plaintiff Donald Zarda, a gay man who alleged he was fired because of his sexual orientation. The circuit court found that the comparative, gender stereotyping, and associational methods were different ways of reaching the same conclusion: that "sexual orientation is a function of sex."[70] The court found that each of these theories illustrated how one's sexual orientation is always defined in relation to one's own sex. Because the two traits could not be separated in common understanding, it made no sense to draw such a distinction under the law. Therefore, the court found that to ignore the "sex-dependent nature of sexual orientation" was to evade the natural protections of Title VII.[71]

Similarly, in the Title IX context in the 2015 case *Videckis v. Pepperdine University* a California federal judge determined that two female students had an actionable sex discrimination claim under Title IX against Pepperdine University for alleged discrimination on the basis of sexual orientation.[72] The two students alleged that the coach of the basketball team, of which they were both members, assumed the two were in a relationship with one another, and based on that assumption, asked inappropriate questions and made discriminatory comments toward them. The university argued that the students could not allege discrimination on the basis of sexual orientation as an independent claim under Title IX. The court rejected this argument and held discrimination on the basis of sexual orientation is an actionable claim on the basis of sex under Title IX. The court reasoned "A plaintiff's 'actual' sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis." This determination relied heavily on the EEOC's decision in *Baldwin v. Foxx* addressing Title VII coverage for sexual orientation discussed in greater detail above.[73]

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[69] *Id.* at 349.
[70] *Zarda*, 883 F.3d at 113.
[71] *Id.* at 114.
[72] *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).
[73] 2015 WL 4397641 at *5 (E.E.O.C. July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to Baldwin. See, e.g., *Complainant v. Cordray,* 2014 WL 7398828 (E.E.O.C. Dec. 18, 2014); *Complainant v. Donahoe,* 2014 WL 6853897 (E.E.O.C. Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, 2014 WL 5511315 (E.E.O.C. Oct. 23, 2014); *Complaint v. Johnson,* 2014 WL 4407457 (E.E.O.C. Aug. 20, 2014); *Couch v. Dep't of Energy,* 2013 WL 4499198(E.E.O.C. Aug. 13, 2013); *Brooker v. U.S. Postal Serv.*, 2011 WL 3555288 (E.E.O.C. May 20, 2013); Castello v. U.S. Postal Serv., 2011 WL 3560150 (E.E.O.C. Dec. 20, 2011); *Veretto v. U.S. Postal Serv.*, 2011 WL 2663401 (E.E.O.C. July 11, 2011).

Videckis builds on the 2014 determination in *Hall v. BNSF Railway Co.,* in which a federal judge allowed a gay plaintiff's sex discrimination claim under Title VII and the Equal Pay Act to proceed to the next step of litigation.[74] In *Hall*, a worker challenged the company's denial to provide healthcare coverage to a same-sex spouse when the coverage was available to workers with different-sex spouses. The judge explicitly provided that the plaintiff "experienced adverse employment action in the denial of spousal health benefit due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." This 2014 decision echoed the holding in *Heller v. Columbia Edgewater Country Club,* a 2002 case in which the court clearly stated that an employer is engaged in unlawful discrimination if the employee would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.[75]

Statutory Codification of this Case Law Is Critical

These judicial advances equip LGBTQ plaintiffs with meaningful legal recourse after they have experienced discrimination. However, they have not provided the broad and clear protection that uniform, explicit, federal statutory protections bring. In the absence of clear protections, individuals facing discrimination must file suit against an employer, landlord, or business owner and present the above tested arguments. This demands access to the legal system and a representative, as well as the luxury of time to file a suit and wait for a judicial conclusion. Not to mention, this assumes that an individual or their attorney knows of this existing case law in the first place and that courts will continue to apply this precedent faithfully.

The Equality Act would equip individuals with more knowledge of their rights to be free from discrimination, and ensure that business owners, employers, landlords and other covered entities are aware of their obligations under the law. Incorporating these protections within the U.S. Code would make it possible for individuals and businesses to know their rights by reading a sign posted in the break room instead of heading to the courtroom.

Religious Exemptions

Employment

Title VII of the Civil Rights Act, which prohibits discrimination in employment, contains an exemption for religious entities with regard to expressing a religious preference in employment. Title VII's limited exemption allows religious corporations, associations, or societies to limit employment to members of their own faith, or co-religionists. This narrow exemption also extends to schools, colleges, and universities that are supported, owned, controlled or managed by a religious organization.

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[74] 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).
[75] 195 F. Supp. 2d 1212, 1223-24 (D. Or. 2002).

The Equality Act leaves intact all the religious exemptions in Title VII. First, it does not alter the scope of religious entities that may exercise the religious hiring exemption. Decades of case law interpreting Title VII have made clear that this language includes a broad range of organizations. Federal courts have found many types of religious entities, well beyond houses of worship alone, may be considered exempt from compliance with these provisions, including:

- A tax-exempt, non-profit organization associated with the LDS Church[76]
- A retirement home operated by Presbyterian Ministries[77]
- A newspaper published by the First Church of Christ, Scientist[78]
- Christian elementary schools and universities,[79] and
- A non-profit medical center operated by the Seventh-Day Adventist Church.[80]

In addition to Title VII's religious exemption, the Supreme Court has identified a "ministerial exception" under the First Amendment that religious organizations are entitled to use in their employment practices.[81] The "ministerial exception" applies to employees serving in roles beyond those with a formal title of minister, and includes roles that that involve teaching or inculcating the faith. Under this exemption, federal courts have recognized a variety of roles to be entirely exempt under nondiscrimination laws including:

- a cemetery employee who organized religious services,[82]
- a theology professor,[83] and
- a music director.[84]

However, employees serving in "purely custodian or janitorial" roles have not been considered ministerial.[85] Similarly, an organist who had no control over order of service and no contact with parishioners fell outside of the scope of the exception.[86] This means that while religious organizations can make employment decisions about their ministers or faith leaders free from any government interference, those organizations cannot otherwise discriminate on the basis of religion against a custodian, janitor, or administrative staff unless they are utilizing the co-

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[76] *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).
[77] *EEOC v. Presbyterian Ministries*, 788 F. Supp. 1154 (W.D. Wash. 1992).
[78] *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983).
[79] *See, e.g.*, Ganzy v. Allen Christian School, 995 F. Supp. 340 (E.D.N.Y. 1998); Killinger v. Samford University, 113 F.3d 196 (11th Cir. 1997); Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991).
[80] *Young v. Shawnee Mission Med. Ctr.*, 1988 U.S. Dist. LEXIS 12248 (D. Kan. 1988).
[81] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).
[82] *Fisher v. Archdiocese of Cincinnati*, 6 N.E.3d 1254 (Ohio Ct. App. 2014).
[83] *See, e.g.*, *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594 (N.D. Tex. 2008).
[84] *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999).
[85] *E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000).
[86] *Archdiocese of Washington v. Moersen*, 925 A.2d 659 (Md. 2007).

religionist exemption. In order to claim the co-religionist exemption a religious organization would have to always hire, or prefer to hire, members of their own faith. This would be unchanged by the Equality Act.

In addition, Title VII provides accommodations for individual employees' sincerely held religious beliefs and practices, where that requested accommodation does not provide an undue hardship for the employer. Under this provision, courts and the EEOC have determined that employees are entitled to accommodations that do not harm others, such as to allow the wearing of head coverings and conservative garb where they conflict with workplace dress codes,[87] scheduling changes to attend religious services,[88] breaks for prayer,[89] and a change in tasks to avoid working on war weapons.[90] Title VII also prohibits harassment of religious employees for religious views that may be uncommon or unpopular.[91]

Neither Title VII nor the "ministerial exception," however, permits any secular employer, which is not a religious organization, to discriminate based on individuals' prejudices, morals, or religious-based beliefs. This is true of all civil rights laws, including those that protect Christians, Jews and other religious individuals from discrimination. A secular employer, organization, or company that markets its good and services to the general public cannot, and under the Equality Act could not, circumvent civil rights laws for a religious purpose. But nothing in the Equality Act, or in any civil rights law before it, affects the ability of a person to hold contrary beliefs, based on religion or otherwise. The Equality Act remains true to the purpose of civil rights laws historically—focusing on issues of fundamental fairness and ensuring that individuals are able to live and work in environments free of discrimination.

Education and Federally Funded Programs

Public educational programs may not discriminate on the basis of sexual orientation or gender identity regardless of the religious views of a principal or administrator, just as a public school may not discriminate against a student based on the student's religion even if that student's religious beliefs conflict with those of the principal or administrator.

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[87] *See, e.g., E.E.O.C. v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006).
[88] *See, e.g., E.E.O.C. v. White Hall Nursing and Rehabilitation Center*, No. 5:08-cv-00185 (E.D. Ark. settled on July 20, 2009).
[89] *See, e.g., E.E.O.C. v. Electrolux Group*, (voluntary resolution reached on Sept. 24, 2003). Press Release Available at: https://www1.eeoc.gov//eeoc/newsroom/release/9-24-03.cfm?renderforprint=1
[90] *E.E.O.C. v. Dresser Rand Co.*, No. 04-CV-6300, (W.D.N.Y. filed in Sept. 2004, settled in Nov. 2011).
[91] *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (although animal sacrifice may seem "abhorrent" to some, Santerian belief is religious in nature and is protected by the First Amendment); *U.S. v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) ("one man's religion will always be another man's heresy").

Title VI as amended by the Equality Act would prohibit recipients of federal funds, including educational institutions and programs, from discriminating on the basis of sex including sexual orientation and gender identity. Title VI does not contain a religious exemption because it does not include religious discrimination in its scope. There is no prohibition on religious organizations taking religion into account when making decisions regarding employment or recipients of services.[92] Thus, a religious elementary school may accept federal funds such as National Federal School Lunch funds while limiting enrollment to co-religionists. Likewise a church could accept federal disaster grants for reconstruction without having to open its doors to the general public. Both the school and the church continue to be permitted to determine who is and who is not a member of the faith.

The Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) was passed with the best of intentions and with the goal of rectifying a troubling Supreme Court decision that permitted a government agency to deny unemployment benefits to two practitioners of a Native American faith tradition who used peyote in a religious ceremony.[93] Unfortunately, over time, use of RFRA has shifted from providing a shield for individual's religious freedom to being used as a sword to discriminate. The successful use of RFRA to permit employers to not comply with federal law has inspired litigation designed to circumvent our nation's civil rights laws by arguing that assertion of religious belief permits an individual to be unencumbered by complying with any provision which they consider inconsistent with their world view.[94] In *EEOC v. Harris Funeral Homes*, U.S. District Court Judge Sean Cox turned a blind eye to the ways in which religiously motivated sex-stereotyping results in real harm to transgender people.[95] Aimee Stephens had worked for the funeral home for nearly six years when she informed the owner that she would be transitioning and that when she returned she would be presenting as a woman, including wearing attire consistent with the dress code for women. The funeral home owner terminated Stephens' employment based on his belief that sex is an unchangeable characteristic set at birth.[96] In providing the funeral home a pass from complying with Title VII, Judge Cox cited Supreme Court's decision in *Hobby Lobby* but disregarded the cautionary note contained in the majority opinion:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction... Our decision today provides no such shield. The Government has a compelling interest in

[92] 42 U.S.C. § 2000d et seq.
[93] Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.
[94] *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[95] 884 F.3d 560 (6th Cir. 2018).
[96] *Id. at* 569.

> providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[97]

While the Sixth Circuit overturned the district court decision, and Harris Funeral Homes has chosen to drop their RFRA defense upon appeal to the Supreme Court,[98] this case provides a road map of bad intentions that will influence future litigation strategy. Recently, a group of pastors and a Texas based health and wellness center sued the EEOC and the US Attorney General because the text of Title VII and EEOC regulatory guidance fail to "make any exemptions or accommodations for churches[99] or corporations that oppose homosexual or transgender behavior."[100] The suit asserts that failure to provide an exemption violates RFRA and seeks to enjoin enforcement of Title VII against any employer who objects to LGBT people.[101]

In crafting and passing RFRA, Congress contemplated that the need might arise to except particular areas of law from coverage. The text of RFRA explicitly permits statutes to exclude application of RFRA.[102] The Equality Act does not repeal RFRA. Rather, it affirms that the government has a compelling interest in eradicating discrimination by removing RFRA as a defense to discrimination under the civil rights laws that the act amends. RFRA will still be available to address burdens on religious beliefs and practices in other contexts. For example, in 2016, a Native American pastor won the right to use eagle feathers in religious ceremonies even though possession of the feathers violated a federal law.[103] In 2014, a Sikh woman won settlement that resulted in the federal government changing its policies to ensure that Sikhs federal employees have the right to carry an article of their faith which resembles a blunt knife into federal buildings.[104] RFRA will still be available in situations such as these.

Limiting usage of RFRA does not affect Constitutional rights. The First Amendment remains in full force. Any individual or organization that is concerned that their religious beliefs or practices are being unjustly burdened retain the ability to bring a claim under the First Amendment.

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[97] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 856 (E.D. Mich. 2016), *rev'd and remanded sub nom. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

[98] REPLY BRIEF OF PETITIONER-APPELLANT, *HARRIS FUNERAL HOMES V. E.E.O.C.*, NO. 18-107 (on petition for a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit). Available at: https://www.supremecourt.gov/DocketPDF/18/18-107/71127/20181106101951980_18-107%20Reply%20Brief.pdf

[99] Churches have an exemption under Title VII to limit employment to co-religionists and a "ministerial exception" under the First Amendment. For more information on exemptions applicable to churches and other religious organizations, see the "Religious Exemptions" section of this testimony.

[100] Complaint at 4, U.S. Pastor Counsel v. Equal Employment Opportunity Comm'n, No. 4:18-cv-824 (N.D. Tex. Oct. 6, 2018).

[101] *Id.* at 9-10.

[102] 42 U.S. Code §□2000bb–3 (b).

[103] *McAllen Grace Church v. S.M.R. Jewel*, No. 7:07-cv-060 (S.D. Tex., filed March 10, 2015, settled June 13, 2016).

[104] *Tagore v. United States of America, et al.*, No. 12-20214 (5th Cir. settled in Nov. 2013).

Conclusion

Now is the time to pass the Equality Act. LGBTQ people live in every state and virtually every county coast to coast. We are your neighbors, co-workers, friends and family. We are a part of the diverse and dynamic fabric of our country. No one should be subject to discrimination based upon who they are whether at work, in school, seeking emergency services, or picking up the groceries. At its core, the Equality Act would deliver on the promise of equal opportunity for all.

Chairwoman BONAMICI. Thank you for your testimony. Thank all the witnesses for your testimony.

Under Committee Rule 8(a), we will now question witnesses under the 5 minute rule. Before we begin, without objection, I would like to enter into the record letters of support for the Equality Act from the U.S. Chamber of Commerce, the ACLU, and the Alaska Air Group.

Without objection.

I now recognize myself for 5 minutes.

Chairwoman BONAMICI. Ms. Shappley, thank you so much for being here today to testify about your experience as the mother of a transgender daughter. You exemplify bravery and humanity, not only by taking control of Kai's education and moving your life to a community that would be welcoming for her, but also by devoting your time to advocating for protections for other transgender kids and their families.

I have met with families in Oregon, I remember Ella and her family, and I know many of them went through similar challenges to find safety for their kids. So you talked about the inclusive environment in Kai's school in Austin. Can you tell us a little bit about how Kai has been affected by this new school and what changes you have seen in her since she transferred?

Ms. SHAPPLEY. I think the biggest thing about being in an inclusive school district is that Kai is just a kid now. We are not focused on other things. You know, her first day of school she ran upstairs to write in her diary about using the restroom at school. How sad is that? In Austin, they have signs at every campus saying that we are an inclusive, safe school. For a mom like me that brought healing just knowing that we were not going to have to go through this same thing. We were so focused on bathrooms and her name and the struggle and the things that the superintendent was saying and doing, and way we were being treated that we were not focused on her education. Moving to an inclusive school district allowed my daughter to realize how smart she is and that she loves math and that she loves science. And we get to do normal things like normal girl fights between her and her peers that have nothing to do with the way that she was born.

Chairwoman BONAMICI. When you think about other kids whose families cannot move them to a school like the school in Austin where Kai attends now, how would the Equality Act, what would that mean to them?

Ms. SHAPPLEY. It would allow their children to have a fair opportunity for an education because I promise you, we were not getting the same educational level when they were focused on the bathroom, when they were focused on her being transgender. She was not getting the education that she was entitled to. And everything about Kai changed. Everything about our family dynamic changed. That extra stress. You know, kids, especially trans kids in schools, they are at higher risk for mental health issues and depression and anxiety. And it is not because they are transgender. It is because the way they are being treated because they are transgender.

Chairwoman BONAMICI. Right. And I know a lot of the homeless youth are LGBTQ. So thank you again.

Mr. Hendren, Hedren, sorry, thank you for your testimony today. You talk about how in 2016 the NAM Board of Directors voted unanimously to affirm the support of manufacturers for equal treatment in personnel matters without regard to sexual orientation or gender identity. And I applaud you for that important step. And on this committee we have long supported our manufacturing work force. And I appreciate in your testimony how you talk about how this bill will bolster the manufacturing sector. So some States have already passed legislation protecting LGBTQ employees. Have you seen a difference in the hiring and competitiveness for your member businesses operating in those States?

And then you mentioned in your testimony also something about if someone gets a promotion, you know, for a company that is in several different States, how would it affect them if they were moving from a State like Oregon with protections to a State without? How would that affect them? How would it affect the work force?

Mr. HEDREN. Chair Bonamici, thank you for that question, or both of those questions.

I think what you are hitting on here is a really, really important element of where we are as a sector right now. And this is sort of broadly speaking but we are all about work force. We need to attract people into the sector, and there are some misperceptions that sort of persist about what our sector really looks like. So, for example, people have an image in their head of these sort of dark, dangerous, dirty factories, and nothing could be further from the truth. We need to attract a work force that reflects that change and who we are toward a sector full of innovative and world-changing ideas and execution.

The question about the regionality and the application of that I think is going to be a little bit different for each company, but I look at a few examples on how this has affected companies with whom we work. And in fact, I have a handful of letters which I would love to submit into the record on their behalf. But I will pull on a couple examples in particular.

So, for example, General Mills has noticed that for talented employees who are offered positions in areas that may lack these protections, it may cause them to think twice about taking that opportunity. And in a company like General Mills, being able to take these rotational opportunities to broaden their experience is critical to your growth as a leader.

Chairwoman BONAMICI. Thank you. And I need to set a good example, and I have already gone over time, so please, if you will submit the rest with your testimony that would be appreciated.

Mr. HEDREN. I would be happy to.

Chairwoman BONAMICI. I appreciate it.

I yield back, and I recognize Mr. Comer for 5 minutes for your questions.

Mr. COMER. Thank you, Madam Chair.

I am going to address my questions to Mr. Lorber.

Mr. Lorber, the public accommodations provisions in the Civil Rights Act applies to places like hotels, restaurants, theaters, and stadiums. H.R. 5 would greatly expand the definition of a public accommodation to include an establishment that provides a gathering, and any establishment that provides a good, service, or pro-

gram. In your view, does the definition of public accommodation in H.R. 5 have any limits?

Mr. LORBER. No, Congressman Comer. As drafted, H.R. 5 does not put limits on definitions of public accommodations. Under, for example, Title II of the Civil Rights Act of 1964, which covers public accommodations, public accommodations are defined as hotels, restaurants, and places of entertainment. Section 3 of the Equality Act expands that as you said to places of gathering and any establishment that provides a good, service, or program, so it focuses on gathering and program to indicate it could cover indeed religious activities.

Mr. COMER. So could this even apply to a church?

Mr. LORBER. Yes.

Mr. COMER. Or other place of worship?

Mr. LORBER. Sure. Because they do conduct various activities which are church-related but are public gatherings.

Mr. COMER. H.R. 5 requires businesses and nonprofit organizations to provide access to facilities such as restrooms and locker rooms in accord with an individual's gender identity. Could you discuss the challenges that businesses, other organizations, and individuals would face in complying with this aspect of H.R. 5 and what the implications would be if organizations and individuals were not in compliance with H.R. 5?

Mr. LORBER. Sure. I think as I stated in my testimony, gender identity is defined by actions and non-innate characteristics. While access to shared facilities, particularly locker rooms is obviously an open question, it seems that with respect to locker rooms in particular, access should require more than a mere self-identification, which cannot be verified and might change. Employers certainly want to follow the law but they also have obligations to their employees. Gender identity differs, for example, from the transgender community in this regard and employers will be subject to all of the damages and other remedial provisions set forth in H.R. 5.

Mr. COMER. So under this bill, would a school have any choice other than to allow a biological man to participate in women's sports if the man identifies as a woman?

Mr. LORBER. Well, I do not think it would be appropriate to have a male participate in women's sports. As I noted in my testimony, there is significant precedent under Title IX addressing gender equality. Title IX's regulations at 34 C.F.R. 106(b) would seem to suggest that the situation raised in this question would not occur. Ms. Warbelow's testimony seems to suggest this situation only arises when the individual is a transgender, but she ends by simply stating that the added protected classifications ensure that all students have equal access to the field. She cites the Videckis case, but that case only dealt with lesbian participants on a women's basketball team.

Mr. COMER. So, would a college or university, a public college or university have to award him, if he were on a women's basketball team—I am using basketball as an example—or any sport, a scholarship that would otherwise go to a woman if he fit the criteria for the award under H.R. 5?

Mr. LORBER. Yes, it very well might. It very well might. It is not only public schools but private schools do receive Federal grants.

Mr. COMER. That is right through—

Mr. LORBER. So. it is not only public institutions, and yes, they very well might be. The way the bill is drafted it is so broad that it would not exclude that.

Mr. COMER. So, would schools have any recourse to protect the rights of women to have access to these opportunities under H.R. 5?

Mr. LORBER. Well, they should but the problem again with this bill is we are sort of overlapping on various rights. Title IX was passed specifically to afford women rights to participate in all activities, including sports. We now have this bill, which by its terms would seem to change that and at least bring into question the rights of women, if not negate them.

Mr. COMER. Okay. Well, these are some of the concerns that I mentioned in my opening statement, and I am sure we will have further questions.

I yield back, Madam Chair.

Chairwoman BONAMICI. Thank you, Mr. Raking Member.

I now recognize the chairman of the full committee for 5 minutes for your testimony, or excuse me, for your questions, Mr. Scott from Virginia. Chair Scott.

Mr. SCOTT. Thank you. Thank you.

Mr. Hedren, can you say a little bit more about the business case for the passage of these laws? How attractive or unattractive is a State trying to recruit businesses based on the laws of the State in this area?

Mr. HEDREN. Mr. Chairman, thank you for that question.

I think suffice it to say, our members have been remarkably clear with us, with me and my team, that this is of huge importance to them. So, one other example that I can raise is that of Dow, which finds that this is a differentiator for them in attracting talent around the country because they are not really located for the most part in urban areas or in States that already provide protections like this, including as I understand it, in their home State. But because they do provide protections like this, they are able to attract employees that are talented and in areas where they otherwise might lack protections in the broader community but get them inside the fence line, so to speak.

So it is a big deal, and in fact, they have found that not only is there a case to make in terms of talent and protecting employees and equality and nondiscrimination, but there is also a business case to be made for it. So they identified that their costs of implementing unilaterally protections for these employees have gone down on the whole because attracting and retaining talented employees is expensive in itself.

Mr. SCOTT. Thank you.

Ms. Warbelow, we had a suggestion that laws like this are costly and unworkable. Although most States do not have protections, many do. What has been the experience in terms of costliness and workability of these kinds of laws?

Ms. WARBELOW. Yes. Thank you for that question.

You know, States across this country and hundreds of municipalities have adopted nondiscrimination protections that include sexual orientation and gender identity. When we look at the data, we find that rates of complaints for sexual orientation and gender identity are about on par when you compare per percentage of the population to complaints based on sex or based on race. What this demonstrates is that laws like the Equality Act are critically needed, but that they do not place a huge burden on businesses. In fact, the vast majority of the Fortune 500 companies are already providing some level of protection to their employees. But what they want to make sure of is that their employees have those full protections outside of the four walls that they control. So when their employees are attending night programs for schooling, when they are purchasing a house or looking for an apartment, or when they are going out to dinner with their families.

Mr. SCOTT. Thank you.

And can you say a word about the religious exemption and whether or not it can be used as a defense under the Equality Act?

Ms. WARBELOW. So existing statutory protections within the Civil Rights laws remain in place. Religious employers are able to continue to limit or prefer employees of their own religion. There are exemptions in the Fair Housing Act that remain in place. What the Equality Act does is it limits the application of the Religious Freedom Restoration Act with respect to this set of nondiscrimination laws. And when Congress passed the Religious Freedom Restoration Act, it clearly contemplated that this would be necessary at some point in the future. In fact, it statutorily provides for an exemption in future laws.

This does not eliminate the Religious Freedom Restoration Act. The Religious Freedom Restoration Act will continue to exist and will be available in instances in which the Federal Government is itself discriminating against individuals.

For example, in 2014, a sick employee of the Federal Government was prohibited from carrying an article of her faith into Federal buildings so that she could go to work. She successfully used RFRA to change the Federal Government's policies and practices. RFRA will continue to be available in circumstances like these.

Mr. SCOTT. Thank you.

Madam Chair, I ask unanimous consent to enter into the record documents from the National Women's Law Center and congressional Research Service that detail the history of the Civil Rights Act of 1964 and the interaction of several of the titles, especially Titles VI, VII, and IX.

Chairwoman BONAMICI. Without objection.

[The information referred to follows:]

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Title IX and the Equality Act

* Under the Equality Act, Title VI and Title IX would provide overlapping protections against sex discrimination that vary somewhat in their coverage. An analog under current law is the overlapping protection provided by Title VI against race, color, and national origin discrimination in federally funded programs and activities and the protection provided by Section 1557 of the Affordable Care Act against race, color, and national origin discrimination in federally funded health programs and activities. The latter's coverage does not remove health programs and activities from Title VI's scope. The two coexist with somewhat different coverage applying under each law; for example, Title VI exempts contracts of insurance from its reach, while Section 1557 covers contracts of insurance. Similarly, for example, under the Equality Act, while Title VI does not reach employment discrimination in federally funded programs and activities except in specific circumstances, Title IX would continue to prohibit employment discrimination on the basis of sex in federally funded education programs and activities. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982).). Therefore, conduct that comports with Title VI as amended by the Equality Act may be in violation of Title IX, and vice versa.[1]

* As another current analog to these overlapping yet distinct protections, Title IX and the Equal Protection Clause both cover federally funded public schools, but differ somewhat in their reach and coverage. *See, e.g., Fitzgerald v Barnstable School Comm.* 555 U.S. 246, 256-57 (2009) (comparing Title IX and the Equal Protection Clause and noting "Title IX's protections are narrower in some respects and broader in others" and that "[e]ven where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause, the standards for establishing liability may not be wholly congruent").

* As long experience with Title VI has established, its prohibition against discrimination is informed by the reach of the Equal Protection Clause as well as other civil rights laws such as Title VII, Title IX, Section 504, and the Fair Housing Act.[2] That would continue to be the case under the Equality Act, though the Equality Act makes Congressional intent explicit that in being guided by these precedents, sex discrimination protections must be understood to include protections against sexual orientation discrimination and gender identity discrimination.

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[1] Nor would the Court would not consider the amendment of Title VI to prohibit sex discrimination as an implied repeal of Title IX in any respect, in the absence of clear statutory language or unequivocal Congressional intent to that effect, as the two are not in conflict. *See, e.g., Carcieri v. Salazar*, 129 S.Ct. 1058 (2009).

[2] *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (looking to Equal Protection Clause for scope of Title VI's protection against race discrimination; DOJ Title VI Legal Manual at https://www.justice.gov/crt/case-document/file/934826/download (relying, for example, on Title VII race and sex discrimination case and Title IX sex discrimination cases in setting out the reach of Title VI, as well as Fair Housing Act cases).

* The Equality Act is also explicit that Title VI's inclusion of sexual orientation discrimination and gender identity discrimination within sex discrimination may in no circumstances be read to support any negative inference that Title IX (or any other prohibition of sex discrimination in federal law) does *not* reach sexual orientation or gender identity discrimination or to limit any claim of sex discrimination brought under Title IX.[3] Any argument to the contrary ignores the clear language of the Equality Act.

* Reference to sex discrimination protections under the Constitution and other civil rights laws make clear that it is not the case that adding a sex discrimination prohibition to Title VI would flatly prohibit gender-specific programming and facilities in the absence of a patchwork of exemptions and carve outs.

* Prohibitions on sex discrimination in civil rights law or in the Constitution have not been interpreted as flat prohibitions on gender-specific facilities and programming. *See United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996) (noting that while "[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications . . . '[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity").

* For example, the prohibitions on sex discrimination under the Constitution, Title VII and Title IX have consistently been understood to permit gender-specific facilities where necessary to protect privacy, so long as these were provided on an equal basis to men and women. *See, e.g. VMI*, 518 U.S. at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.") An amended Title VI would merely require such facilities in federally funded programs and activities be trans inclusive.

* Sex classifications may also be used "to compensate women 'for particular economic disabilities [they have] suffered,' *Califano v. Webster*, 430 U. S. 313, 320 (1977) (per curiam), to 'promot[e] equal employment opportunity,' *see California Fed. Sav. & Loan Assn. v.*

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[3] See Section 9 of the Equality Act, amending Title XI of the Civil Right Act, Sec. 1106(a) ("Nothing in section 1101 [defining sex to include sexual orientation and gender identity] or the provisions of a covered title incorporating a term defined or a rule specified in that section shall be construed . . . to limit the protection against an unlawful practice on the basis of sex available under any provision of Federal law other than covered title, prohibiting a practice on the basis of sex."); Sec. 1106(b) ("Nothing in section 1101 or a covered title shall be construed to support any inference that any Federal law prohibiting a practice on the basis of sex does not prohibit discrimination on the basis of pregnancy, childbirth, or a related medical condition, sexual orientation, gender identity, or a sex stereotype."); Sec. 1106(c) ("Nothing in section 1101 or a covered title shall be construed to limit the claims or remedies available to any individual for an unlawful practice on the basis of . . . sex (including sexual orientation and gender identity) . . . including claims brought pursuant to . . . any other law . . . .".)

Guerra, 479 U. S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people." *VMI*, 518 U.S. at 533-34.

* For example, under Title IX gender-specific programming is permissible to overcome the "effects of conditions which resulted in limited participation therein by persons of a particular sex." 34 C.F.R. 106.3(b). This provision does not rely on any statutory exemption from Title IX's sex discrimination prohibition. Given the close relationship between Title IX and Title VI, Title VI's prohibition of sex discrimination would incorporate this principle, permitting gender-specific federally funded programs and activities in such circumstances.[4]

* With regard to single-sex colleges specifically, the Supreme Court has acknowledged that "single-sex education affords pedagogical benefits to at least some students," 518 U.S. at 535, and has noted that "Indeed, it is the mission of some single-sex schools 'to dissipate, rather than perpetuate, traditional gender classifications." VMI at 534 n.7. Because the scope of Title VI's prohibitions is guided by the Equal Protection analysis, single-sex colleges furthering such a mission would remain permissible under the amended Title VI.

* In contrast, single single-sex institutions and programs that exclude one sex based on "archaic and stereotypic notions" or to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior" discriminate impermissibly on the basis of sex. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (striking down state nursing school's exclusion of men as not justified by any compensatory purpose aimed at overcoming a discriminatory barrier faced by women, given that women were the overwhelming majority of nurses and the single-sex nature of the program only heightened the stereotyped view of nursing as a job only for women). These same constitutional guideposts would inform the scope of Title VI's new prohibition on sex discrimination in federally funded programs and activities.[5]

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[4] Similarly, Title VI currently permits race-conscious programming in a variety of circumstances, such as scholarships for racial minorities at federally funded educational institutions. *See* https://www2.ed.gov/about/offices/list/ocr/docs/racefa.html.

[5] Indeed, Supreme Court precedent already establishes that the Constitution prohibits public funding of private schools engaging in invidious discrimination. *Norwood v Harrison*, 413 U.S. 455, 465 (1973). ("A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial *or other invidious discrimination*.") (emphasis added); *id.* at 466 ("A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.").

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TESTIMONY

Statement of

Christine J. Back
Legislative Attorney

Before

Committee on Education and Labor
Subcommittee on Civil Rights and Human Services
U.S. House of Representatives

Hearing on

"The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination"

April 9, 2019

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CRS TESTIMONY
Prepared for Congress

My name is Christine Back and I am a legislative attorney with the American Law Division of the Congressional Research Service. Thank you for the invitation to testify regarding the introduced version of H.R. 5, the "Equality Act" of 2019,[1] and, more specifically, the bill's proposed amendments to Title IV and Title VI of the Civil Rights Act of 1964.

My testimony will provide a preliminary analysis of several potential legal implications of H.R. 5's proposed amendment to Title VI, with particular focus on how the amendment could affect the statute as it relates to Title IX of the Education Amendments of 1972 (Title IX).[2] The testimony will also make preliminary observations regarding H.R. 5's proposed amendments to Title IV. My testimony will not address any other aspects of the bill.

Amendments Proposed by H.R. 5: the "Equality Act" of 2019

The bill, as introduced, proposes various amendments to a range of federal statutes, including to Titles II, III, IV, VI, VII, and IX of the Civil Rights Act of 1964,[3] the Congressional Accountability Act,[4] the Fair Housing Act,[5] the Equal Credit Opportunity Act,[6] and statutory provisions relating to discrimination in federal court jury selection.[7] Section 9 of H.R. 5 also contains a provision entitled "No Negative Inference," which states that no "covered title shall be construed to support any inference that any Federal law prohibiting a practice on the basis of sex does not prohibit discrimination on the basis of pregnancy, childbirth, or a related medical condition, sexual orientation, gender identity, or a sex stereotype."[8] The bill makes no express reference to Title IX of the Education Amendments of 1972.[9]

Proposed Amendments to Title IV of the Civil Rights Act of 1964

Among these proposed amendments, H.R. 5 would modify several provisions of Title IV of the Civil Rights Act of 1964,[10] a school desegregation statute.[11] At present, Title IV defines desegregation as "the assignment of students to public schools[12] and within such schools without regard to their race, color, religion, sex or national origin."[13] H.R. 5 would amend that definition by adding "(including sexual orientation and gender identity)" immediately after "sex."[14]

[1] Equality Act of 2019, H.R. 5, 116th Cong. §§1-12 (2019).

[2] 20 U.S.C. §§ 1681-1688.

[3] *See id.* §§ 3-9.

[4] *See id.* § 7(g) (amending 2 U.S.C. §1301).

[5] *See id.* § 10 (amending 42 U.S.C. § 3601).

[6] *See id.* § 11 (amending 15 U.S.C. § 1691(a)).

[7] *See id.* § 12 (amending 28 U.S.C. §§ 1862, 1867(e), and 1869).

[8] *Id.* § 9(c). This analysis does not evaluate or address the legal effect or implications of this provision.

[9] *See id.* §§ 1-12.

[10] *See id.* § 5 (amending 42 U.S.C. §§ 2000c(b), 2000c-6(a)(2), 2000c-9).

[11] *See* 42 U.S.C. § 2000c (defining "desegregation" in the context of "public schools").

[12] *See* 42 U.S.C. § 2000c ("'Public school' means any elementary or secondary educational institution").

[13] 42 U.S.C. § 2000c(b) (adding that "'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance").

[14] H.R. 5, § 5(a).

In addition to amending the definition of "desegregation," the bill would also amend a provision within Title IV that defines one type of written complaint alleging unlawful conduct under the statute that may be submitted to the Attorney General for possible enforcement litigation.[15] The Title IV provision currently provides that a qualifying complaint includes one "signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin."[16] H.R. 5 would amend this language to add "(including sexual orientation and gender identity)" immediately after "sex."[17]

The bill would also amend Title IV by adding identical text to another provision[18] regarding permissible forms of classification and assignment of students. As amended, that Title IV provision would read: "Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, sex (including sexual orientation and gender identity) or national origin."[19]

Proposed Amendment to Title VI of the Civil Rights Act of 1964

H.R. 5 also proposes amending Title VI, which presently prohibits discrimination based on race, color, or national origin by any recipient of federal funding.[20] The bill would amend Title VI to additionally prohibit discrimination on the basis of "sex (including sexual orientation and gender identity)."[21] Specifically, as amended, the statute would state: "No person in the United States shall, on the ground of race, color, sex (including sexual orientation and gender identity), or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[22]

In contrast to the proposed amendments to Title IV, which add "(including sexual orientation and gender identity)" immediately after an existing statutory reference to "sex," H.R. 5 would add "sex (including sexual orientation and gender identity)" to Title VI.[23]

Preliminary Analysis and Observations

As this testimony principally addresses Title VI, the analysis begins by discussing possible legal implications of H.R. 5's proposed amendment to that statute, followed by a discussion of Title IV.

With respect to the bill's proposed amendment to Title VI, the analysis primarily focuses on how that amendment could implicate Title IX of the Education Amendments of 1972.[24] More specifically, this analysis discusses the existing relationship between the two statutes, Title IX's statutory exceptions, and

[15] *See* 42 U.S.C. §§ 2000c-6(a)(1) and (2).

[16] H.R. 5, § 5(b) (amending 42 U.S.C. § 2000c-6(a)(2)).

[17] *Id. See also* 42 U.S.C. § 2000c-6(a)(2).

[18] H.R. 5, § 5(c) (amending 42 U.S.C. § 2000c-9).

[19] *See id.*; 42 U.S.C. § 2000c-9.

[20] 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[21] H.R. 5, § 6 (amending 42 U.S.C. § 2000d).

[22] *See id.*; 42 U.S.C. § 2000d.

[23] *Cf.* H.R. 5, § 5(a) (inserting "(including sexual orientation and gender identity)"); *id.* § 6 (inserting "*sex* (including sexual orientation and gender identity)") (emphasis added).

[24] Given its narrow scope, this analysis does not address the full range of possible legal implications or legal issues relating to H.R. 5's proposed amendments to Title VI or evaluate the relative strength or weight of possible arguments relating to these implications.

how the Supreme Court's statutory interpretation of Title VI could implicate future application of the statute, if amended as proposed by H.R. 5. Following that discussion, this analysis addresses case law that has developed with respect to Title IV of the Civil Rights Act, to provide context for and preliminary observations about H.R. 5's proposed amendments to that statute.

Possible Implications of H.R. 5 relating to Title VI

Background: Relationship between Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972

Title VI, comprised of various statutory provisions,[25] generally prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin. Section 601 of the statute provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[26]

The statute conditions the receipt of federal funding on the recipient's compliance with Title VI's prohibition of "race, color, or national origin" discrimination.[27] To administratively enforce compliance with the statute, federal agencies that distribute funding are "directed" to issue regulations regarding recipients' responsibilities under the statute, may investigate potential violations, and, if a violation is found, suspend or terminate funding to recipients, pursuant to a statutorily defined procedure.[28]

Title IX of the Education Amendments of 1972 (Title IX), which was modeled after Title VI,[29] also conditions the receipt of federal funds on recipients' compliance with an antidiscrimination mandate.[30] Title IX, however, prohibits discrimination "on the basis of sex" only in federally funded *educational* programs or activities.[31]

The Supreme Court has repeatedly observed that Title VI and Title IX share administrative and procedural features.[32] For example, Congress enacted both statutes pursuant to its power under the Spending Clause,[33] and the Court has viewed the two statutes as sharing similar general purposes.[34] Nonetheless, the

[25] *See* 42 U.S.C. §§ 2000d – 2000d-7.

[26] *Id.* § 2000d.

[27] *See id.*

[28] *Id.* § 2000d-1.

[29] Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 286 (1998) (stating that Title IX "was modeled after Title VI of the Civil Rights Act of 1964," and "is parallel" to Title VI, except that Title VI "prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs").

[30] *See id*; 20 U.S.C. § 1681(a).

[31] 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

[32] *See, e.g.*, *Gebser*, 524 U.S. at 286 (observing that the two statutes "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds"). *See generally, e.g.*, Parker v. Franklin Cty. Cmty. School Corp., 667 F.3d 910, 917 (7th Cir. 2012) ("Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.").

[33] *See Gebser*, 524 U.S. at 287 (observing that Congress "attach[ed] conditions to the award of federal funds under its spending power, U.S. Const., Art. I, § 8, cl. 1" in both Title VI and Title IX).

[34] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979) (stating that "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives" to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices"; explaining that "[b]oth of these

statutes are substantively distinct, in that they address different bases for discrimination and differ in scope.[35] Notably, Title IX contains nine exceptions that categorically exclude certain sex-based conduct from its general prohibition against sex discrimination.[36] Title VI contains no exceptions to its antidiscrimination provision.[37]

Among these exceptions, Title IX's prohibition against sex discrimination as it relates to admissions policies applies only to "vocational education, professional education, and graduate higher education, and to *public* institutions of undergraduate higher education."[38] Accordingly, Title IX permits single-sex admissions in private colleges.[39] In addition, the statute does not apply with respect to *admissions* at any public college that "traditionally and continually from its establishment has had a policy of admitting only students of one sex."[40]

Among other exceptions, Title IX does not apply to educational institutions "whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine."[41] Also excepted from Title IX are educational institutions "controlled by a religious organization," where the application of Title IX "would not be consistent with the religious tenets of such organization."[42] In addition, Title IX provides that the statute shall not be construed "to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."[43]

Given the educational focus of Title IX, claims arising under the statute include a range of allegations regarding sex discrimination in schools, and more recently have alleged discrimination based on gender identity.[44] At present, the issue of whether Title IX's prohibition against sex discrimination may reach discrimination on that basis remains unresolved among the federal courts.[45]

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purposes were repeatedly identified in the debates on the two statutes").

[35] *See Gebser*, 524 U.S. at 286 (describing Title VI and Title IX as "parallel," except that Title VI "prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs"). *See also* 42 U.S.C. §2000d; 20 U.S.C. § 1681(a).

[36] 20 U.S.C. § 1681(a)(1)-(9).

[37] *See* 42 U.S.C. §§ 2000d – 2000d-7. *See generally, e.g.*, Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n., 647 F.2d 651, 660 (6th Cir. 1981) ("[U]nlike Title VI, . . . Congress included many exceptions to the general prohibition against discrimination on the basis of sex in educational programs. Thus, Congress never intended a total ban on sex classifications in educational programs. Instead, Congress recognized the value or legacy of sex classifications in certain limited contexts.").

[38] 20 U.S.C. § 1681(a)(1) (emphasis added).

[39] *See id. See also, e.g.*, Naranjo v. Alverno Coll., 487 F. Supp. 635, 637 (E.D. Wis. 1980) ("By its express terms, it is apparent that the proscription of [Title IX] does not apply with regard to admissions to private institutions of undergraduate higher education.").

[40] 20 U.S.C. § 1681(a)(5) (stating that "in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex").

[41] *Id.* § 1681(a)(4) ("[T]his section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine").

[42] *Id.* § 1681(a)(3) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization").

[43] *Id.* § 1686 ("Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.").

[44] *See, e.g.*, Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017) (reflecting that transgender plaintiff had challenged a school district's bathroom policy under Title IX and concluding that, for the purpose of a preliminary injunction, the plaintiff had sufficiently demonstrated a likelihood of success on his Title IX claim under a sex-stereotyping theory), *cert. dismissed*, 138 S.Ct. 1260 (2018).

[45] *See id. Cf.* Doe by and through Doe v. Boyertown Area Sch. Dist., 897 F.3d 515, 516 n. 2 (2018) (Jordan, J., dissenting)

Possible Implications Relating to Continued Availability of Title IX Exceptions

At present, Title VI and Title IX both apply to federally funded educational programs and activities—Title VI with respect to race, color, or national origin,[46] and Title IX with respect to sex. H.R. 5 would amend Title VI to add "sex" as a protected category—that is, "sex (including sexual orientation and gender identity)." Thus, Title VI, as amended by H.R. 5, would appear to prohibit the same conduct (at least with respect to "sex" discrimination), by the same actors (educational programs or activities that receive federal financial assistance), already prohibited under Title IX. Because H.R. 5 would give Title VI and Title IX overlapping coverage of sex discrimination in the education context, the bill, if enacted, would appear to introduce an ambiguity regarding the relationship between these two civil rights statutes. In particular, in light of Title IX's express exceptions, and the bill's silence as to Title IX, the continued availability of Title IX's exceptions may be unclear, both to a reviewing court and to the federal agencies that administratively enforce Title VI.

One illustration of the ambiguity that might arise concerns single-sex admissions at educational institutions or programs that receive federal funding.[47] As previously noted, Title IX excepts, with respect to sex-based admissions, private colleges, and public undergraduate institutions that "traditionally and continually from its establishment ha[ve] had a policy of admitting only students of one sex." Under these exceptions, single-sex colleges that receive federal funding, such as Smith College (female only)[48] and Morehouse College (male only),[49] are permitted to maintain sex-based admissions without violating Title IX's express terms.[50] H.R. 5, however, would amend Title VI to prohibit sex discrimination by any federal funding recipient, and as drafted, contains no exceptions. Nor does the bill, as mentioned earlier, refer to Title IX generally, or refer to any of Title IX's exceptions specifically, including as it relates to "admissions."

Consequently, at least one possible way to read H.R. 5's proposed amendment to Title VI is as a wholesale prohibition against sex-based admissions in educational institutions or programs receiving federal funding, viewing Title IX's exceptions as being limited to that statute alone and thus inapplicable to a Title VI violation.[51] It is also possible that a court could adopt an interpretation harmonizing the two

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(noting "the substantial controversy over how to interpret the meaning of the word 'sex' in Title IX, namely, whether Title IX's use of the term denotes only biological sex or if it also encompasses concepts of gender identity"). For more information, see CRS Legal Sidebar LSB10229, *Title IX: Who Determines the Legal Meaning of "Sex,"* by Jared P. Cole and Christine J. Back (discussing federal case law and administrative interpretations regarding the scope of Title IX's prohibition of discrimination "on the basis of sex").

[46] *See, e.g.*, *Education and Title VI*, U.S. Dep't of Educ., Office for Civ. Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html ("Programs and activities that receive Federal financial assistance from the United States Department of Education (ED) are covered by Title VI").

[47] Title IX applies not only to educational institutions that directly receive federal funding, but also appears to apply to schools that benefit *indirectly* from federal funds, through a student's receipt of federal financial aid. *See* 34 C.F.R. § 106.2(g) (for purposes of Title IX, defining "[f]ederal financial assistance" to include, among other things, "[s]cholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity") and 34 C.F.R. § 106.2(i) (defining "[r]ecipient" to include, among other entities, "any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof").

[48] *See* Smith College, About Smith, https://www.smith.edu/about-smith/why-a-womens-college (last visited April 2, 2019).

[49] *See* Morehouse College, Admissions, https://www.morehouse.edu/admissions/ (last visited April 2, 2019).

[50] *See* 20 U.S.C. § 1681(a)(1).

[51] In *United States v. Massachusetts Maritime Academy*, 762 F.2d 142 (1st Cir. 1985), for example, the U.S. Court of Appeals for the First Circuit (First Circuit) addressed the question of whether a Title IX exception for certain military colleges could be read to apply to Title IV of the Civil Rights Act of 1964, and thereby preclude the Attorney General from filing suit under Title IV against the merchant marine academy for sex discrimination. *Id.* at 148-51. In its analysis, the First Circuit rejected the argument,

statutes in a manner that might permit sex-based admissions under Title VI, as amended by H.R. 5, or that otherwise gives effect to Title IX and its exceptions.[52]

While this preliminary analysis does not suggest that a court would necessarily adopt one of these interpretations of the amended statute, should a court or agency determine that Title IX exceptions do not apply to Title VI (as amended by H.R. 5), such determinations would seem to necessarily affect other federally funded educational institutions, programs, or activities, but which currently fall under an existing exception, such as religiously controlled private colleges, military colleges, and single-sex social clubs or organizations.[53] This analysis does not address all of Title IX's exceptions, or implications that may arise from H.R. 5's proposed amendment to Title VI as it relates to Title IX exceptions.[54]

The Supreme Court's Interpretations of Title VI and Related Implications

In evaluating any proposed amendment to Title VI, another relevant consideration concerns how federal courts have interpreted Title VI's broadly phrased antidiscrimination provision in the past.[55] Two views of how to interpret Title VI have appeared among the Justices' opinions. One view reads Title VI co-extensively with the Fourteenth Amendment's Equal Protection Clause, such that the statute is read to permit the use of racial classifications in very narrow circumstances.[56] Another view would prohibit *any* consideration of race.[57] This part of the analysis briefly discusses how those interpretations could apply to sex-based classifications prohibited by an amended Title VI, as proposed by H.R. 5.

The Court appears to have settled for now on a reading of Title VI that incorporates equal-protection principles.[58] Under this analysis, though Title VI generally prohibits race-based considerations, the Court

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and pointed to Supreme Court precedent as "strongly indicat[ing] that the Title IX exemptions are limited to that statute only." *Id.* at 150 (citing and discussing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).

[52] *See generally, e.g.*, Morton v. Mancari, 417 U.S. 535, 549-50 (1974) (noting the "'cardinal rule'" that repeals by implication are disfavored and that courts must, "when two statutes are capable of co-existence," "regard each as effective"; also stating that a repeal by implication may be permissibly justified only "when the earlier and later statutes are irreconcilable"). *Cf., e.g.*, Branch v. Smith, 538 U.S. 254, 273 (2003) (stating that "[a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute'") (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). It is beyond the scope of this preliminary analysis to evaluate arguments for or against whether a court could construe an amended Title VI, as proposed by H.R. 5, as an implied repeal of Title IX.

[53] *See, e.g.*, 20 U.S.C. § 1681(a)(3)-(7) (excepting certain religious educational institutions, military or merchant marine educational institutions, social fraternities or sororities, voluntary youth service organizations, and boy or girl conferences).

[54] It is also beyond the scope of this preliminary analysis to evaluate the strongest arguments for competing readings of Title VI, as amended by H.R. 5, relating to the availability of Title IX's present exceptions.

[55] *See* Regents of Univ. of California v. Bakke, 438 U.S. 265, 284 (1978) (quoting the antidiscrimination provision of Title VI and observing that "the concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible of varying interpretations").

[56] *Cf. Bakke*, 438 U.S. at 284 (Powell, J., announcing judgment of the Court) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); *id.* at 325 (Brennan, J., concurring in part and dissenting in part) (explaining dissenters' agreement with Justice Powell that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself"); *id.* at 416-21 (Stevens, J., concurring in part and dissenting in part) (expressing *disagreement* with a reading of Title VI that incorporates equal protection principles; instead reading Title VI to prohibit any race-based "exclusion" at all and concluding that the challenged admissions program, which considered race, violated Title VI "by excluding [the white plaintiff] from the Medical School because of his race").

[57] *See supra* note 55. For more information, see CRS Report R45481, *"Affirmative Action" and Equal Protection in Higher Education*, by Christine J. Back and J.D. S. Hsin.

[58] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (holding that because the challenged racial classification—a law school's voluntary use of race as a factor in admissions decisions—was narrowly tailored to further a compelling interest, the challenged admissions policy did not violate the Equal Protection Clause or Title VI).

will allow, in very narrow circumstances, a recipient to justify its use of race, where it demonstrates that that use was narrowly tailored to further a compelling interest.[59] In that narrow set of circumstances, Title VI liability will not be found.[60]

If Title VI is read coextensively with equal protection, then there appear to be at least two possible implications of H.R. 5's addition of "sex (including sexual orientation and gender identity)." The first implication relates to admissions at single-sex colleges and universities that receive federal funding. The second implication relates to sex-based classifications by federal funding recipients outside the education context. Both are discussed in further detail below.

Single-Sex Colleges and Universities

Should federal courts continue to read Title VI coextensively with equal-protection principles, then at least one possible implication of H.R. 5's addition of "sex (including sexual orientation and gender identity)" relates to admissions at single-sex colleges and universities that receive federal funding. That is because the Supreme Court, when addressing *equal protection* challenges to single-sex admissions at *public* colleges, have thus far held that they violate the Equal Protection Clause,[61] even where a Title IX exception otherwise applied. In light of that precedent, if courts were to continue reading Title VI coextensively with equal-protection principles, the admissions policies of single-sex colleges or universities that *receive federal funding* could similarly be found to violate Title VI (as amended by H.R. 5), assuming courts apply the same standard of review.

In *Mississippi University for Women v. Hogan*, for example, the Court addressed an equal-protection challenge to a female-only admissions policy at a public nursing school.[62] In the course of its analysis, the Court addressed the state's contention that because the school's single-sex admission policy was exempted from Title IX, it could not be held in violation of the Equal Protection Clause for excluding men.[63] Stating that the "argument requires little comment," the Court observed that Congress had "apparently intended, at most, to exempt [the nursing school] from the requirements of Title IX," not the Constitution.[64] Even if Congress had "envisioned a constitutional exemption," the Court added, "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[65] In *United States v. Virginia*, the Court again analyzed an equal-protection challenge to a sex-based admissions policy, this time "reserve[ed] exclusively to men" at Virginia Military Institute (VMI), a public military college.[66] In the course of its analysis, the Court observed that "[s]ingle-sex education affords pedagogical benefits to at least some students," and that it was undisputed that

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[59] *See id.*

[60] *See supra* note 61.

[61] United States v. Virginia, 518 U.S. 515, 519-20 (1996) (holding that the single-sex admissions policy excluding women at Virginia Military Institute, a public military college, violated the Equal Protection Clause); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (concluding that "the State's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment").

[62] *Miss. Univ. for Women*, 458 U.S. at 719-20.

[63] *Id.* at 732 (addressing the state's argument to read the Title IX exception at issue as "'a congressional limitation upon the broad prohibitions of the Equal Protection Clause of the Fourteenth Amendment'"). The exception at issue was 20 U.S.C. § 1681(a)(5), which excepts, with respect to *admissions*, "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex." *Id.* It was undisputed in that case that, since its inception, the public university "limited its enrollment to women." 458 U.S. at 719-20.

[64] *Miss. Univ. for Women*, 458 U.S. at 732.

[65] *Id.* at 732-33.

[66] *Virginia*, 518 U.S. at 519-20.

"diversity among public educational institutions can serve the public good."[67] Yet the Court, in evaluating the evidence offered by VMI to support its contention that its single-sex policy was established and maintained for that justification, found "no persuasive evidence in this record that VMI's male-only admission policy" was in furtherance of a "state policy of 'diversity.'"[68]

As a general matter, to survive a constitutional challenge to such a sex-based classification, the party seeking to defend the sex-based action "must demonstrate an 'exceedingly persuasive justification' for that action"[69] and "'that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[70] Accordingly, should courts continue to read Title VI co-extensively with the Equal Protection Clause, colleges that have sex-based admissions and which receive federal funding would appear to have to make that same showing, in response to a claim under Title VI (as amended by H.R. 5).

Sex-Based Classifications outside the Education Context

A second possible implication of H.R. 5's addition of "sex (including sexual orientation and gender identity)"—under a reading of Title VI as coextensive with equal protection—relates to other sex-based classifications that might be used outside the education context. Title VI, as discussed previously, reaches all federal funding recipients, not just those engaged in educational programs or activities. Accordingly, the statute's plain language, as amended by H.R. 5—with no sex-based exceptions in the bill—could possibly be interpreted to prohibit all federal funding recipients from using *any* sex-based classification.[71] One example, among the possible range of sex-based classifications that may be in use, are homeless shelters or rehabilitation programs, which at times offer sex-based housing in the form of men's shelters and women's shelters.[72] Should there be homeless assistance programs that offer sex-specific housing, and receive federal funding, for example, from the Department of Housing and Urban Development (HUD),[73] such sex-based classifications would appear to be subject to heightened scrutiny.[74]

Apart from a reading that incorporates equal-protection principles, another interpretation of Title VI appears to prohibit any race-conscious action *at all*—a view of Title VI at one time endorsed by four

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[67] *Id.* at 535.

[68] *Id.* at 536-40.

[69] *Id.* at 531 (quoting *Miss. Univ. for Women*, 458 U.S. at 724).

[70] *Id.* at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724).

[71] As Title VI prohibits "race, color, or national origin" discrimination in "any program or activity receiving federal financial assistance," the statute reaches funding recipients in a broad array of contexts. *See* 42 U.S.C. § 2000d. Thus, as a general matter, given the administrative enforcement of Title VI across multiple agencies, any broadening of the statute's coverage may affect various agencies' existing capacity for administratively enforcing the statute through the issuance of guidance and regulations relating to expanded coverage, monitoring compliance of the statute through Title VI investigations into potential violations, seeking voluntary compliance through administrative resolutions, and initiating fund termination proceedings. *See generally* 42 U.S.C. § 2000d-1 (describing federal agencies' administrative enforcement of Title VI).

[72] *See generally, e.g.*, District of Columbia Dep't of Human Serv., Single Adults - Transitional Shelter/Housing, Community Partnership for the Prevention of Homelessness Funded Program and Services, https://dhs.dc.gov/page/single-adults-transitional-shelterhousing (listing transitional shelters for single adults in Washington, D.C., and including references to shelters for women, and shelters for men) (last visited Apr. 2, 2019).

[73] *See, e.g.*, Press Release, U.S. Dep't of Hous. and Urban Dev., Press Room, HUD Renews Funding to Thousands of Local Homeless Programs. Jan. 26, 2019, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_003.

[74] As discussed, however, this depends on whether a court continues to read Title VI as co-extensive with the Equal Protection Clause. Under that reading, should a claim under Title VI (as amended by H.R. 5) challenge a funding recipient's use of a sex-based classification, it appears that a recipient could arguably justify a sex-based classification by showing that it has "an exceedingly persuasive justification" and its sex-based classification is "substantially related" to that justification. *See Virginia*, 518 U.S. at 531, 533.

Justices on the Court.[75] Under that interpretation, any consideration of race is prohibited, including, for example, in the context of an institution's voluntary consideration of race as a factor in an affirmative action admissions policy.[76] If a court were to adopt this reading to an *amended* Title VI, which would add "sex (including sexual orientation and gender identity)," such a view could implicate affirmative action programs designed to increase the participation of individuals belonging to those categories as well.[77]

A Possible Inference of Legislative Intent as to Statutory Coverage under Title IX

A separate implication of H.R. 5's proposed amendment to Title VI concerns how a reviewing court might interpret Title IX's statutory coverage, were Title VI amended to expressly include "sex (including sexual orientation and gender identity)," while leaving Title IX unchanged. As previously mentioned, lower courts that have addressed Title IX claims alleging discrimination based on gender identity remain divided as to whether Title IX's prohibition of discrimination "on the basis of sex"—as a matter of statutory interpretation—can be read to include gender identity.[78] While H.R. 5 would add "sexual orientation and gender identity" to Title VI, the bill is silent as to Title IX.

Because the Supreme Court has interpreted Title IX by reference to Title VI in the past,[79] it is possible that a court might interpret legislation amending Title VI to cover discrimination based on "sex (including sexual orientation and gender identity)," while leaving Title IX's statutory language "on the basis of sex" unchanged, to mean that Title IX is not intended to encompass claims alleging sexual orientation or gender identity-based discrimination. As a general matter, the Court has repeatedly observed the parallel structure and language of Title IX in relation to Title VI,[80] and has turned to Title VI to inform its analysis of congressional intent relating to Title IX.[81] The Court has also assumed that Congress is aware of the case law interpreting Title VI and Title IX.[82] Accordingly, among the possible interpretations that a court

[75] These Justices included Chief Justice Burger, and Justices Stevens, Stewart, and Rehnquist. *See Bakke*, 438 U.S. at 416-21. (Stevens, J., concurring in part and dissenting in part).

[76] *Id.* at 418-21 (Stevens, J., concurring in part and dissenting in part) (reading Title VI to prohibit any race-based "exclusion" under the statute and concluding that the challenged admissions program, which had considered applicants' race, violated Title VI "by excluding [the white plaintiff] from the Medical School because of his race").

[77] Though beyond the scope of this analysis, there may be arguments relating to whether an amendment to Title VI, as proposed by H.R. 5, could lead courts to re-evaluate how to interpret the amended statute—as co-extensive with equal protection or as prohibiting any consideration of a protected trait at all. It should be noted that these are but two of the possible approaches to interpreting the statute, among others. *See, e.g.*, Jeldness v. Pearce, 30 F.3d 1220, 1227-28 (9th Cir. 1994) (rejecting a reading of Title IX that incorporates equal protection principles, and instead adopting a reading of Title IX—and by implication, Title VI—that requires "the same levels of protection and equality" under both statutes; reasoning that "[b]ecause Title IX and Title VI use the same language, they should, as a matter of statutory interpretation, be read to require the same levels of protection" and "should not be read to require different levels of protection because the Equal Protection Clause is interpreted differently for race than for gender").

[78] *See supra* notes 44 and 45.

[79] *See, e.g.*, Fitzgerald v. Barnstable Sch. Committee, 555 U.S. 246, 258-59 (2009) (in addressing whether Title IX should be interpreted as allowing for parallel § 1983 claims, concluding that "Congress intended Title IX to be interpreted similarly" to Title VI) and "presum[ing] Congress was aware" that Title VI was being interpreted to allow for parallel and concurrent § 1983 claims at the time of Title IX's enactment in 1972).

[80] *See Gebser*, 524 U.S. at 286; Cannon v. Univ. of Chicago, 441 U.S. 677, 694-96 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class.").

[81] *See, e.g.*, *Cannon*, 441 U.S. at 696-98 (in analyzing whether Title IX should be interpreted to include a private right of action for damages, stating that the "drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years" and pointing to case law that had already read Title VI as creating a private remedy by the time Title IX was enacted).

[82] *See Fitzgerald*, 555 U.S. at 258-59; *Cannon*, 441 U.S. at 696-98 ("It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of

might adopt with respect to this legislative change, is one that construes H.R. 5's proposed amendment to Title VI as indicating an intent to exclude claims alleging discrimination based on sexual orientation and gender identity from Title IX.

Preliminary Observations of H.R. 5 Relating to Title IV

Background: the Desegregation of Public Schools under Title IV

Title IV, comprised of various statutory provisions,[83] generally requires desegregation in public education, and defines "desegregation" as the "assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin."[84]

The statute authorizes the Attorney General to file lawsuits to enforce that desegregation mandate,[85] arising from complaints alleging either a deprivation "by a school board of the equal protection of the laws" or a public college's denial of admission or continued attendance to an individual "by reason of race, color, religion, sex or national origin."[86] The Attorney General must communicate directly with the school board or college alleged to have violated the statute, to "giv[e] notice" of a complaint, and may file suit only "after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint."[87]

Importantly, because Title IV concerns segregation in public schools that deprives individuals of the "equal protection of the laws,"[88] a Title IV violation involves a showing of a violation of the Equal Protection Clause of the Fourteenth Amendment.[89] Indeed, the Supreme Court has read the "language and the history of Title IV" to show that Congress enacted the statute to implement racial desegregation pursuant to its 1954 *Brown v. Board of Education* decision[90] holding that racially segregated public schools violate the Equal Protection Clause. In so interpreting Title IV in its 1971 decision *Swann v. Charlotte-Mecklenburg Board of Education*, the Court drew particular attention to the statute's provisions

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enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.").

[83] *See generally, e.g.*, 42 U.S.C. § 2000c-2 (discussing technical assistance in desegregating schools); *id.* § 2000c-3 (providing for training regarding desegregation); *id.* § 2000c-4 (authorizing grants for training relating to "problems incident to desegregation").

[84] *Id.* § 2000c(b).

[85] *See id.* § 2000c-6(a)-(c).

[86] *See id.*§ 2000c-6(a)(1) and (2). *See also id.* § 2000c(c) (defining a "public school" as "any elementary or secondary educational institution, and "public college" as "any institution of higher education or any technical or vocational school above the secondary school level," where "such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source").

[87] *Id.* § 2000c-6(a).

[88] *See, e.g.,id.* § 2000-6(a) (1).

[89] *See generally, e.g.*, United States. v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184, 1216 (2d Cir. 1987) (discussing district court holding that the city had engaged in intentional race-based segregation of its schools "in violation of Title IV and the Equal Protection Clause"; concluding that defendants' arguments on appeal challenging aspects of the district court decision were all "without merit"). *See also, e.g.*, *Maritime Academy*, 762 F.2d at 148 (stating that the Title IV suit "was brought, and was considered by the district court, solely on the basis of whether or not the Academy was in compliance with the Constitution" and that Title IV "clearly empower[s]" the Attorney General to file such a suit).

[90] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (stating that Title IV was enacted "to define the role of the Federal Government in the implementation of the *Brown I* decision"). *See also* Brown v. Bd. of Educ., 347 U.S. 483, 486-88, (1954) (addressing consolidated cases challenging the denial of "admission to schools attended by white children under laws requiring or permitting segregation according to race," and holding that race-based segregation in public education violates the Fourteenth Amendment's Equal Protection Clause).

concerning technical assistance to local school boards "in the preparation of desegregation plans," training for school personnel "involved in desegregation efforts," grants for "eas[ing] the transition to unitary systems," and the Attorney General's authority to "initiate federal desegregation suits."[91] Consistent with *Swann*, Title IV federal case law generally reflects claims alleging a school district's failure to desegregate school systems that were intentionally segregated by race.[92]

As discussed earlier, Title VI has also been interpreted to prohibit race discrimination coextensively with the Equal Protection Clause. Assuming that both Title IV and Title VI prohibit race-based discrimination that violates equal protection principles, the two statutes nonetheless appear to *enforce* that mandate differently. Title VI authorizes federal agencies to administratively enforce the statute through the issuance of regulations and investigations,[93] with an agency's termination of federal funds to the recipient as the ultimate administrative sanction for non-compliance with Title VI.[94] Title IV, however, authorizes the Attorney General to initiate and file lawsuits to enforce compliance and seek relief for aggrieved individuals in federal court *directly*[95]—that is, without referrals from other agencies as required under Title VI.[96]

After Title IV was amended in 1972 to mandate "desegregation" of public schools based on "sex,"[97] it appears that only a few cases have reached federal courts alleging a Title IV violation on that basis, and that these claims have challenged admissions policies in the *higher education* context.[98] In two such cases

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[91] *Swann*, 402 U.S. at 16-17 (discussing various Title IV provisions, and citing 42 U.S.C. §§ 2000c(b) and 2000c-6). *See generally* 42 U.S.C. § 2000c-2 (discussing technical assistance in desegregating schools); 42 U.S.C. § 2000c-3 (providing for training regarding desegregation); and 42 U.S.C. § 2000c-4 (authorizing grants for training relating to "problems incident to desegregation").

[92] *See, e.g.*, *Swann*, 402 U.S. at 5-6 (addressing consolidated cases concerning states with "a long history of maintaining two sets of schools in a single school system deliberately operated" to separate students based on race). *See generally, e.g.*, United States v. Bd. of Educ. of City of Chicago, 744 F.2d 1300, 1301 (7th Cir. 1984) (in a racial segregation case concerning violations of "the fourteenth amendment and [T]itles IV and VI of the Civil Rights Act of 1964," discussing consent decree in which the school board would "implement a system-wide plan to remedy the effects of past segregation on black and Hispanic students in Chicago schools"); Andrews v. Monroe City Sch. Bd., 2016 WL 1484506, at *1-3, 6-8 (W.D. La. Apr. 14, 2016) (in Title IV case, in which the United States intervened, discussing continued "disproportionate concentration of white faculty and staff in the few schools that serve the overwhelming majority of the District's white students" and the parties' agreement to a consent decree to resolve "outstanding concerns regarding faculty and staff assignment"; among other terms, ordering the school district to "assign classroom teachers so that in no case will the racial composition of a staff indicate that a school is intended for black students or white students"). *Cf., e.g.*, Davis v. Hooper, 2008 WL 4220062, at *1, 5 (D. Del. Sept. 15, 2008) (in dismissing Title IV claim alleging sexual harassment, stating that the purpose of Title IV "is to remedy segregation in public schools" and that the plaintiff had "no private cause of action for civil damages under 42 U.S.C. § 2000c–8 and this is not a segregation case").

[93] *See* 42 U.S.C. 2000d-1 (authorizing federal agencies to issue Title VI regulations and suspend or terminate federal funds to a non-compliant funding recipient pursuant to a statutorily defined procedure).

[94] *See id.*

[95] *See id.* § 2000c-6.

[96] *See id.* § 2000d-1 (in addition to the termination, suspension, or refusal to grant federal funds, stating that compliance with Title VI may be effected "by any other means authorized by law"). *See generally, e.g.*, Nat'l Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 575 (D.C. Cir. 1983) (noting that "although fund termination was envisioned as the primary means of enforcement under Title VI,[] . . . Title VI clearly tolerates other enforcement schemes," including the "referral of cases to the Attorney General, who may bring an action against the recipient").

[97] *See* United States v. Mass. Maritime Academy, 762 F.2d 142, 148 (1st Cir. 1985) (noting that "Title IV was amended in 1972 so as to include sex discrimination").

[98] *See* United States v. Virginia, 518 U.S. 515, 519-520 (1996) (in equal protection challenge to male-only admissions policy at Virginia Military Institute (VMI), holding that VMI's admission "reserved exclusively to men" violated "the Constitution's equal protection guarantee"). *See also id.* at 523 (noting that the VMI lawsuit was "prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI"). *See also Maritime Academy*, 762 F.2d at 145, 147, 157-58 (reflecting that the Attorney General filed the Title IV suit challenging the male-only admissions of the Massachusetts Maritime Academy, which was followed by a bench trial resulting in a finding of intentional discrimination; and affirming the district court

(concerning the Virginia Military Institute and the Massachusetts Maritime Academy, respectively), the Attorney General filed suit challenging admissions policies that excluded all women.[99]

Preliminary Observations of H.R. 5's Proposed Amendments to Title IV

A preliminary review of federal case law arising under Title IV suggests at least several considerations relating to how a federal court might assess claims alleging discrimination based on gender-identity or sexual orientation in the context of school desegregation.

Against the backdrop of Title IV desegregation precedent such as *Swann*,[100] it is unclear how a court might assess legal theories regarding segregation based on "sex (including sexual orientation and gender identity)." With respect to sex-segregation claims, federal case law appears to reflect only a few Title IV cases addressing claims on that basis, which challenged admissions policies in the higher education context.[101] In light of this sex-segregation case law under Title IV, it might be argued, for example, that a Title IV claim alleging gender identity-based segregation, pursuant to H.R. 5's amendments, could similarly challenge an admissions policy at a "public college"[102] that excludes transgender students. How a reviewing court would evaluate such a claim and—importantly, what standard of review it would apply to assess the challenged action, as discussed in further detail below—are open questions.

Indeed, because courts have read Title IV in the context of the Equal Protection Clause, the application and effect of H.R. 5's proposed amendments to Title IV may turn significantly on the standard of review the Supreme Court determines should apply to equal-protection challenges based on gender identity.[103] As previously discussed, the Court has determined that sex-based classifications are subject to heightened review, which require an "exceedingly persuasive justification" and a showing that the sex-based classification at issue is "substantially related" to that justification.[104] Should the Court, for example, determine that "gender identity" is a sex-based classification, or that it constitutes another, quasi-suspect

order permanently enjoining defendants from sex discrimination in admissions and recruiting).

[99] *See supra* note 98.

[100] *See supra* note 92.

[101] *See supra* note 98. While this preliminary analysis addresses case law under Title IV, it appears that the Attorney General, in enforcing the statute, has previously cited Title IV as authority for enforcing claims alleging sexual harassment, including harassment "based on nonconformity with gender stereotypes." *See, e.g.*, Press Release, U.S. Dep't of Justice, Office of Public Affairs, "Departments of Justice and Education Resolve Harassment Allegations in Anoka-Hennepin School District in Minnesota" (March 5, 2012), https://www.justice.gov/opa/pr/departments-justice-and-education-resolve-harassment-allegations-anoka-hennepin-school (discussing a proposed consent decree and stating that Title IV "prohibits sex-based harassment, including harassment based on nonconformity with gender stereotypes and sexual harassment").

[102] *See* 42 U.S.C. § 2000c(c) (defining a "public college" as "any institution of higher education or any technical or vocational school above the secondary school level," that "is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source").

[103] The application of H.R. 5's proposed Title IV amendments could also turn on whether the Supreme Court arguably clarifies or modifies the standard of review with respect to classifications based on sexual orientation. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631-36 (1996) (in equal protection challenge to a state constitutional provision based on sexual orientation, stating that where "a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end" and invalidating the challenged provision because it lacked "a rational relationship to legitimate state interests"). *Cf., e.g.*, SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 481-84 (9th Cir. 2014) (reasoning and concluding that "heightened scrutiny [must] be applied to equal protection claims involving sexual orientation" in light of the Supreme Court's analysis in United States v. Windsor, 570 U.S. 744 (2013)). *But see, e.g.*, Davis v. Prison Health Services, 679 F.3d 433, 438 (6th Cir. 2012) (addressing equal protection challenge and stating that "[b]ecause this court has not recognized sexual orientation as a suspect classification, [the plaintiff]'s claim is governed by rational basis review.").

[104] *See supra* p. 8.

class distinct from sex, then segregation based on gender identity would appear to be subject to "heightened" scrutiny.[105]

On the other hand, should the Court conclude that gender identity-based classifications receive "rational basis" review,[106] segregation on that basis would not violate Title IV unless a court concluded that the segregation at issue lacked a "rational relationship to a legitimate governmental purpose."[107] Consequently, it is unclear how the Attorney General—and importantly, a federal court—might interpret a Title IV complaint alleging such discrimination in light of equal protection principles.

Relatedly, it is also unclear how the Attorney General or federal court might evaluate H.R. 5's proposed amendments in light of existing statutory requirements that must be satisfied for the Attorney General to file suit under Title IV. As noted earlier, the Attorney General enforces Title IV[108] and may "initiate and maintain appropriate legal proceedings for relief," but only in certain statutorily defined conditions.[109] Among those conditions—including that a suit be responsive to a written complaint—the statute appears to require "that the institution of an action will materially further the orderly achievement of desegregation in public education."[110] H.R. 5 would amend Title IV to provide for written complaints to the Attorney General alleging a denial of admission or continued attendance at a public college based on "sex (including sexual orientation and gender identity)."[111] It is an open question how an Attorney General or federal court[112] would read the statutory requirement that civil actions "materially further the orderly achievement of desegregation in public education" in relation to such complaints.

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[105] *See generally, e.g.*, *Cleburne*, 473 U.S. at 441 (stating that a "gender classification fails unless it is substantially related to a sufficiently important governmental interest" and describing such classifications as "subject to somewhat heightened review"). *See, e.g.*, *Whitaker*, 858 F.3d at 1050-52 (in equal protection challenge to a school bathroom policy based on "the sex listed on the student's birth certificate," concluding that the *policy* concerned a sex-based classification and that "heightened review" applied; stating that when a sex-based classification is used, the state must show that it "'serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives'") (quoting *Virginia*, 518 U.S. at 524). *Cf.* Brown v. Zavaras, 63 F.3d 967, 969-72 (10th Cir. 1995) (in equal protection claim raised by "transsexual" inmate challenging a prison's refusal to provide estrogen treatment for gender dysphoria, holding that plaintiff was not a member of a protected class "in this case" and applying "rational basis" review).

[106] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 706 (5th ed. 2015) ("Although the Court has phrased the test in different ways, the basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose."). *See also id.* ("The rational basis test is the minimal level of scrutiny that all government actions challenged under equal protection must meet").

[107] *See Romer*, 517 U.S. at 635. *See also, e.g.*, City of Cleburne, Tex. V. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

[108] *See* 42 U.S.C. § 2000c-6. *See also, e.g.*, Weiss v. City University of New York, 2019 WL 1244508, at *10 (S.D.N.Y. Mar. 18, 2019) (noting other courts' findings that Title IV does not contain an express private cause of action and dismissing plaintiff's Title IV claim).

[109] *See* 42 U.S.C. § 2000c-6.

[110] *See id.* § 2000c-6(a) (reflecting that after the Attorney General receives a written complaint as defined in § 2000c-6(a)(1) and (2), the Attorney General is authorized to file a civil action in federal court in cases in which the Attorney General "believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment" *and* "that the institution of an action will materially further the orderly achievement of desegregation in public education"). *See Maritime Academy*, 762 F.2d at 152 (in analysis of statutory language relating to lawsuits filed by the Attorney General under Title IV, stating that "[a] required purpose in all such cases is to 'materially further the orderly achievement of desegregation in public education'") (quoting 42 U.S.C. § 2000c-6(a)).

[111] H.R. 5, § 5(b) (amending 42 U.S.C. § 2000c-6(a)(2)).

[112] *See, e.g.*, *Andrews*, 2016 WL 1484506, at *1 (concluding, without express analysis, that the Title IV consent decree would "further the orderly desegregation of the District").

Conclusion

A preliminary analysis of federal case law relating to Titles IV and VI of the Civil Rights Act, and Title IX of the Education Amendments of 1972, indicates the possibility of at least several legal implications arising from H.R. 5's proposed amendments, as presently drafted. These include the continued availability of Title IX exceptions, as well as other open questions relating to H.R. 5's proposed amendments to Title IV, including in light of Supreme Court precedent such as *Swann*.

To the extent there is legislative interest in addressing possible implications, legislative options might include, among other things, adding provisions to H.R. 5 that: (1) address Title IX, including expressly clarifying whether or how its exceptions apply in light of the proposed amendment to Title VI or amending Title IX; or (2) instruct how Title VI, as amended by H.R. 5, should be interpreted and applied, perhaps through proposed rules of construction.

Mr. SCOTT. Thank you. I yield back.

Chairwoman BONAMICI. Thank you.

Without objection, I would also like to enter into the record letters of support from Women's Rights and Gender Justice organizations in support of full and equal access to participation in athletics for transgender people, and also letters from the Business Coalition for the Equality Act that lists many employers and associations across the country in support of the Equality Act.

Without objection.

[The information referred to follows:]

Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People

We, the undersigned organizations committed to women's rights and gender justice, support the full inclusion of transgender people in athletics. Our organizations have a long history of advocating for fairness in sports and opportunities for all women to benefit from athletic participation and competition. Inclusion of transgender women and girls in women's sports advances those goals. As organizations that care deeply about ending sex-based discrimination and ensuring equal access to athletics for women and girls, we support laws and policies that protect transgender people from discrimination, including in participation in sports, and reject the suggestion that cisgender women and girls benefit from the exclusion of women and girls who happen to be transgender.

Opponents of the Equality Act, the federal bill that would update our civil rights laws to provide explicit protection to LGBTQ people and expand existing sex discrimination protections, have cited alleged concerns for women's equality and fair competition in sports as reasons to oppose the bill. Some state legislators have introduced bills that would ban transgender youth from competing in school sports consistent with their gender, citing fears about sexual assault in locker rooms and cisgender boys pretending to be girls in order to dominate girls' sports. As organizations dedicated to opportunity and well-being for women and girls, we reject these unfounded fears. Instead, we recognize the harm to all women and girls that will flow from allowing some women and girls to be denied opportunities to participate and cast out of the category of "woman" for failing to meet standards driven by stereotypes and fear.

Just as opponents of equality claimed that cisgender women and girls would be harmed if transgender people could use restrooms that match who they are, opponents are now claiming that the need to "protect" cisgender women and girls in athletics justifies opposition to nondiscrimination protections for transgender people in public spaces and activities. As organizations that fight every day for equal opportunities for all women and girls, we speak from experience and expertise when we say that nondiscrimination protections for transgender people—including women and girls who are transgender—are not at odds with women's equality or well-being, but advance them.

Equal participation in athletics for transgender people does not mean an end to women's sports. The idea that allowing girls who are transgender to compete in girls' sports leads to male domination of female sports is based on a flawed understanding of what it means to be transgender and a misrepresentation of nondiscrimination laws. Transgender girls are girls and transgender women are women. They are not and should not be referred to as boys or men, biological or otherwise. And when transgender people are excluded from participation on teams

that align with their gender identity, the result is often that they are excluded from participating altogether.

Nondiscrimination laws and policies protecting transgender people have existed for years in many states and athletic associations around the country. These laws and policies have allowed transgender people to participate equally in society, including in sports, without harming anyone else. None of these policies has resulted in the dissolution of girls' or women's athletics or a surge in transgender girls and women winning national championships. Rather, just like other female athletes, they have made important contributions within expected ranges; and, unfortunately, the small numbers of transgender girls and women who have achieved some level of local sports success have been wrongly stripped of the opportunity to celebrate their hard-earned victories due to public backlash.

People are right to be concerned about sex discrimination in sports. Women and girls continue to fight for equal opportunities and resources at all levels of athletics. As experts in sex discrimination, we know firsthand that equal opportunities for transgender people are not the problem, they are part of the solution. We will continue to spend our energy combating the actual problems: stereotypes about women and girls' interest and ability to compete, lack of equal resources for girls' sports, pay inequality and other types of discrimination against women coaches and professional women athletes, and sexual harassment that pushes women and girls out of sports. We will only accomplish these goals by treating all people, including transgender people, with fairness and respect. That means celebrating all athletes, including transgender athletes—not shaming them and casting them out.

American Association of University Women (AAUW)

Clearinghouse on Women's Issues

End Rape on Campus

Equal Rights Advocates

Girls Inc.

Legal Momentum, the Women's Legal Defense and Education Fund

Legal Voice

National Women's Law Center

National Women's Political Caucus

Public Justice

Sargent Shriver National Center on Poverty Law

Southwest Women's Law Center

Surge Reproductive Justice

Tucker Center for Research on Girls & Women in Sport

Women Leaders in College Sports

Women's Sports Foundation

EQUALITY ACT

The Business Coalition for the Equality Act is a group of leading U.S. employers that support the Equality Act, which would finally guarantee explicit, permanent protections for lesbian, gay, bisexual and transgender people under our existing civil rights laws.

THE COMPANIES:

EMPLOY OVER **9.8 MILLION** WORKERS IN THE U.S.

HAVE COMBINED REVENUE THAT EXCEEDS **$4.2 TRILLION**

HAVE OPERATIONS IN ALL **50 STATES**

COMPANY NAME	CITY	STATE
A.T. Kearney Inc.	Chicago	IL
Abercrombie & Fitch Co.	New Albany	OH
Accenture	New York	NY
Adobe Systems Inc.	San Jose	CA
ADP	Roseland	NJ
Advanced Micro Devices Inc.	Sunnyvale	CA
Airbnb Inc.	San Francisco	CA
Alaska Airlines	Seattle	WA
Alcoa Corp.	Pittsburgh	PA
Ally Financial Inc.	Detroit	MI
Amalgamated Bank	New York	NY
Amazon.com Inc.	Seattle	WA
American Airlines	Fort Worth	TX
American Eagle Outfitters Inc.	Pittsburgh	PA
American Express Global Business Travel	Jersey City	NJ
Apple Inc.	Cupertino	CA
Arconic	New York	NY
Ascena Retail Group Inc.	Mahwah	NJ

As of 04/05/19

COMPANY NAME	CITY	STATE
Aspen Skiing Company LLC	Aspen	CO
AT&T Inc.	Dallas	TX
Atlassian	San Francisco	CA
Bain & Co. Inc./ Bridgespan Group	Boston	MA
Bank of America Corp.	Charlotte	NC
Bayer U.S. LLC	Whippany	NJ
BD	Franklin Lakes	NJ
Best Buy Co. Inc.	Richfield	MN
Biogen	Cambridge	MA
Boehringer Ingelheim USA Corp.	Ridgefield	CT
Booz Allen Hamilton Inc.	McLean	VA
Boston Scientific Corp.	Marlborough	MA
Box Inc.	Redwood City	CA
Bristol-Myers Squibb Co.	New York	NY
Broadridge Financial Solutions Inc.	Lake Success	NY
Brown-Forman Corp.	Louisville	KY
Caesars Entertainment Corp.	Las Vegas	NV
Capital One Financial Corp.	McLean	VA
Cardinal Health Inc.	Dublin	OH
Cargill Inc.	Wayzata	MN
Chevron Corp.	San Ramon	CA
Chobani	Norwich	NY
Choice Hotels International Inc.	Rockville	MD
Cisco Systems Inc.	San Jose	CA
Citigroup Inc.	New York	NY
Citrix Systems Inc.	Fort Lauderdale	FL
Coca-Cola Co., The	Atlanta	GA
Compass Bancshares Inc. (BBVA Compass)	Birmingham	AL
Corning	Corning	NY
Converse Inc.	Boston	MA
Cox Enterprises Inc.	Atlanta	GA
CSAA Insurance Group	Walnut Creek	CA
Cummins Inc.	Columbus	IN
CVS Health Corp.	Woonsocket	RI

As of 04/05/19

COMPANY NAME	CITY	STATE
Danone North America	White Plains	NY
Darden Restaurants Inc.	Orlando	FL
Deloitte LLP	New York	NY
Dell Technologies Inc.	Round Rock	TX
Diageo North America	Norwalk	CT
Dow Chemical Co., The	Midland	MI
Dropbox Inc.	San Francisco	CA
E. I. du Pont de Nemours and Co. (DuPont)	Wilmington	DE
Eastern Bank Corp.	Boston	MA
Eaton Corp.	Cleveland	OH
eBay Inc.	San Jose	CA
Ecolab Inc.	St. Paul	MN
Ernst & Young LLP	New York	NY
Estée Lauder Companies Inc., The	New York	NY
Evolent Health Inc.	Arlington	VA
Exelon Corp.	Chicago	IL
Expedia Group	Bellevue	WA
Facebook Inc.	Menlo Park	CA
First Data Corp.	Atlanta	GA
Food Lion	Salisbury	NC
Gap Inc.	San Francisco	CA
General Electric Co.	Boston	MA
General Mills Inc.	Minneapolis	MN
General Motors Co.	Detroit	MI
Gilead Sciences Inc.	Foster City	CA
Glassdoor Inc.	Mill Valley	CA
Google Inc.	Mountain View	CA
Guardian Life Insurance Co. of America, The	New York	NY
Gusto	San Francisco	CA
HERE North America LLC	Chicago	IL
Hershey Co., The	Hershey	PA
Hewlett Packard Enterprise Co.	Palo Alto	CA
Hilton Inc.	McLean	VA
HP Inc.	Palo Alto	CA

As of 04/05/19

COMPANY NAME	CITY	STATE
HSN Inc.	St. Petersburg	FL
Hughes Hubbard & Reed LLP	New York	NY
Hyatt Hotels Corp.	Chicago	IL
IBM Corp.	Armonk	NY
IHS Markit Ltd.	New York	NY
IKEA Holding US Inc.	Conshohocken	PA
Ingersoll-Rand Company	Davidson	NC
Insight Enterprises Inc.	Tempe	AZ
Intel Corp.	Santa Clara	CA
InterContinental Hotels Group Americas	Atlanta	GA
Iron Mountain Inc.	Boston	MA
John Hancock Financial Services Inc.	Boston	MA
Johnson & Johnson	New Brunswick	NJ
JPMorgan Chase & Co.	New York	NY
Juniper Networks Inc.	Sunnyvale	CA
Kaiser Permanente	Oakland	CA
Kellogg Co.	Battle Creek	MI
Kenneth Cole Productions Inc.	New York	NY
KPMG LLP	New York	NY
Lendlease Americas Inc.	New York	NY
Levi Strauss & Co.	San Francisco	CA
Linden Research Inc.	Davis	CA
Lush Fresh Handmade Cosmetics	Wilmington	NC
Lyft Inc.	San Francisco	CA
Macy's Inc.	Cincinnati	OH
Marriott International Inc.	Bethesda	MD
Massachusetts Mutual Life Insurance Co.	Springfield	MA
Mastercard	Purchase	NY
Medtronic PLC	Minneapolis	MN
Merck	Kenilworth	NJ
Meredith Corp.	Des Moines	IA
MGM Resorts International	Las Vegas	NV
Microsoft Corp.	Redmond	WA
Mitchell Gold + Bob Williams	Taylorsville	NC

As of 04/05/19

COMPANY NAME	CITY	STATE
Moody's Corp.	New York	NY
Morgan Stanley	New York	NY
Nationwide	Columbus	OH
Navient	Wilmington	DE
Navigant Consulting Inc.	Chicago	IL
Netflix Inc.	Los Gatos	CA
Nike Inc.	Beaverton	OR
Northrop Grumman Corp.	Falls Church	VA
Nuance Communications	Burlington	MA
Office Depot Inc.	Boca Raton	FL
Oracle Corp.	Redwood City	CA
Patreon Inc.	San Francisco	CA
Paul Hastings LLP	Los Angeles	CA
PepsiCo Inc.	Purchase	NY
Pfizer Inc.	New York	NY
Pinterest Inc.	San Francisco	CA
PNC Financial Services Group Inc., The	Pittsburgh	PA
PricewaterhouseCoopers LLP	New York	NY
Procter & Gamble Co.	Cincinnati	OH
Pure Storage Inc.	Mountain View	CA
QUALCOMM Inc.	San Diego	CA
Realogy Holdings Corp.	Madison	NJ
Replacements Ltd.	McLeansville	NC
S&P Global Inc.	New York	NY
Salesforce	San Francisco	CA
SAP America Inc.	Newtown Square	PA
Seagate Technology plc	Cupertino	CA
Shire PLC	Lexington	MA
Shook, Hardy & Bacon LLP	Kansas City	MO
Shutterstock Inc.	New York	NY
Siemens Corp.	Washington	DC
Sodexo Inc.	Gaithersburg	MD
Spotify USA Inc.	New York	NY
Square Inc.	San Francisco	CA

As of 04/05/19

COMPANY NAME	CITY	STATE
SurveyMonkey Inc.	San Mateo	CA
Symantec Corp.	Mountain View	CA
Synchrony	Stamford	CT
Takeda Pharmaceuticals USA Inc.	Deerfield	IL
Target Corp.	Minneapolis	MN
Tech Data Corp.	Clearwater	FL
TIAA	New York	NY
T-Mobile USA Inc.	Bellevue	WA
TPG Global LLC	Fort Worth	TX
TransUnion	Chicago	IL
Turner Construction Co.	New York	NY
Twitter Inc.	San Francisco	CA
U.S. Bancorp	Minneapolis	MN
Uber Technologies Inc.	San Francisco	CA
Ultimate Software	Weston	FL
Under Armour Inc.	Baltimore	MD
Unilever	Englewood Cliffs	NJ
United Parcel Service Inc.	Atlanta	GA
Univision Communications Inc.	New York	NY
Verizon Communications Inc.	New York	NY
Visa	Foster City	CA
Warby Parker	New York	NY
WeddingWire Inc.	Chevy Chase	MD
Wells Fargo & Co.	San Francisco	CA
Whirlpool Corp.	Benton Harbor	MI
Williams-Sonoma Inc.	San Francisco	CA
Workday Inc.	Pleasanton	CA
Wyndham Hotels & Resorts Inc.	Parsippany	NJ
Xerox Corp.	Norwalk	CT
Yelp Inc.	San Francisco	CA
Yext Inc.	New York	NY
Zillow Group	Seattle	WA
Zimmer Biomet Holdings Inc.	Warsaw	IN

As of 04/05/19

Chairwoman BONAMICI. And I now recognize Ranking Member Foxx from North Carolina for 5 minutes for your questions.

Ms. FOXX. Thank you, Madam Chairman. And I want to thank our witnesses for being here today.

Mr. Lorber, you State in your written testimony that the definition of gender identity in H.R. 5 is not clear. Do you anticipate that H.R. 5's definition of gender identity will create uncertainty or even more dire consequences for organizations and individuals subject to the bill's requirements? Can you expand on the problems that are created when Congress enacts a new legal requirement but does not clearly define what that requirement entails?

Mr. LORBER. Thank you, Congressman Foxx.

As my testimony explains, the definition of gender identity does not provide any definitive definition. As noted in my testimony and Ms. Warbelow's, the Hopkins decision did interpret Title VII to prohibit discrimination based on mannerisms or sex stereotypes. The definition of gender identity, including appearance or other related gender characteristics, either simply replicates the Hopkins decision or goes further than mannerisms and related appearance. Thus so, the obligations place on employers in section seven, grantees in sections three and six, in places of accommodation in which the coverage will be extremely amorphous. We have seen this situation where definitions are not well crafted where the Congress had to amend the ADA 20 years after initial passage because it believed that the Supreme Court misapplied the definitions of disability.

So the definition of gender identity, or the lack of a definition, could well lead to years of unnecessary litigation and uncertainty for employers and individuals.

Ms. FOXX. Thank you.

Mr. Lorber, supporters of H.R. 5 say the legislation will not infringe on religious liberty. Can you explain to the subcommittee what the legal effect is of the provision in H.R. 5 stating that the Religious Freedom Restoration Act of 1993 (RFRA) shall not provide a claim or defense to claims under provisions of the Civil Rights Act amended by H.R. 5? Does this provision eliminate the ability of organizations and individuals to assert their rights under RFRA in the countless matters covered by H.R. 5?

Mr. LORBER. Thank you, Congresswoman.

The Religious Freedom Restoration Act was enacted to ensure that there would be no government imposition on religious observance and practice. It is and was a Civil Rights Act and it is still a Federal law. H.R. 5 creates an anomalous situation whereby it States that one Federal law involving civil rights addressing sexual orientation and gender identity overwhelms and overrides another Federal civil rights law addressing religion. I would note that the findings in RFRA State, "Laws neutral toward religion may burden religion exercise as surely as laws intended to interfere with religious exercises." So that by summarily negating RFRA, H.R. 5 would seem to negate the protections that RFRA was enacted to protect. Federal statutes must be read and interpreted to preserve their purpose. H.R. 5 seems to supplement one statute with another. It would seem, therefore, that section 1107, the claims mis-

apprehends the purpose of RFRA and should be reconsidered and frankly deleted as inappropriate in the context of a civil rights law.

Ms. FOXX. Thank you, Mr. Lorber.

One more question. H.R. 5 expands Federal discrimination law to prohibit actions based on a perception even if inaccurate, that an individual is of a certain race, color, religion, sex, national origin, sexual orientation, or gender identity. Do you have concerns with how this provision would be interpreted and enforced and whether there would be difficulties with compliance?

Mr. LORBER. Well, yes. In one respect the provision seems to adopt in part the standard in the ADA that acting on an assumption of a disability, whether a disability is in effect or not, violates the ADA if the underlying action would violate the law. Under Title VII it is already clear from the Hopkins decision that negative inferences cannot be drawn from mannerisms. If, however, gender identity remains as ill-defined as it is with no specifications, then employers or managers of public accommodations, for example, may find it extremely difficult to establish policies to deal with the requirements of H.R. 5. Perception is a difficult standard under the law since it establishes a liability, frankly, on a non-fact. The question is highlighted when the underlying protection is so ill-defined. So the question of perception discrimination, particularly with H.R. 5 as it defines its various new covered classes will remain and become, I think, a substantial imposition on employers simply to know what they have to do.

Ms. FOXX. Thank you very much.

Madam Chairman, I yield back.

Chairwoman BONAMICI. Thank you, Dr. Foxx.

I now recognize Representative Hayes from Connecticut for 5 minutes for your questions.

Ms. HAYES. Thank you, Madam Chair. I would also like to thank the witnesses who are here today before this committee for your testimony.

I am a career educator who just came to Congress and I have always held one very central value, that every child, no matter their background, their identity, their community, their diversity, matters. And I hear a lot about employers and people who abuse policies and how are we going to enforce policy. I want to hear more about the people because these kids matter.

Ms. Shappley, you should not have to advocate for the right for your child to be treated equally in the classroom. That should be a given, and we should do our job to make sure that happens. And you should not have to move your child to a new school district for fear of their safety and their ability to learn. I am sorry that happened to you and your daughter. You should not have to figure out how to advocate for your child. That is our job, too. Our educational system should be built in such a way that all students of all ages know that they will be treated with dignity and respect and will be safe in school.

As I was preparing for this hearing, I made a phone call to our Connecticut Kid Governor, a 10-year-old girl. Her name is Ella Briggs. And her entire platform was safe spaces for LGBTQ youth. And 6,000 kids in the State of Connecticut voted for her to become our Kid Governor. And she has advocated fiercely for her commu-

nity because she recognized and she understood that while she had parents who were supportive and empowering and loved her unconditionally, not every child has that. And she felt bad for them. And this 10-year-old recognized that we have to do something. That the adults have to do something. Her inauguration was one of the very first events that I attended as the Congresswoman from Connecticut's Fifth District, and I promised Ella that I would bring her voice and her concerns to Washington. So I am very happy, Madam Chair, that we are having this hearing and for you all for coming and sharing your testimony because Ella cannot be here. These kids cannot speak for themselves, so they need for us to stand up and speak for them.

Ms. Shappley, I mean, we know the statistics. You know, 30 percent of kids are missing either classes or full days of school because they do not feel welcome, they do not feel safe, that most of our homeless youth population is comprised of children that come from LGBTQ community. I have seen kids transition out, being kicked out of their homes, and end up not graduating high school or having any opportunity for success in the future. And I will tell you, whether it is the LGBTQ community, whether it is religious freedoms, whether it is ethnic backgrounds, I always operated with one question in mind. Is this the education I would want for my child? And I challenge everyone to ask themselves that same question. Would this be acceptable for your child?

Ms. Shappley, you talked a little bit about having to go to the school and advocate. Can you help us understand a little bit better? Because the kids get it. The adults are the ones that need an education on how to respond. Ella's platform includes teaching teachers how to respond. Can you help us understand how you advocated for Kai to the adults in her community?

Ms. SHAPPLEY. Thank you. I think for the adults in the community that want to advocate for Kai or for all kids is to educate themselves. The HRC, the ACLU, Equality Texas, there are resources out there to give you the information so that you have a good knowledge of what the statistics really are. Approximately 41 percent of transgender youth will attempt suicide. Right? That is not acceptable.

We need communities. My daughter needs communities to stand up. We need allies. Go to the schools. Go to the school board meetings. Speak up. Shut down homophobic rants. If your pastor at your church is not affirming to the LGBTQ community, have a meeting with them and discuss why that might be, and maybe even consider whether your tithes should go to a different church that is affirming of LGBTQ kids because I think that we are missing the whole point of the gospel when we sit in places that are not teaching love.

Ms. HAYES. Thank you. I appreciate that.

I also know that many adults, their biases move forward with them. I have seen higher rates of discipline amongst students who identify as LGBTQ because the adults do not know how to respond. And it is very interesting that you brought up religion because I was thinking about that. When we are talking about gender identity as a choice and it is not innate and it can be changed at any time, we would never question someone's religious beliefs which is

also a choice and not innate and can be changed at any time. So I just think we have to look at this differently and educate ourselves because these kids are relying on us to get it right. Thank you.

Chairwoman BONAMICI. Thank you, Representative Hayes.

I now recognize Dr. Schrier for 5 minutes for your questions.

Ms. SCHRIER. Thank you, Madam Chair.

Thank you, first, to all of the witnesses, and Ms. Shappley, thank you for sharing your story. I found it particularly touching and so moving. And Kai is so lucky to have you as her mom. You are her best advocate and such a supporter. And you listened, and you heard, and you learned and you did the right thing. And unfortunately, it required you to go leaps and bounds beyond where you would have to. And unfortunately, not all parents are so supportive, and that is really what troubles me. I am a pediatrician, and so I see these kids as they grow up, and I know that many parents are not as supportive as you are. And this is one of the reasons that so many transgender teens become homeless teens.

I wanted to tell you about one, and part of this is—you may know this story, but part of it is for my colleagues so that they understand what kids go through.

So this is one of my patients, and first, for the sake of confidentiality, because I cannot use names, we are going to call him Sam. And he comes from a family probably a lot like yours. A very religious family. A very loving family. But he knew that he could not talk with them about who he was and how he felt and that he was in the wrong body. And so he came to me because I was the only safe person for him to talk to. And I was in the medical office and I shudder to think about all these kids who do not have a safe place even in the doctor's office.

He would come in for little things. I mean, practically a broken fingernail, just so he would have somebody safe to talk with because he could not talk to a teacher. He could not talk to his parents. He came in. I tried to help by saying, hey, I will sit in the room with you. We can have this conversation together. But he knew that if that happened he would be kicked out of the house. And so we planned together. And I got him through a few years until he went off to the University of Washington where he could explain to his parents who he is, feel safe in his own skin and in his environment, and finally, at age 18, be okay.

So one of my frustrations that I think you share is just this failure of imagination and this failure to be able to be empathetic in our country. We do not support stem cell research until our own kid has a disease that could be helped from it. We do not support marriage equality until our own child wants to get married to the person they love. And so I am so impressed that you are involved in,—and I have to refresh the faith outreach coordinator for Equality Texas because I think that is the way to change hearts and minds.

I wanted to see if you could talk a little bit about your experience there and about how it is going. How are you getting through to people and changing hearts and minds?

Ms. SHAPPLEY. Thank you. It started out that I just needed Equality Texas because I went to them when I needed help for my

daughter to be able to use the restroom. And I do not even know how it happened. Now I am just on the team, right, because I needed them. I still need them. And I mean, who takes on somebody with a ministry background and says, hey, do you want to work for this LGBTQ group? Why not? So I literally had to move from being a homophobic person into advocating for the community that I used to be so afraid of. And I think that just by telling our story, Kai and I just tell our story over and over and over. And we just get blessed. Doors keep opening for us to share in the most unlikely of places. We speak at affirming churches. We speak at non-affirming churches. We speak at many Baptist churches, Methodist churches. We speak privately with pastors of mega churches and we speak publicly with them. And we just continue to tell our story because we believe that there is power in testimony and we stay true to our faith. And I believe that is all we can do, and we just continue to have faith that it will be effective.

Ms. SCHRIER. Thank you. And thank you for doing that hard and really important work.

I also just wanted to make a couple comments for the record. First is that I know that when we are talking about bathrooms and bathroom safety, that the only person at risk right now is my patient Sam. He is the one who is subject to being injured. And I just want to say that it is maddeningly frustrating to hear all this discussion about the bathroom. I would say similarly about sports. Nobody chooses this so that they can win a race or they can be a football star. That we need to look out for these kids and young adults and make sure that they are welcome.

So thank you. I am out of time.

Chairwoman BONAMICI. Thank you, Dr. Schrier.

I now recognize Representative Lee from Nevada for 5 minutes for your questions.

Ms. LEE. Great. Thank you all for being here and talking about this important act.

I wanted to first ask you, Mr. Hedren, you Stated that manufacturers believe that discrimination of any kind sharply contrasts with the four values of free enterprise, competitiveness, individual liberty, and equal opportunity, and that these four pillars underpin what makes manufacturing strong. Can you expand on how the Equality Act will help further these values?

Mr. HEDREN. Thank you, Representative Lee, for that question. And in fact, I would like to make a quick point.

So in 2016, when the NAM officially adopted a policy position making clear our opposition to discrimination on the grounds of sexual orientation or gender identity, which by the way was a longer running and longer held belief, just recently this spring the NAM Board of Directors adopted the four pillars explicitly as part of the policies that we advocate for. And that was a big moment for us. And it is for reasons just like this.

These are important because these are about our work force. These are about our perception in the community. This is about talent. This is about doing the right thing in the market. And we are frankly in a place that I think has surprised some people. Our members have gone farther, faster than I think many people expected. Is that perfection? No. There is always more to go. But I

look at examples of companies like Cargill, that have had explicit protections and a perfect record on the Corporate Equality Index for 15 years running. Cargill is a company that is located all over the world with thousands of facilities globally. And they find value in affirming these values for their work force, for their customers, and for their broader communities. So these are very, very important protections to those who adopt them.

I would also actually like to take the opportunity to mention Salesforce, a company we are not as often associated with which, like many larger companies, manages a corporate program, like an affinity group, which is a company-sanctioned group for folks of particular characteristics that come together and have a place to talk and network and address the issues of the day. And in their LGBT affinity group, they found that many people join not because of themselves and their own orientation or identity but because of their families, because of their children, because of their communities. I hope that is—

Ms. LEE. No, that is great. Thank you very much.

Yes, I just wanted to followup. I am really proud of two major employers in Las Vegas, Nevada, Caesar's Entertainment and MGM Resorts support this legislation and are a part of the Business Coalition for the Equality Act that we are discussing today. How do you think these values might extend to businesses beyond manufacturing?

Mr. HEDREN. Thank you for that question, Representative.

I think to a certain extent I need to be a little cautious about describing issues that go beyond our industry because really what I can talk to is what manufacturers are living now and dealing with in their own work forces. So I do hesitate to go extend into other industries too far.

I think that when you look at the list of companies that have come out, for example, as part of the human rights campaign's collection of now over 180 companies, I understand looking at my copanelist, and she is nodding, that obviously extends well beyond our sector and I think gives you an example of companies like Caesar's and MGM that would not be our members, although perhaps who make the chips, but that also have found it valuable for their own reasons to come out in favor of protections like these.

Ms. LEE. Thank you. Yes, I am really proud of my State that we champion inclusion across the board, whether it is employment practices, educational attainment, or health care for transgender individuals.

Can you tell us how discrimination against LGBTQ individuals in public accommodations, including access to health care impacts business?

Mr. HEDREN. Thank you for that question as well.

As I mentioned before with one particular example from Dow, the value of these protections extends beyond the fence line. So in some cases in facilities this may be the only place in a community where employees may feel protected and welcomed. The value of these protections obviously extends beyond that. Then, again, to a certain extent, I am not actually able to talk about some of the issues that other industries might face here, but suffice it to say that being able to feel safe in your community, and like where chil-

dren can go to school and be treated with love, kindness, and fairness is important to employees no matter what.

Ms. LEE. Great. Thank you. I yield.

Chairwoman BONAMICI. Thank you. And I now recognize Representative Trone from Maryland for 5 minutes for your questions.

Mr. TRONE. Thank you, Madam.

Before I ran for Congress I ran a successful business with over 7,000 employees. And for more than a decade before same sex marriage became legal in this country, we offered partner benefits for health insurance to all of our team members. I say that not because I am looking for a pat on the back. You do not get a pat on the back for doing what is right. I say it because we built an inclusive workplace. I know it can be done. I know it is time to ensure every American is protected from discrimination at work.

Mr. Lorber, I understand the purpose of your testimony today is not to recommend whether or not Congress should pass the Equality Act. Without endorsing any specific legislation and drawing on your vast experience in a private practice and in government on employment issues, do you feel LGBTQ individuals deserve to be protected against discrimination in the workplace? Would you expand on that?

Mr. LORBER. Sure. I think LGBTQ individuals should be protected, and indeed, three courts of appeals in employment have already held that they are protected under the law so that the issue in my view is not protection, though that is critically important and there should be protection for LGBTQ individuals. The real question is passing this encompassing statute which amends a variety of other statutes without definition and without guidance seems to me is just simply an invitation to unnecessary litigation. It is an invitation to unnecessarily confusion. As I said in my testimony, there was previous legislation, the Employee Nondiscrimination Act, which over time evolved into a fairly definitive set of guidance, rules if you will, as to what it meant. What we are talking about here is a quite different beast, if I could use that term, where we are simply throwing out protections without definition. We are dealing in a case of RFRA with another statute, and we are in the anomalous position of simply saying it does not matter and it does not apply except when it does. And that to my mind is just not an appropriate way of dealing with these issues.

But just to conclude, and I apologize for taking this time, absolutely LGBTQ folks should be protected, in school and in the workplace.

Mr. TRONE. Well, at least we have agreed on that point. Thank you.

Mr. LORBER. Well, yes, we never disagreed. It is just how it is to be done and is it to be done in a statutory manner which simply does not make it, in my view, a lot of sense.

Mr. TRONE. Mr. Hedren, the National Association of Manufacturers recently joined a letter with 40 associations in support of workplace nondiscrimination protections contained in the bill.

Madam Chairwoman, I would like to submit that letter for the record.

Chairwoman BONAMICI. Without objection.

[The information referred to follows:]

April 9, 2019

The Honorable Suzanne Bonamici
Chair
Subcommittee on Civil Rights
and Human Services
U.S. House of Representatives
Washington, DC 20515

The Honorable James Comer
Ranking Member
Subcommittee on Civil Rights
and Human Services
U.S. House of Representatives
Washington, DC 20515

Dear Chair Bonamici and Ranking Member Comer:

The undersigned trade and professional associations support provisions in the Equality Act that amend Title VII of the Civil Rights Act to provide employment non-discrimination protections based on sexual orientation and gender identity. Equality of opportunity is a key pillar of our great democracy—one that allows all people to pursue their American Dream—and part of what makes our nation exceptional. Our industries, representing tens of millions of Americans, understand this basic fact and have been at the forefront of efforts to combat discrimination based on sexual orientation and gender identity in the workplace.

We believe an appropriately-tailored federal standard would complement our members' ongoing work to promote equal opportunity in the workplace. A clear federal standard would better enable individuals to succeed based on their abilities and qualifications to perform a job. Our members recognize the value of equal opportunity because it enables them to attract and retain the most talented employees.

Title VII of the Civil Rights Act provides a well-understood legal framework for preventing and addressing discrimination. Amending the Act to include protections based on sexual orientation and gender identity is a sensible approach to ensure consistency with other protected classes.

We look forward to working with Congress to promote and perfect the Equality Act, as we believe it meets these criteria.

Sincerely,

ACT | The App Association
AdvaMed
Aerospace Industries Association
American Benefits Council
American Chemistry Council
American Cleaning Institute
American Hotel & Lodging Association
American Medical Association
American Society of Association Executives
Asian American Hotel Owners Association
Auto Care Association
BSA | The Software Alliance

Business Roundtable
College and University Professional Association for Human Resources
Consumer Healthcare Products Association
Consumer Technology Association
Council for Responsible Nutrition
Edison Electric Institute
Financial Executives International
Food Marketing Institute
Fragrance Creators Association
Grocery Manufacturers Association
Household & Commercial Products Association
HR Policy Association
Information Technology Industry Council (ITI)
International Council of Shopping Centers
International Franchise Association
Internet Association
Nareit
National Association of Chain Drug Stores
National Association of Manufacturers
National Investor Relations Institute
National Leased Housing Association
National Restaurant Association
National Retail Federation
National Safety Council
National Venture Capital Association
Personal Care Products Council
Retail Industry Leaders Association
Solar Energy Industries Association
Sports & Fitness Industry Association
The Center for Baby and Adult Hygiene Products
The ERISA Industry Committee
The National Multifamily Housing Council
The Real Estate Roundtable
U.S. Chamber of Commerce

Mr. TRONE. Mr. Hedren, from my understanding, this level of support is new. Why do you believe all these groups have come together now to call on Congress to support the Equality Act?

Mr. HEDREN. Thank you, Representative Trone. And thank you for entering the letter into the record as well. I know that is important to us and to others who signed on to it.

Why now is a really, really good question. And I think the answer is a little bit, to play off of my co-panelists and talk a little bit about what has been going on in the trajectory of cases in the Federal Courts. The State of affairs for protections for LGBTQ individuals is a little bit confused and it depends a little bit on where you sit. Actually, more than a little bit. And because of that, I think employees and employers are at times unclear what their obligations are under the law and what will apply to them. So I would actually disagree respectfully with my co-panelists and say the value of statutory clarity is that it puts on notice both employers and employees as to what rights look like and more or less how they work.

Now, I will also say that I do share my co-panelists' concerns with the thought of litigation that could run for years to explain these issues further. And I would posit that this type of litigation is not necessarily a good thing for employers or for employees. But I do think that is the opportunity that we have now is to work through these questions where reasonable lawyers may disagree and to find the right way to get them done. And for that reason I am grateful for the chance to work with the committee and other Members of Congress to do that this term.

Mr. TRONE. Thank you.

I yield the balance of my time.

Chairwoman BONAMICI. Thank you, Representative.

I am now going to move to the members of the full committee who are not members of the subcommittee. We are glad they are here today, and I recognize Representative Takano from California for 5 minutes for your questions.

Mr. TAKANO. I thank Chairwoman Bonamici for this important hearing. And as co-chair of the LGBT Equality Caucus and as a former teacher, I want to ensure that schools are welcoming places for all students regardless of their gender identity or sexual orientation. And I want to make sure that, you know, workers in workplaces are protected from discrimination. I want to make sure that people, LGBT people who want to buy something in a store or go to a hotel or do business with anybody who is in the marketplace, that they are covered under the public accommodations portion of this law. All Americans, and especially children, deserve equal protection under the law. No person, no matter where they live in this country, should face discrimination.

Equality should not depend on the zip code where you live. All students should be allowed to receive an education without fear of discrimination, which is why I am proud to be a co-sponsor of the Equality Act. California, along with 14 other States and the District of Columbia, have laws prohibiting discrimination against students in public education on the basis of sexual orientation and gender identity. With two States prohibiting discrimination on the basis of sexual orientation, it is beyond time that we have a Fed-

eral law ensuring protections for the most vulnerable in our communities no matter where they live. When students attend schools they should receive a good education, not bullying or mistreatment because of who they are.

Ms. Shappley, I, too, was really moved by your testimony. And just the journey you have traveled as a mother. But I know you are a school nurse and I assume you have seen your fair share of students who have come to you attempting to get out of school. Can you tell me more about that?

Ms. SHAPPLEY. Yes. And I am a middle school nurse. And, yes, we do have LGBTQ kids in the schools that need extra love. Yes.

Mr. TAKANO. Extra love. I do not know why that kind of hit me emotionally but you did.

I was a middle school teacher at one point, too. And I remember having a transgender about 20–25 years ago, even as a gay person, I did not quite understand transgender myself then. But I knew this student was being bullied. And did not have the tools as a teacher. Administrators did not have tools to deal with the bullying. And there really was not a law that this young person could use to seek protection. We know that many students are facing some sort of bullying. And would you also say, Ms. Shappley, it is kind of fair to say that it is sometimes true that educators do not want to know that there is bullying or that it is hard to know that it is going on?

Ms. SHAPPLEY. Yes, I would say that is true.

Mr. TAKANO. What are some of the social and emotional consequences of discrimination for gender identity and sexual orientation in schools?

Ms. SHAPPLEY. Well, in a bigger picture I guess is the way that I can answer that. Okay?

Mr. TAKANO. Yes.

Ms. SHAPPLEY. So we have these kids who have peers that are bullying them. There are teachers who decide that they do not want to intervene because maybe they agree with the kids that are bullying these kids. That was the case for us. I mean, my child was bullied by her peers but there were staff members who chose to look the other way. And I believe that the staff members who were consistently calling her by the wrong name were bullying her as well. They knew that this was hurting her but yet they consistently did it and that to me is bullying.

Like I said earlier, transgender kids specifically, but LGBTQ kids, they are at higher risk for mental health issues and for physical health issues, and it is not because they are transgender. It is because of the way they are treated.

Mr. TAKANO. It is sad to know that there are adult teachers who do not understand and would passive aggressively intentionally call a student by a name that student does not want to be called by because of their beliefs.

Ms. SHAPPLEY. Correct.

Mr. TAKANO. That is a disrespect to that student.

My time is running out. I wish we could talk a lot more about bringing this story more to light, but I appreciate your being here today. And I want to just urge all my colleagues in the Congress to pass the Equality Act. The time is long overdue.

And I yield back.

Chairwoman BONAMICI. Thank you, Representative.

I now recognize Representative Davis, the chair of the Higher Education Subcommittee, for 5 minutes for your questions.

Ms. DAVIS. Thank you, Madam Chair.

Ms. Warbelow, I wanted to ask you thank you all for being with us today. We appreciate it.

Federal law currently prohibits juror discrimination on the basis of race, color, religion, sex, national origin, and economic status. But as I think you well know, there are no clear protections for those in the LGBT community. Why is it important to amend the Jury Service and Selections Act to include LGBTQ people?

Ms. WARBELOW. Thank you for that question.

You know, discrimination in jury service undermines our democracy, and it is a serious problem. There was a case in which a gay man was stricken from a jury based on his sexual orientation because the attorneys believed that he could not be unbiased in contemplating a case involving HIV medications. This was not only damaging to him as a member of our society, but also damaging to the process, ensuring that all Americans have an opportunity to have a jury of their peers and that all instances and issues that crop up in daily life are fairly considered by a cross section of the American population. And that is one of the reasons that the Equality Act amends this critical area of law.

Ms. DAVIS. And have you seen clear evidence that happens? That there really is not that opportunity to make sure that actually it is a fair hearing?

Ms. WARBELOW. You know, it is very much jurisdiction by jurisdiction. And it is a very small number of States that have tackled this issue. We really need to make sure that it is nationwide for all of our Federal courts.

Ms. DAVIS. Thank you. We have been working on it for some time, so I appreciate that.

Ms. WARBELOW. Thank you.

Ms. DAVIS. Ms. Shappley, I want to thank you also for your very frank, honest testimony. My colleague, Mr. Takano, just asked you a question about the schools. We see that it made a really big difference for Kai when she found a safe and healthy environment. What do you think schools across the country need to do far better then? You just spoke about the staff involvement, of teacher involvement, and sometimes it ends up being more negative. What do they need to do better and really focus in?

Ms. SHAPPLEY. I think that there needs to be some continuing education for teachers and staff. For some of these teachers that have been around for a while, perhaps they have not been educated on LGBTQ issues. I think that would be a great place to start is just by educating. I think that we have to look at leadership. We have to look at leadership, superintendents and, you know, principals. Your teachers are going to follow what their leaders set as an example and the tone for the school. And I think that is a great place to start is just to try to get people to understand that discrimination is wrong and that they are hurting these children. People go into education because they love children and they want to do good things for children. And I think that if we arm them with

the education that they need they would make good choices for these children.

Ms. DAVIS. Thank you. It is a good message. Whatever setting you are in, it starts at the top.

Thank you. I appreciate you being here.

Chairwoman BONAMICI. Thank you, Representative Davis.

Before we move to closing, I would, without objection, like to enter into the record letters of support for the Equality Act from the American Association of University Women; a letter or a map showing from the Human Rights Campaign the States that have addressed discrimination, and importantly, the States that have not; a letter from the National Women's Law Center; and a letter from the National Center for Transgender Equality.

Without objection.

[The information referred to follows:]

April 8, 2019

Representative Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Representative James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee:

On behalf of the more than 170,000 members and supporters of the American Association of University Women (AAUW), I urge you to cosponsor and support the Equality Act (H.R. 5). AAUW opposes all forms of discrimination and supports the civil rights of all individuals.[1] Our nation's civil rights laws must be updated to protect all of us. It is critical that Congress pass the Equality Act, which would amend existing federal civil rights laws to provide explicit protection against discrimination based on sexual orientation and gender identity in housing, employment, education, public spaces, and other key areas.

While the Supreme Court made clear in its 2015 decision *Obergefell v. Hodges* that LGBTQ people cannot be denied the right to marry, there is still much to be done to ensure that they are afforded equal treatment and equal rights. Only 20 states provide explicit protections prohibiting discrimination based on sexual orientation and gender identity in public accommodations.[2] An estimated 6.9 million LGBT people, ages 13 and older, live in states without statutes prohibiting sexual orientation and gender identity discrimination in public accommodations.[3] In addition, while the U.S. Equal Employment Opportunity Commission (EEOC) currently argues that lesbian, gay, bisexual, and transgender workers are protected from wage discrimination under Title VII of the Civil Rights Act of 1964,[4] federal court rulings and state and local laws are inconsistent and workplace protections for LGBTQ workers are not sufficiently robust. There are approximately 8.1 million LGBT workers, ages 16 and older, in the U.S., and an estimated 4.1 million of them live in the 29 states without statutes prohibiting sexual orientation and gender identity discrimination in employment.[5] These are only a few examples of the patchwork of protections, which leaves LGBTQ people vulnerable to discrimination in many aspects of daily life – including employment, housing, credit, and federally funded programs such as education. This letter will address the need for uniform federal protections by providing a few examples in key AAUW areas.

Discrimination Impacts LGBTQ Workers' Economic Security

It is critical that LGBTQ employees can work free from discrimination. Indeed, it is an economic imperative to ensure that LGBTQ people have civil rights protections and equal recourse for workplace discrimination. A study of the pay received by gay men, lesbians, and bisexual men and women found that all three groups have labor market outcomes that diverge from heterosexual workers.[6] Gay men, on average, are paid less than straight men, while lesbians tend to be paid more than straight women, but both differences are attributed primarily to differences in assumptions in family structure: gay men do not receive the "fatherhood bonus" that many straight men receive, while lesbians are more likely than straight women to avoid the "motherhood penalty."[7] Bisexuals seem to face lower earnings primarily as a result of discrimination.[8] However, the gender pay gap is consistent across sexual orientation: regardless of sexual orientation, women tend to have lower earnings than men. [9] Discrimination based on cultural norms and gender stereotypes persist and many LGBTQ workers are left without recourse if they face pay discrimination or other forms of workplace discrimination, such as termination or harassment.

In addition, transgender people frequently experience harassment and discrimination in the workplace because of

their gender identity, as well as discrimination and obstacles in other domains that further harm their economic security.[10] For example, more than one-quarter of respondents to a survey of transgender people reported an income of less than $20,000 annually, while another analysis found that 15 percent of transgender people have earnings less than $10,000 annually, compared to 4 percent of the general population.[11] There is evidence to suggest that people who transition from a male to female gender expression experience a drop in pay after their transition, while those who transition from female to male gender expression may see no difference in pay or even a small increase.[12] The experiences of transgender people offer a powerful tool for understanding gender stereotypes and bias and how these factors play a role in the gender pay gap. They also demonstrate the clear need for clarified and consistent anti-discrimination protections for LGBTQ workers.

Discrimination Impacts LGBTQ Students' Education

Equal educational rights is another key area where protections are needed. Nearly 2.1 million students ages 15 and older, and countless more under the age of 15, live in states without statutory protections against sexual orientation and gender identity discrimination at school.[13] For them, accessing education often includes experiencing bullying and harassment on a regular basis. LGBTQ students experience harassment or assault based on personal characteristics, including sexual orientation, gender expression, gender, religion, race and ethnicity, and disability, at alarming rates. In a GLSEN report, 87 percent of these students reported experiencing this type of discrimination.[14] Around seven in ten LGBTQ students experienced verbal harassment at school based on sexual orientation, and more than half experienced harassment based on gender expression or gender.[15] In addition, AAUW research has found that students in grades 7-12 are often targeted for failing to follow norms that are typical for their gender. Boys were most likely to identify being called gay as the type of sexual harassment most troubling to them. For girls, being called a lesbian was also a common occurrence, particularly for female athletes.[16] This bullying and harassment impacts the ability of all students to access education. But with a patchwork of federal court rulings and state and local laws, students are often left without a solution when they experience this type of discrimination at school, as well as other forms of discrimination based on their sexual orientation or gender identity.

The Equality Act is a Critically Needed Solution

The Equality Act (H.R. 5) would make clear that discrimination on the basis of gender identity or sexual orientation are forms of sex discrimination and unlawful. In addition, the Equality Act would close loopholes in existing federal law that prohibits sex discrimination in public spaces and federally funded activities, providing new protections for women. Finally, the Equality Act would update the spaces considered public accommodations, thus extending current civil rights protections against discrimination based on race, religion, and national origin (in addition to sex) to more places key to our everyday lives.

Specifically, the Equality Act provides clear protections for LGBTQ people across a number of areas. These protections would:

- Protect discrimination against LGBTQ people who access federally funded programs and activities. This includes prohibiting discrimination by schools, hospitals, domestic violence shelters, and police departments that receive federal funds.

- Explicitly prohibit employment discrimination against LGBTQ people by clarifying that sex discrimination includes discrimination on the basis of gender identity or sexual orientation. The Equality Act also clarifies that discrimination based on sex stereotyping is a form of prohibited discrimination.

- Ensure LBGTQ people do not experience harassment and other forms of discrimination in public accommodations, such as at stores, in restaurants, and on transportation.

- Make clear that LGBTQ people are protected from discrimination in housing, including the sale or rental, and in credit, financing, and lending.

In addition to ensuring the LGBTQ people are clearly included in our civil rights laws, the Equality Act would update those laws to provide important new protections against sex discrimination overall. Currently, federal law does not prohibit sex discrimination in public spaces or in all federally funded programs. The new protections would:

- Ensure that sex discrimination is prohibited in public spaces and services. This would mean that women who experience sexual harassment on public transportation or in restaurants or stores would have a remedy. In addition, businesses would not be able to charge women more than men for the same services or products or to refuse services. For example, pharmacists would not be able to refuse to fill a woman's birth control prescription.

- Prohibit any programs that are federally-funded from discriminating on the basis of sex, including sexual orientation and gender identity. This would mean that businesses that receive federal grants and organizations that receive federal funding could not discriminate on the basis of sex.

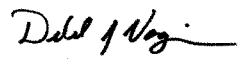
While existing federal law provides protections against discrimination on the basis of race, religion, or national origin in public accommodations, these provisions need updating to ensure that everyone can fully participate in social and public spaces. The Equality Act's updated protections would:

- Include other important providers of goods and services like retail stores, accountants, and salons, and providers of transportation, to ensure they are also required to not discriminate on the basis of any protected characteristic.

- Extend protections to "actual or perceived" membership in a protected class and include protections based on association with a member of a protected class.

It is critical that Congress pass the Equality Act (H.R. 5) and update existing federal civil rights laws to provide explicit protection against discrimination based on sexual orientation and gender identity. I urge you to stand up for the rights of all by cosponsoring and supporting the Equality Act. Cosponsorship and votes associated with this bill and amendments may be scored in the AAUW Action Fund *Congressional Voting Record for the 116th Congress*. Please do not hesitate to contact me at 202/785-7720 or Anne Hedgepeth, Director of Federal Policy, at 202/785-7724, if you have any questions.

Sincerely,



Deborah J. Vagins
Senior Vice President, Public Policy and Research

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[1] AAUW, *Public Policy Priorities 2017-2019*, June 2017, www.aauw.org/resource/principles-and-priorities.
[2] Human Rights Campaign, *State Maps of Laws and Policies, Public Accommodation*, June 2018, www.hrc.org/state-maps/public-accomodations.
[3] The Williams Institute, "LGBT People in the United States Not Protected by State Nondiscrimination Statutes" (UCLA School of Law, March 2019), williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-March-2019.pdf.
[4] U.S. Equal Employment Opportunity Commission, "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers," 2018, www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.
[5] The Williams Institute, "LGBT People in the United States Not Protected by State Nondiscrimination Statutes"; Human Rights Campaign, *State Maps of Laws and Policies, Public Accommodation*.
[6] Trenton D. Mize, "Sexual Orientation in the Labor Market," American Sociological Review, November 2016, 1132-1160.
[7] *Id.*

[8] *See, e.g.* Kevin Miller and Deborah J. Vagins, "The Simple Truth about the Gender Pay Gap" (American Association of University Women, Fall 2018), www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/; Trenton D. Mize, "Sexual Orientation in the Labor Market."

[9] M. V. Lee Badgett and Alyssa Schneebaum, "The impact of wage equality on sexual orientation poverty gaps" (The Williams Institute at UCLA School of Law, June 2015), williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-of-Wage-Equality-on-Sexual-Orientation-Poverty-Gaps-June-2015.pdf.

[10] U.S. Equal Employment Opportunity Commission, "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers," www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; Center for American Progress and Movement Advancement Project, "Paying an Unfair Price: The Financial Penalty for Being Transgender in America," February 2015, www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf.

[11] Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, "Injustice at every turn: A report of the National Transgender Discrimination Survey" (National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

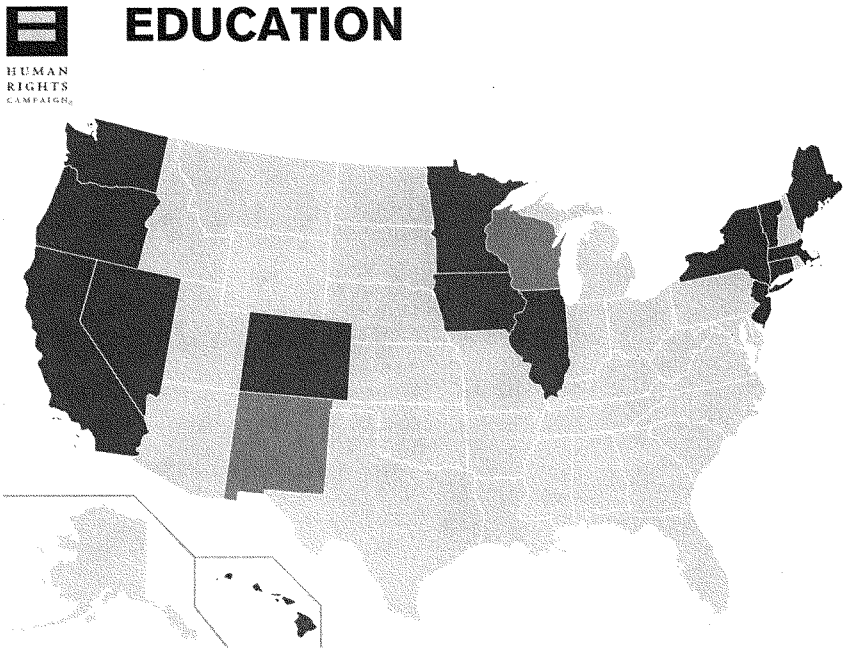
[12] Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, "Injustice at every turn: A report of the National Transgender Discrimination Survey"; Kristen Schilt, "Just one of the guys? Transgender men and the persistence of gender inequality" (University of Chicago, 2010), www.press.uchicago.edu/ucp/books/book/chicago/J/bo9743256.html.

[13] The Williams Institute, "LGBT People in the United States Not Protected by State Nondiscrimination Statutes."

[14] GLSEN, *National School Climate Survey Released*, October 2018, www.glsen.org/article/glsen-releases-new-national-school-climate-survey-report.

[15] *Id.*

[16] Catherine Hill and Holly Kearl, "Crossing the Line: Sexual Harassment at School" (American Association of University Women, 2011), www.aauw.org/research/crossing-the-line/.



EDUCATION

Updated January 15, 2019

Increasingly, states are explicitly addressing discrimination against LGBTQ elementary and high school students. This map indicates state laws that prohibit discrimination against students in public education on the basis of sexual orientation or gender identity. The states that explicitly address discrimination against LGBTQ students are shown.

Address discrimination against students based on sexual orientation and gender identity (15 states & D.C.): California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Oregon, Vermont, Washington

Address discrimination against students based on sexual orientation only (2 states): New Mexico, Wisconsin

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April 5, 2019

Hon. Suzanne Bonamici, Chair
Civil Rights and Human Services Subcommittee
House Education and Labor Committee
2231 Rayburn House Office Building
Washington, D.C. 20515-0003

Hon. James Comer, Co-Chair
Civil Rights and Human Services Subcommittee
House Education and Labor Committee
1513 Longworth House Office Building
Washington, D.C. 20515-0004

Dear Chairwoman Bonamici and Ranking Member Comer:

The National Women's Law Center has been working since 1972 to protect the rights of women and girls to learn, work, and live free from sex-based discrimination and harassment. We believe that ending all forms of sex-based discrimination and harassment is crucial to protecting the opportunities of all women, and for that reason, we write in strong support of the Equality Act. Because we recognize the inadequacy of federal law in providing explicit protection against all forms of sex discrimination, including discrimination based on sexual orientation and gender identity, we support the Equality Act's proposed amendment of key federal nondiscrimination laws to provide such protection. As we affirm the necessity of the Equality Act for women, girls, and all LGBTQ people, we condemn the shameful viewpoints of those who, falsely claiming to support women's rights, seek to further their own discriminatory agendas without legal, scientific, or moral basis.

Women and girls, especially those who are members of the LGBTQ community, need the Equality Act. In addition to the necessary, explicit prohibition of sex discrimination based on sexual orientation or gender identity, the Equality Act would for the first time prohibit sex discrimination in all federally funded activities. It would further protect all people from discrimination based on sex, race, religion, or national origin by expanding the kinds of entities considered spaces of public accommodations. Finally, it would ensure that the Religious Freedom Restoration Act (RFRA) cannot be used as a license to ignore these federal civil rights protections.

Protections under the Equality Act are especially essential for LGBTQ people at school and at work, where they deserve to be safe, respected, and valued. In 2017, 70.1 percent of LGBTQ students faced verbal harassment at school based on sexual orientation, and more than half based on their gender expression or gender.[1] More than a third report having missed one day at school in the past month because they felt unsafe at school, and at least two in five students avoided bathrooms and locker rooms.[2] Transgender students experience even higher rates of harassment in schools than LGBTQ students overall—77 percent experienced mistreatment because of their gender identity.[3] Over one third of transgender women report losing a job because of their gender identity or expression, and

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[1] GLSEN, THE 2017 NATIONAL SCHOOL CLIMATE SURVEY xix, available at https://www.glsen.org/sites/default/files/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf.
[2] *Id.* at xviii.
[3] Sandy E. James et al., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER Survey 11 (2016).

lesbian, bisexual, and queer women are 30 percent less likely to be invited for job interviews than their straight counterparts.[4] Students and working people need the Equality Act's strong, explicit protections against these and other forms of sex-based discrimination.

The Equality Act would also close longstanding gaps in federal civil rights law that will benefit all women, including providing new protections against sex-based harassment in public places and federally funded programs, new protections against excluding breastfeeding parents from public places, new protections against sex discrimination against independent contractors in federally funded programs, and new protections to ensure equal access to health care services, including reproductive health care services, to name only a few.

Some have sought to defend their opposition to the Equality Act by claiming that their opposition is rooted in concerns for the safety and equality of women and girls. The National Women's Law Center rejects in the strongest terms this attempt to scapegoat transgender women and girls in the name of women's rights. Not only do such arguments fail to recognize that transgender women and girls *are* women and girls deserving of the same rights to equal treatment as all other women and girls, these opponents falsely claim to represent the views, needs, and rights of women—and in doing so, ignore and distort reality. Put simply, allowing transgender people to use restrooms, locker rooms, and other gender-specific spaces aligned with their gender identity does not create risks for others.[5] In fact, forcing transgender girls or women to use men's rooms or trans boys or men to use women's rooms puts them at risk of verbal, physical, and sexual assault.[6] Many transgender students avoid using the restroom altogether while at school, for example, leading to serious health consequences.[7]

In considering the need for the Equality Act, we urge you to consider transgender individuals' heightened vulnerability to sexual violence. About one in two transgender individuals are sexually abused or assaulted at some point in their lives, with especially high rates among transgender people of color.[8] Protections against gender identity discrimination under our civil rights laws would meaningfully reduce transgender people's vulnerability to discriminatory treatment and violence based on their failure to conform to traditional gender stereotypes.

We also reject the false notion that the Equality Act threatens women's and girls' athletics participation or gender equity in sports. As an organization that has fought for over 45 years for the rights and opportunities of women and girls, we recognize that the real threats to women's and girls' athletics is institutional underfunding and undervaluing of athletic opportunities for women and girls. Equal participation in athletics for transgender women and girls does not pose such a threat. For this reason, with 20 other women's rights and gender justice organizations, this week we joined a statement in support of full and equal access to participation in athletics for transgender people, to which we direct the Committee.[9] Transgender women and girls have been participating in women's sports and activities for decades without any systemic competitive advantage. Their legal rights to do so have been successfully protected in many states for many years. As experts in sex discrimination, we know firsthand that equal opportunities for transgender people in athletics are not the problem; they are part of the solution.

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[4] CENTER FOR AMERICAN PROGRESS AND MOVEMENT ADVANCEMENT PROJECT, PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR LGBT WOMEN IN AMERICA (2015).

[5] *Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools*, HUMAN RIGHTS WATCH (Sept. 14, 2016), https://www.hrw.org/report/2016/09/14/shut-out/restrictions-bathroom-and-lockerroom-access-transgender-youth-us-schools; *see also* Rachel E. Moffitt, *Keeping the John Open to Jane: How California's Bathroom Bill Brings Transgender Rights Out of the Water Closet*, 16 GEO. J. GENDER & L. 475, 488-91 (2015).

[6] *See Shut Out, supra* note 5.

[7] NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 130-37 (Dec. 2016), available at https://perma.cc/M7MQ-ZQ52 ("NCTE Survey").

[8] *Id.* at 205.

[9] Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People, https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.5.19.pdf.

Sex discrimination blocks opportunities and works deep harm on those who face it. The National Women's Law Center supports the Equality Act because we believe those concerns require a strong federal response. Your Committee plays a critical role in affirming the rights of students and workers to learn and work free from discrimination. Thank you for your support of the important civil rights protections that the Equality Act would ensure for women, girls, and all LGBTQ people. If you have any questions, please contact me at emartin@nwlc.org or (202) 588-5180.

Sincerely,

Emily Martin
Vice President for Workplace Justice & Education
National Women's Law Center

Testimony of the National Center for Transgender Equality

U.S. House of Representatives - Committee on the Education and Labor

Subcommittee on the Civil Rights and Human Services

H.R. 5, The Equality Act – April 9, 2019

In the United States, there is a serious and urgent need to enact an explicit law to clarify and expand federal civil rights protections against sex discrimination, including discrimination against transgender people in employment, housing, education credit, public spaces and services, and federally funded programs. The National Center for Transgender Equality believes that passing H.R. 5, the Equality Act, will play a critical role in preventing this discrimination from continuing to erect barriers in the everyday lives of transgender Americans, especially in the 29 states that do not yet provide these explicit protections in state law. Through this testimony, we will demonstrate the far-reaching effects of discrimination against transgender people, which has been allowed to persist due to the lack of clarity on federal nondiscrimination protections and the inadequate patchwork of state and local laws.

Founded in 2003, the National Center for Transgender Equality is dedicated to improving the lives of transgender people and their families through public policy and public education. NCTE has worked with policymakers and advocates at the national, state, and local levels to implement effective policies in all of the areas covered by the Equality Act, including working on many of the 21 state and hundreds of local laws providing similar explicit protections. In 2015, NCTE conducted the U.S. Transgender Survey (USTS), a comprehensive survey of nearly 28,000 transgender adults in all every state and U.S. territories and military bases overseas, which provides evidence of the need for the protections of the Equality Act.

Who Transgender People Are

Transgender people—people who know themselves to be a gender that is different from the one they were thought to be at birth—live in every region and Congressional district. It is estimated that 1.4 million American adults and 150,000 youth between the ages of 13 and 18 identify as transgender.[1] In all, nearly two million Americans are transgender. The geographic distribution of the transgender

[1] Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* (2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-UnitedStates.pdf (estimating that 0.6% of adults in the United States identify as transgender); Jody L. Herman et al., *Age of Individuals who Identify as Transgender in the United States* (2017),

Americans is similar to that of the United States population overall.[2] Transgender people are of every age,[3] every faith, every race and ethnicity,[4] and come from every walk of life.

The Urgent Problem of Discrimination

Transgender people have always been a part of American society. Over recent years, the national conversation about transgender people has grown dramatically, giving an increasing number of Americans the chance to get to know who the transgender people in their communities are. Americans have come to know transgender people as their coworkers, classmates, and friends, and many Americans have learned to embrace their transgender children and parents, grandparents and grandchildren, siblings, and other loved ones. This growing understanding—and with it, growing acceptance—has allowed more and more transgender people to flourish and fully participate in their communities with the support of their families and communities.

Despite this unmistakable progress, transgender people continue to face widespread and pervasive mistreatment and discrimination when it comes to the most basic elements of public life—finding a job, having a place to live, accessing medical care, visiting restaurants and shopping malls, and using public transportation. This reality is reflected in a wide body of research over the last two decades,[5] including a several key federal surveys.[6] The most comprehensive survey to date of transgender Americans, the 2015 U.S. Transgender Survey (USTS), surveyed nearly 28,000 transgender adults nationwide.[7] The USTS revealed mistreatment, harassment, and violence in every aspect of life and startling disparities between transgender respondents and the general population. Several of its findings are highlighted below.

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https://williamsinstitute.law.ucla.edu/wpcontent/uploads/TransAgeReport.pdf (estimating that 0.7% of people in the United States between the ages of 13 and 17, or 150,000 adolescents, are transgender).

[2] Flores et al., *supra* note 1, at 3-4.

[3] Herman et al., *supra* note 1, at 3.

[4] Andrew R. Flores, Taylor N. T. Brown, & Jody L. Herman. *Race and Ethnicity of Adults Who Identify as Transgender in the United States* (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-ofTransgender-Identified-Adults-in-the-US.pdf.

[5] *See, e.g.*, Institute of Medicine. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011) (summarizing earlier research).

[6] *See, e.g.*, Michelle Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide*
Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017, 68 MMWR 67–71 (2019) (reporting data from the CDC's Youth Risk Behavior Survey demonstrating high rates of violence and harassment against transgender youth).

[7] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* (2016), www.ustranssurvey.org/reports. [8] American Psychiatric Association, "Position Statement on Discrimination Against Transgender and Gender Diverse Individual" (approved 2012; updated 2018), https://www.psychiatry.org/File%20Library/About-APA/OrganizationDocuments-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf.

Workplace Discrimination

As the American Psychiatric Association stated in adopting a policy in favor of inclusive nondiscrimination protections in 2012 (which it reaffirmed last year), "Being transgender or gender diverse implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression."[8] Respondents in the 2015 U.S. Transgender Survey reported widespread discrimination in the workplace and the job market:

- **One in eight (13%) have lost job because of being transgender** in their lifetime.
- **In the past year, 27%** of those who held or applied for a job during that year—or 19% of all respondents—**were fired, denied a promotion, or denied a job because of being transgender.**
- **Fifteen percent (15%) of those who had a job in the past year were verbally harassed, physically attacked, or sexually assaulted** at work because of being transgender during that year.
- **Nearly one-quarter (23%) of those who had a job in the past year reported other forms of mistreatment during that year** because of being transgender, such being told to present in the wrong gender in order to keep their job, being forced to use the wrong restroom, or having a boss or coworker share private information about their transgender status without their permission.
- **Overall, 30% of respondents who had a job in the past year were fired, denied a promotion, or experienced some other form of mistreatment related to being transgender.**

Experiences in Schools

The 2015 USTS surveyed transgender adults regarding their past experiences in K–12 schools, as well as their experiences in postsecondary education. Here, too, respondents reported widespread and severe discrimination that limited their educational opportunities and achievements.

- **More than three-quarters (77%)** of those who were out or perceived as transgender at some point between Kindergarten and Grade 12 (K–12) **experienced some form of mistreatment**, such as being verbally harassed, prohibited from dressing according to their gender identity, or physically or sexually assaulted because people thought they were transgender.
- This includes **more than half** (54%) who were **verbally** harassed, **nearly one-quarter** (24%) who were **physically attacked**, and **one in eight** (13%) who were **sexually assaulted** in K–12 because of being transgender.

- Out of all respondents who were out or perceived as transgender in K–12, **nearly one in five (17%) faced such severe mistreatment that they left a K–12 school.**
- Mistreatment followed transgender people into postsecondary school. Out of those who were out or perceived as transgender **in college or vocational school, nearly one-quarter (24%) were verbally, physically, or sexually harassed.**

The retrospective reports of transgender adults in the USTS are consistent with recent surveys of transgender middle and high school students, including in the CDC-backed Youth Risk Behavior Survey and in the 2017 National School Climate Survey.[8]

Housing

USTS respondents also reported far-reaching discrimination in the rental and real estate markets, as well as in accessing emergency shelter:

- **Nearly one-quarter (23%) of respondents experienced some form of housing discrimination in the past year**, such as being evicted from their home or denied a home or apartment because of being transgender.
- **Nearly one-third (30%) of respondents have experienced homelessness** at some point in their lives, and **one in eight (12%) experienced homelessness in the past year** as a result of anti-transgender discrimination.
- For many transgender people, homeless shelters provide little recourse. In the past year, **seven out of ten (70%) of those who stayed in a shelter faced mistreatment**, including being harassed, sexually or physically assaulted, or kicked out because of being transgender. **More than one-quarter** (26%) of those who experienced homelessness in the previous year **avoided staying in a shelter** because they feared being mistreated for being transgender.

Barriers to housing and even to emergency shelter subject transgender people and their families to tremendous instability in their lives, puts them at risk of greater violence and poor health outcomes, and prevents many from productively participating in the workforce and public life.

Public Services and Spaces

Transgender respondents in the 2015 USTS also reported pervasive discrimination when accessing the many public spaces and services Americans avail themselves of every day, from retail stores, movie theaters, and hotels to courthouses and government offices.

Respondents reported the following experiences **from the previous year:**

[8] Johns et al., *supra* note 6; Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in our Nation's Schools* (2018).

- Out of respondents who visited a place of public accommodation where they were perceived to be transgender, **nearly one-third (31%) experienced mistreatment**.
- This included **14%** who were **denied equal treatment or service, 24%** who were **verbally harassed**, and **2%** who were **physically attacked** at a public accommodation because of being transgender.
- Respondents were asked about their experiences in **public assistance or other government offices**. Out of those who visited such offices in the past year and were perceived to be transgender, 17% were denied equal treatment or verbally harassed. These experiences were especially common among people of color, including Native American (25%), multiracial (22%), Black (20%), and Latino/a (20%) respondents, as well as among respondents with disabilities (21%).
- Of respondents who had visited a **state motor vehicle agency (DMV) office** in the past year and believed staff knew or thought they were transgender, 14% reported mistreatment because they were transgender.
- Of respondents who used **public transportation** in the past year and believed transit employees knew or thought they were transgender, 34% reported harassment, physical violence, or denial of equal treatment or service because they were transgender.
- Of respondents who visited **courthouses** in the past year and believed judges or court staff knew or thought they were transgender, 13% reported harassment or other mistreatment because they were transgender.
- Of respondents who sought **services for victims of domestic or sexual violence** and believed staff knew or thought they were transgender, 16% were denied equal treatment or service, 11% were verbally harassed, and 2% were physically attacked because of being transgender.
- Of respondents who interacted with **police** who thought or knew they were transgender in the past year, 58% faced some form of mistreatment. This included being verbally harassed, physically assaulted, or sexually assaulted by police.

Health Care

Like anyone else, transgender people need preventive health care to protect their health and medical treatment when they are ill or injured. Yet in this most basic of human needs as well, USTS respondents reported severe and widespread discrimination, including harassment and outright refusal of care.

Respondents reported the following experiences **in the previous year**:

- **One-third (33%) of those who saw a health care provider faced mistreatment,** such as being verbally harassed or refused treatment because of their gender identity.

- **Nearly one-quarter (23%) did not seek the health care they needed due to fear of being mistreated as a transgender person**, and 33% did not see a doctor when needed in the previous year because they could not afford it.
- **One in four (25%) respondents experienced a problem with their insurance related to being transgender,** such as being denied coverage for care related to gender transition or being denied coverage for routine care because they were transgender.

These barriers to care contribute to the significant health disparities that continue to affect transgender people.

The Wide-Ranging Impacts of Discrimination

By denying transgender people equal opportunities to thrive, stigmatizing them, and pushing them to the margins of society, discrimination imposes profound harm on the lives of these members of the American community. It contributes to economic hardships, to health disparities, and to transgender people's vulnerabilities to violence. The following findings from the USTS underscore key disparities between transgender respondents and the general population. These disparities were consistently starker for people who had faced discrimination, such as losing a job, being mistreated in school, or being denied access to health care.

Economic Hardship and Instability

Widespread and pervasive discrimination in across all areas of public life drives substantial economic disparities for transgender people today:

- **Nearly one-third (29%) were living in poverty**, more than twice the rate among adults in the U.S. population at the time (12%).
- With an **unemployment rate of 15%**, respondents were three times as likely as adults in the U.S. population to be unemployed.
- Respondents were nearly **four times less likely to own a home (16%) compared to the U.S. population (63%)**.
- **Nearly one-third (30%) had experienced homelessness** in their lives.

Health Disparities

Discrimination across the lifespan, including in access to health care, also drives health disparities. As major medical and mental health associations have recognized, these disparities are not "inherently attributable to one's identity" as a transgender person, but are driven in large part by social stigma,

rejection, discrimination, violence, and the resulting stress and social and economic barriers.[9] USTS respondents reported the following:

- Nearly **four in ten (39%) experienced serious psychological distress** in the month before completing the survey (based on the Kessler 6 Psychological Distress Scale), compared with only 5% of the U.S. population.
- Forty percent (40%) have attempted suicide in their lifetime, nearly **nine times the estimated rate in the U.S. population** (4.6%). Seven percent (7%) attempted suicide in the past year— **nearly twelve times the rate in the U.S. population** (0.6%). Psychological distress and suicide attempts were correlated with experiences of discrimination, violence, and rejection.
- Respondents were **living with HIV** (1.4%) at **nearly five times the rate in the U.S. population** (0.3%).

Harassment and Violence

Discrimination against transgender people often includes, and makes transgender people more vulnerable to, violent victimization across the lifespan. USTS respondents reported the following:

- **Nearly one in ten (9%) respondents were physically attacked** in the past year because of being transgender.

  Nearly half (47%) of respondents were sexually assaulted at some point in their lifetime and **one in ten (10%) were sexually assaulted in the past year.**
- **More than half (54%) experienced some form of intimate partner violence**, including acts involving coercive control and physical harm.
- **Nearly one-quarter (24%) have experienced severe physical violence by an intimate partner, compared to 18% in the U.S. population.**

Many respondents reported being targeted for violence in the workplace, at school, in hospitals or other health care settings, and by police and other government officials.

The Compounding Impact of Other Forms of Discrimination

The 2015 USTS found a clear and disturbing pattern when respondents' experiences were examined by race and ethnicity: transgender people of color consistently experienced higher rates and more severe forms of discrimination.

- **Poverty:** While respondents in the USTS overall were living in poverty (29%) at a rate more than twice that in the U.S. adult population (12%), **the rate of poverty among transgender people of color was more than three times higher than the general U.S.**

[9] Jason Rafferty, *American Academy of Pediatrics Policy Statement: Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 PEDIATRICS (2018).

population, including Latino/a (43%), Native American (41%), multiracial (40%), and Black (38%) respondents.

- **Unemployment:** The unemployment rate among respondents of color—including Middle Eastern (35%), Native American (23%), multiracial (22%), Latin/o (21%), and Black (20%) respondents—was **more than four times higher** than that in the U.S. population (5%).
- **HIV Status:** 6.7% of Black respondents were living with HIV—compared to 1.4% of USTS respondents overall and 0.3% in the general U.S. population. For Black transgender women, the prevalence was a staggering 19%.

The 2015 USTS similar found that other historically marginalized groups—including undocumented residents, respondents with disabilities, and respondents who have experienced homelessness—faced higher levels of violence, mistreatment, and discrimination.

Experiences of Discrimination

It is difficult to understand the full significant and impact of this widespread and pervasive discrimination from statistics alone. These are just a few of the stories of discrimination NCTE hears about from across the country every day:

- **Elizabeth Hardy** is a transgender woman and veteran from Shreveport, LA who has been repeatedly subject to harassment and humiliation while accessing health care at the Overton Brooks Department of Veterans Affairs Medical Center in Northwest Louisiana. Ms. Hardy, whose identity documents have been updated for over two decades to identify her as female, is regularly called "mister" by staff in front of other patients. She says that the anxiety created by her experiences at the clinic have impacted her medical care and overall health.[10]
- **Maddie Rose**, a transgender girl, was the subject of violent online threats from local parents during her first week of seventh grade in Achille, OK in August 2018. In response to these threats and to in-person harassment the family faced they shortly thereafter relocated to Houston, TX.[11]
- **Jenn Brewer** is a transgender girl in middle school in Ft. Belvoir, VA. Jenn has been laughed at, shoved, and ultimately punched and knocked unconscious at school, missing a week of classes due to a concussion. The response of school officials was sorely

[10] Sara McNell, *Transgender Veteran Clashes with Shreveport VA Over Medical Records*, SHREVEPORT TIMES (Mar. 22, 2019), https://www.shreveporttimes.com/story/news/2019/03/22/transgender-veteran-claims-discrimination-va-medicalcenter/3236472002.

[11] Alexander Kacala, *After Violent Threats, Family of Transgender Girl Looks to Leave Town*, NBC NEWS (Aug. 20, 2018), https://www.nbcnews.com/feature/nbc-out/after-violent-threats-family-transgender-girl-looks-leave-town-n902216.

inadequate, with officials a school resource officer saying, "Well she's really a boy so what did you expect when people found out?"[12]

- **Amy Adams** is the mother of a transgender girl in Stafford, VA who was left out in the hallway during a lockdown drill when teachers did not know which locker room she should take shelter in. This was a direct result of the school's policy of excluding her from the girls' restrooms and locker rooms.[13]

Why the Equality Act?

The Equality Act is sorely needed to provide clarity and consistency to our civil rights laws while filling longstanding gaps in protections for all. In doing so, it will send the important message that transgender, lesbian, gay, and bisexual Americans are full members of our society, entitled to dignity, respect, and equal opportunity.

Over the past two decades, five federal circuit courts[14] and dozens of district courts[15] have applied

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[12] Dawn Ennis, *Military Families with Transgender Kids Fear for Future*, NBC NEWS (Jul. 28, 2017), https://www.nbcnews.com/feature/nbc-out/military-families-transgender-kids-fear-future-n787046.

[13] Tim Fitzsimmons, *Virginia School Allegedly Barred Trans Student from Active-Shooter Drill*, NBC NEWS (Oct. 9, 2018), https://www.nbcnews.com/feature/nbc-out/virginia-school-allegedly-barred-trans-student-active-shooter-drill-n918216.

[14] *Rosa v. Park West Bank & Trust Co.,* 214 F.3d 213 (1st Cir. 2000); *Smith v. City of Salem,* 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *EEOC v. Harris Funeral Homes,* 884 F.3d 560, 566 (6th Cir. 2018); *Schwenk v. Hartford* 204 F.3d 1187 (9th Cir. 2000); *Glenn v. Brumby,* 663 F.3d 1312, 1316 (11th Cir. 2011); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018).

[15] *See, e.g.*, *Tovar v. Essentia Health*, No. cv-16-100-DWF-LIB (D. Minn. Sept. 20, 2018); *EEOC v. A&E Tire*, No. 1:17cv-02362 (D. Colo. Sept. 5, 2018); *Adams v. Sch. Bd. Of St. Johns Cty.*, 318 F. Supp. 3d 1293 (M.D. Fla. Jul. 26, 2018); *Flack v. Wis. Dep't of Health Servs.*, No. 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018); *Doe v. Mass. Dep't of Corr.*, No. CV-17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018); *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv-54 (E.D. Va. May 22, 2018); *Parker v. Strawser Construction*, No. 2:17-cv-541, 2018 WL 1942374 (S.D. Ohio Apr. 25, 2018); *Wittmer v. Phillips 66 Co.*, No. CV H-17-2188, 2018 WL 1626366 (S.D. Tex. Apr. 4, 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp.3d 704 (D. Md. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 5668071 (W.D. Wash. Dec 11, 2017); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, No. 3:17-cv-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017); *E.E.O.C. v. Rent-a-Center East, Inc.*, 264 F. Supp. 3d 952 (C.D. Ill. 2017); *Brown v. Dep't of Health & Human Servs.*, No. 8:16DCV569, 2017 WL 2414567 (D. Neb. June 2, 2017); *Mickens v. Gen. Elec. Co.*, No. 16-603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388, 2016 WL 5843046 (D. Nev. Oct. 4, 2016); *Bd. of Ed. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Cruz v. Zucker*, 195 F. Supp .3d 554 (S.D.N.Y. 2016); *Doe v. Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Ca. 2015); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015); *U.S. v. S.E. Okla. State Univ.*, No. CIV–15–324–C, 2015, WL 4606079 (W.D. Okla. July 10, 2015); *Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03–CV–0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

[17] *Compare, e.g., Attorney General Jeff Sessions, "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964" (Oct. 4, 2017) with Macy v. Holder, E.E.O.C. Appeal No. 0120120821 (2012).*

Supreme Court precedent to recognize that discrimination on the basis of an individual's gender identity is a form of sex discrimination under a range of federal laws, including the 1964 Civil Rights Act, the Fair Housing Act, and the Equal Credit Opportunity Act. Indeed, the overwhelming majority of federal courts addressing the issue have agreed that anti-transgender discrimination is illegal under sex discrimination laws. The logic in these cases has also been applied in a rapidly growing number of courts to recognize that discrimination based on sexual orientation is also necessarily a form of sex discrimination.

In the absence of clear, explicit protections enshrined in federal legislation, however, confusion persists about the protections afforded transgender Americans under our laws. This confusion has been exacerbated as several federal agencies that previously recognized the overwhelming weight of the case law have reversed their positions and argued that these laws afford no protection to transgender people, creating a split among federal agencies.[17] The Equality Act seeks to remedy this persistent problem by providing clarity and consistency nationwide while also strengthening existing protections. This bill would clarify existing laws to make it explicit and unambiguous that federal protections against sex discrimination encompass discrimination based on gender identity or sexual orientation. In doing so, it formally codifies years of case law, aiming to ensure that the rights federal judges have recognized time and again are reflected in the lives of LGBT people and their families.

The Equality Act also strengthens the protections on the basis of sex, including sexual orientation and gender identity, by taking the long overdue step of prohibiting sex discrimination in public spaces and services and federally funded programs. And finally, the bill fills a longstanding and unacceptable gap in our historic civil rights laws by ensuring that for the first time that protections in public spaces and services—including against discrimination on the basis of race, color, religion, or national origin—extend to retail stores, online merchants, and public transportation.

Conclusion

All Americans will benefit by affording transgender Americans equal opportunities to participate in and contribute to their communities. That is the purpose and the essence of our historic civil rights laws, which the Equality Act clarifies and strengthens. The Equality Act reflects the best of American values and aspirations, and it is past time to enact this simple legislation.

Chairwoman BONAMICI. I remind my colleagues that pursuant to committee practice, materials for submission for the hearing record must be submitted to the committee clerk within 14 days following the last day of the hearing, preferably in Microsoft Word format. The materials submitted must address the subject matter of the hearing. Only a member of the committee or invited witness may submit materials for inclusion in the hearing record. Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the committee clerk within the required timeframe, but please recognize that years from now that link may no longer work. That is my favorite part of this.

So again, I want to thank the witnesses all for your participation today. What we have heard is very valuable. Members of the committee may have additional questions for you. We ask the witnesses to please respond to those questions in writing. The hearing record will be held open for 14 days to receive those responses.

And I remind my colleagues that pursuant to committee practice, witness questions for the hearing record must be submitted to the majority staff or committee clerk within 7 days. The questions submitted must address the subject matter of the hearing.

I now recognized the distinguished ranking member, Mr. Comer, for his closing statement.

Mr. COMER. Thank you, Madam Chair, for yielding. It is very clear this is a difficult subject, and I appreciate you all coming to testify here today.

What is clear is that this bill is not ready to become law, and Mr. Lorber discussed several significant concerns with the scope and application of the language in H.R. 5, specifically our concern with what it does to the Religious Freedom Restoration Act, unfunded mandate in public schools, as well as the disarray it could potentially create in women's high school sports.

And to that point, I have several letters and documents I want to include in the record which will highlight several concerns with the bill.

The first letter is in opposition from the Council for Christian Colleges and Universities; a letter from seven medical professional organizations expressing their concern; a letter from Women's Liberation Front; a letter from the American Association of Christian Schools noting the harm the Equality Act would cause to Christian education in America; ACSI, Association of Christian Schools International expressing concerns with respect to the Religious Freedom Restoration Act; a letter from the Family Policy Alliance; a letter from the United States Conference of Catholic Bishops in opposition to H.R. 5; a letter from more than 50 religious faith-based groups writing about the harm the Equality Act does to religious freedom; and finally, a Wall Street Journal article I would like to submit to the record.

Chairwoman BONAMICI. Without objection.

[The information referred to follows:]

Chairwoman Suzanne Bonamici
Subcommittee on Civil Rights and
Human Services
2176 Rayburn House Office Building
Washington, DC 20515

Ranking Member James Comer
Subcommittee on Civil Rights and
Human Services
2101 Rayburn House Office Building
Washington, DC 20515

April 9, 2019

Dear Chairwoman Bonamici and Ranking Member Comer:

As the committee begins its hearings today on the Equality Act we write representing over 150 institutions of faith-based higher education in the United States to share with you the impact that this piece of legislation would have on our institutions. While the Equality Act moves to expand the scope of the Civil Rights Act, it ultimately harms a diverse group of educational, social service, and civic institutions that contribute significantly to the strength and vibrancy of our society by failing to preserve the essential liberty protections provided even under current law. In particular, as it relates to the sector of faith-based higher education that has religious convictions around marriage, human sexuality, and gender, the Equality Act would put at risk their ability to hire professors who support these schools' religious teachings and to operate programs that are consistent with their religious beliefs and missions. Middle- and low-income students would be prohibited from taking their federal student aid to these institutions, thus having their choice of colleges restricted in an unprecedented way. Religious students, first-generation college students, and students from racial and ethnic minority groups would be disproportionately impacted.

Specifically:

- Religious colleges and universities will not be able to apply religious standards of conduct in making employment decisions. The Equality Act's religious protection is so narrow that a school could make hiring decisions based only on whether the applicant professed to be a member of the same religion, regardless of whether the member actually followed the institution's religious beliefs and teachings.
- Properties of religious schools will be treated as public accommodations (spaces). This would require the religious college to allow access to campus facilities to the general public, even to those who don't comply with university religious standards. Additionally, the bill makes a place of "gathering" a public accommodation, which raises doubts whether a house of worship or the sacred spaces on a college campus would now be governed by federal law.
- Federal financial aid (such as Pell grants) will be jeopardized for any student seeking to attend a religious college or university whose religious teachings vary from the Equality Act. This penalty on middle- and low-income students would disproportionately impact religious students, first-generation college students, and students from racial and ethnic minority groups.
- Federal research grants will be denied to any religious university that enforces religious conduct standards in its student admissions, continuing enrollment, and graduation

decisions, even when they are the best qualified or most cost-effective institutions to conduct the research. Taxpayers lose when government must select from a smaller pool of applicants.

- The bill has no protection from the loss of federal or state tax-exempt status because of a religious organization's lawful expressions or activities stemming from its beliefs regarding marriage, human sexuality, and gender. Loss of tax-exempt status would harm students directly, as scholarships, new classrooms, and athletic facilities are all funded through the generous donations of others.
- The bill guts the Religious Freedom Restoration Act (RFRA), whose important balancing test ensures that the government is rightly protecting the religious rights of its citizens. Without this balancing test in place, LGBT rights will always trump an institution's religious conscience rights, no matter how great the harm to religion.

Faith-based higher education has always been an essential element of the diversity of the higher education system in the United States—many of the first colleges and universities in the United States were religious—and religious colleges and universities continue to play a vital role in ensuring that every aspiring college student is able to find the institution that is the best fit for her. In fact, the most recent data on this topic from the Higher Education Research Institute at UCLA on Spirituality in Higher Education found that four in five entering college students indicated "having an interest in spirituality" and "believing in the sacredness of life," and nearly two-thirds said that "my spirituality is a source of joy." Moreover, nearly half (48%) say that it is "essential" or "very important" that college encourage their personal expression of spirituality. Therefore, it is essential that protections for LGBT persons be paired with the essential religious freedoms that maximize freedom for all.

Like all colleges and universities in the country, faith-based institutions graduate future teachers, social workers, nurses, members of the military, and business leaders. Our society benefits from their contribution to the common good. Additionally, faith-based colleges and universities have graduation rates that are above the national average, the highest loan repayment rates in higher education, and remarkable track records of successfully graduating low-income, first-generation, and racial- and ethnic-minority students.

The United States has a long tradition of preserving diversity of thought, especially as contributed by religious beliefs and communities, not only within its higher education system but also within society as a whole. This was most recently affirmed by Justice Kennedy in the majority opinion in *Obergefell,* when the matter of same-sex marriage and religious convictions were at odds: "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." It is vital that religious institutions of higher education—which offer unique and essential perspectives to

society, to the academy generally, and to the scholarship of each academic discipline—be protected so that they can continue to flourish.

We believe that God created every person equally in his own image. As divine image-bearers, all people have inestimable value and dignity before God and deserve honor, respect, and protection. We agree that no one should face violence, harassment, or unjust discrimination on the basis of sexual orientation or gender identity. American civil rights laws have never treated—and should not treat—all issues and protected groups identically, but have been amended over time to provide basic protections to additional groups. We believe there is a place for recognizing that, as all people are made in the image of God, LGBT Americans should also receive such basic protections, in a way that also respects the rights of others.

Thank you for taking the time to consider the issues raised in this letter. We are grateful to you and to this committee for its longstanding commitment to student access and success, and we wanted you to understand how the Equality Act would undermine many of those goals by failing to respect the religious character and mission of our institutions. We look forward to working with you on this piece of legislation and on the Higher Education Act to ensure that every student in the United States, including religious students and students who wish to attend religious institutions, can find the best higher educational opportunity to prepare them for a lifetime of successful contribution to society. Because of the devastating impacts this bill would have on millions of students and the hundreds of institutions they attend, we write to express our opposition to the Equality Act. We believe there is a better way forward.

Thank you for your attention to our concerns,

Shirley V. Hoogstra
President
Council for Christian Colleges & Universities

Henry J. Eyring
President
Brigham Young University–Idaho

Kevin J Worthen
President
Brigham Young University

Clark G. Gilbert
President
BYU–Pathway Worldwide

John S. Tanner
President
Brigham Young University–Hawaii

Bruce S. Kusch
President
LDS Business College

April 9, 2019

The Honorable Suzanne Bonamici
Chair
Subcommittee on Civil Rights and Human Services
U.S. House of Representatives
Washington, DC 20515

The Honorable James Corner
Ranking Member
Subcommittee on Civil Rights and Human Services
U.S. House of Representatives
Washington, DC 20515

Re: The Equality Act (H.R. 5)

Dear Chairman Nadler and Ranking Member Collins:

We are writing on behalf of the countless medical professionals—physicians, nurses, and other health care workers—who are deeply concerned about a mounting threat to our conscience rights and the integrity of the medical profession.

The Equality Act (H.R. 5) elevates "sexual orientation" and "gender identity" as protected categories in the federal Civil Rights Act. It also expands the definition of public accommodations to include any "establishment that provides health care."[1] This bill would effectively mandate that all health care professionals and providers perform and pay for controversial transition-affirming therapies against their best medical judgment. The bill includes no conscience protections and explicitly removes recourse to the Religious Freedom Protection Act (RFRA) for citizens affected by this burdensome mandate.

Medical professionals must be free to exercise their best medical judgment when it comes to the treatment of our patients. There is no consensus within the medical community about how to best care for individuals who struggle with gender dysphoria (i.e. "significant distress or impairment" arising from the "incongruence between one's experienced/expressed gender and assigned gender").[2] In fact, many of these treatments remain highly controversial, especially given the accompanying medical risks.

So-called sex-reassignment therapies have not been shown to reduce the extraordinarily high rate of suicide attempts among people who identify as transgender: 41 percent, compared with 4.6 percent of the general population).[3] As pointed out by the Obama Centers for Medicare and Medicaid, the most thorough study of outcomes for sex-reassigned people, a 30 year longitudinal study from Sweden, found a nineteen-times-greater likelihood for death by suicide.[4]

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[1]Equality Act, H. 5, 116th Cong., 1st Sess., https://www.congress.gov/bill/116th-congress/house-bill/5/text.
[2]American Psychiatric Association, "Gender Dysphoria," Diagnostic and Statistical Manual of Mental Disorders, 5th ed. (Arlington, Va.: American Psychiatric Publishing, 2013), 452.
[3]American Foundation for Suicide Prevention, "Suicide Attempts among Transgender and Gender Non-Conforming Adults," January, 2014, https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf (accessed April 1, 2019).
[4]Centers for Medicare & Medicaid Services, *Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N)*, June 2, 2012, https://www.cms.gov/medicare-coverage-database/details/nca-proposed-decision-memo.aspx?NCAId=282 (accessed April 1, 2019).

These studies do not even begin to address the experimental therapies being conducted on gender dysphoric children. Studies show that 80 to 95 percent of children who experience a discordant gender identity come to identify with their bodily sex after puberty.[5] Yet transgender activists advise drastic hormonal and surgical interventions for gender dysphoric children: social transition as young as 4, puberty blocking drugs as young as 9, cross-sex hormones as young as 14, and surgery as young as 18.[6] These medical interventions come with serious health consequences.

Puberty blocking drugs are non-FDA approved to permanently delay natural puberty and must be prescribed off-label by doctors. Side effects include "disfiguring acne, high blood pressure, weight gain, abnormal glucose tolerance, breast cancer, liver disease, thrombosis, and cardiovascular disease"—and, of course, sterility.[7]

Moreover, blocking therapies are non-reversible. As Drs. Hruz, Mayer, and McHugh note in a study for *The New Atlantis*, "If a child does not develop certain characteristics at age 12 because of a medical intervention, then his or her developing those characteristics at age 18 is not a 'reversal,' since the sequence of development has already been disrupted."[8]

The medical community must take these numbers seriously and exercise caution when it comes to the treatment of gender dysphoria. Yet the Equality Act would leverage federal authority to silence the debate within the medical community regarding these controversial therapies.

There are already efforts at the state level to suppress any difference of opinion when it comes to these drastic therapies. Catholic hospitals in New Jersey and California were sued when they declined to perform hysterectomies on otherwise healthy females who wished to become male.[9] A third Catholic hospital in Washington settled out of court with the ACLU after they sued the hospital for declining to perform a double mastectomy on a sixteen-year-old girl.[10] These lawsuits are a direct attack on the autonomy and integrity of the medical profession.

Human sexuality is not a disease and should not be treated as such. Moreover, it is not standard medical practice to intervene in the natural, healthy sexual development of children nor to unnecessarily remove healthy organs in adults. We believe that the best therapies for gender

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[5]Jessica Singal, "What's Missing From the Conversation About Transgender Kids," *The Cut*, July 25, 2016, https://www.thecut.com/2016/07/whats-missing-from-the-conversation-about-transgender-kids.html (accessed April 1, 2019).
[6]Ryan T. Anderson, *When Harry Became Sally*, (New York, NY: Encounter Books, 2018), p. 120-122.
[7]Paul Hruz, Lawrence S. Mayer, and Paul R. McHugh, "Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria," *The New Atlantis*, Number 52 (Spring 2017), https://www.thenewatlantis.com/publications/growing-pains (accessed April 1, 2019).
[8]Ibid.
[9]Sandhya Somashekhar, "Transgender man sues Catholic hospital for refusing surgery," *The Washington Post*, January 6, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/01/06/transgender-man-sues-catholic-hospital-for-refusing-surgery/ (accessed April 1, 2019). "Catholic hospital group sued for refusing transgender hysterectomy," *Catholic News Agency*, March 25, 2019, https://www.catholicnewsagency.com/news/catholic-hospital-group-sued-for-refusing-transgender-hysterectomy-85873 (accessed April 1, 2019).
[10]News release, "ACLU-WA and PeaceHealth Agree to Settle Lawsuit Involving Transgender Healthcare," ACLU, January 3, 2019, https://www.aclu.org/news/aclu-wa-and-peacehealth-agree-settle-lawsuit-involving-transgender-healthcare (accessed April 1, 2019).

dysphoria will seek to make patients comfortable in their own bodies, rather than take unnecessary medical risks to attempt the impossible and make their bodies reflect their feelings.

Medical professionals must remain free to exercise their best medical judgment when it comes to their patients. A federal gender identity health care mandate like the Equality Act would have disastrous consequences.

We urge you to oppose the Equality Act in order to protect the integrity of the medical profession and allow us to serve our patients freely and in good conscience.

Sincerely,

Donna J. Harrison, MD
Executive Director
American Association of Pro-Life Obstetricians and Gynecologists

Michelle Cretella, MD
Executive Director
American College of Pediatricians

Greg F. Burke, MD, FACP
Co-Chairman, Ethics Committee
Catholic Medical Association

David Stevens, MD, MA (Ethics)
CEO
Christian Medical Association

Diana Ruzicka, RN, MSN, CNS-BC
President
National Association of Catholic Nurses, U.S.A.

Dr. Marie T. Hilliard, MS, MA, JCL, PhD, RN
Senior Fellow
The National Catholic Bioethics Center

Phillip L. Stiver, MD
Chair
Physicians Resource Council of Focus on the Family

April 4, 2019

The Honorable
U.S. House of Representatives
Washington, DC 20515

Dear Education and Labor Committee Member,

We are national grassroots women's organizations with contrasting views on many issues, but we are joining hands in our mutual concerns over the Equality Act. The attached US Equality Act: Gender Identity Impact Summary delineates why we are united in purpose against this bill. Making "gender identity" a protected characteristic under federal law would erase the protected category of sex which has been a foundation for securing the rights and opportunities of women in the United States.

We implore you to recognize the powerful message that our joining together from the left and the right conveys in opposing the Equality Act.

Sincerely,

Women's Liberation Front

Concerned Women for America Legislative Action Committee

Hands Across the Aisle

Attachment

US EQUALITY ACT: GENDER IDENTITY IMPACT SUMMARY

Making "gender identity" a protected characteristic under federal law would erase the protected category of sex.

The Equality Act, introduced in the US House of Representatives as H.R. 5 in 2019, includes gender identity rules that have received little public focus regarding their adverse impact on sex stereotyping bans, or the **danger they pose to women and children.**

In several places in this bill, it directs the term "sex" in federal civil rights law to be replaced with the term, "sex, sexual orientation, gender identity." The bill's authors made clear that gender identity is to take precedence over and replace sex as a protected category. The bill doesn't mention individuals with clinically diagnosed gender dysphoria, or undertaking surgical or hormonal transition, thus making clear that **self-declared gender identity would be sufficient** to claim protected legal status.

From the bill summary: "Employers must recognize individuals in accordance with their gender identity if sex is a bona fide occupational qualification that is reasonably necessary to the normal operation of that particular business or enterprise."

Women and girls would be harmed by the Equality Act.

Under current civil rights law employers may hire and assign work on the basis of sex only when it's a bona fide occupational qualification. These are some jobs and assignments this change will affect, **taking away the right** of Americans to insist that only someone of the same sex be able to:

- Perform security pat downs or strip searches
- Supervise locker rooms or shared **showers**
- Handle **intimate care** for hospital and long-term care patients
- Chaperone a doctor or medical assistant who is providing such care
- Perform intimate **medical examinations**
- Supervise drug tests
- Supervise **children** on overnight trips

Also from the summary, "The bill prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity." This means that American women will no longer be able to expect any single-sex facilities when using or being required to stay in:

- Shared hospital rooms or wards
- Locker rooms and public or group showers
- Multi-stall bathrooms
- Jails, prisons, or **juvenile detention** facilities
- Homeless shelters
- Overnight drug rehabilitation centers
- Domestic **violence or rape crisis** shelters

Women sharing prison showers, emergency shelters, changing rooms, and long-term care facilities with strangers shouldn't be put in the position of wondering if they can complain about a naked male in their presence, or if that complaint would be a violation of his civil rights.

No concept so poorly defined as "gender identity" should be passed into federal law as a protected characteristic, especially not when it would effectively erase the protected category of sex.

Women's sports and scholarships would be at risk

This bill will end sports programs and scholarships set aside for women and girls. All such programs **will have to admit men and boys** who identify themselves as women or girls. Such programs will no longer meet their intended purpose of protecting the rights of women and girls by redressing historical inequality of opportunity.

What is Gender? Anything Except Sex.

Because the term gender identity has been defined in the bill as, "gender-related identity, appearance, mannerisms, or characteristics, regardless of the individual's designated sex at birth," it redefines the protected characteristic of sex as everything **except** sex.

"Gender-related identity" has **no definition**. It likely refers to a claim of feeling that one is of a different sex, or no sex, regardless of one's biological makeup. Physical sex is clear for 99.98 percent of people, and all intersex people also have a sex. Rules and policies based on this poor wording and muddled thinking will create **judicial chaos** and will not protect the rights of women and children, or anyone else the bill seeks to protect.

Discrimination against people on the basis of appearance, mannerisms, and the oddly undefined "characteristics," as related or unrelated to sex, should already be prohibited under existing laws that prohibit discrimination on the basis of sex stereotypes. This definition seems to define **sex stereotypes** as a protected characteristic, thereby erasing legal protections women may have against discriminatory sex stereotyping. Indeed, lawyers and judges are being directed to disregard sex, making it **impossible to define the category of sex** that commonly has the stereotype attached to it.

The authors of this bill **can't define either gender or gender identity** outside of sex stereotypes, yet they suggest that any person can claim a gender identity. This gender identity, still undefined, will override their legal sex in all those cases that the law previously allowed sex to be recognized as a bona fide consideration.

This bill tragically attempts to prohibit sex discrimination by forbidding the law to see sex. A law, and courts, that cannot see sex objectively, also cannot address sex discrimination or protect the **bodily privacy rights and dignity** of Americans in those circumstances where sex matters immensely.

April 5, 2019

Chairwoman Suzanne Bonamici
Civil Rights and Human Services Subcommittee
2176 Rayburn House Office Building
Washington, DC 20515

Ranking Member James Comer
Civil Rights and Human Services Subcommittee
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Bonamici and Ranking Member Comer,

I write to you on behalf of the 750 schools in our national association, urging you to oppose the Equality Act (H.R. 5), which would mandate a single ideological viewpoint of human sexuality across America. The Equality Act would irreparably harm Christian education in America.

We agree with many others who have written and argued that the Equality Act would hurt medical and creative professionals, women, charitable civic organizations, churches, employers, and individuals. We are particularly concerned that the Equality Act would undermine the rights of women and girls in athletics, education, and business. We are also alarmed that the Equality Act would force medical professionals to administer experimental puberty blockers and cross-sex hormones to children and to perform sex reassignment surgery on teenagers and adults who experience gender dysphoria. The available evidence indicates that such treatments do more harm than good. In any event, as a Christian school association, our primary focus is on the hundreds of schools, thousands of teachers, and the tens of thousands of students in our association who would be irreparably harmed by this bill.

Of primary concern to us is that the Equality Act is inherently hostile to religion. Unlike virtually all state and local laws that forbid discrimination on the basis of sexual orientation and gender identity, the Equality Act contains no exemptions for religious organizations or others exercising their religious beliefs. It does not even exempt houses of worship and their relationships with their clergy. Christian schools, which are voluntary communities, live out the biblical ethic regarding human sexuality and the distinction between the sexes. They welcome into their communities those experiencing same-sex attraction or gender dysphoria but expect all community members to heed their understanding of what the Bible teaches on these subjects. The Equality Act would forbid our schools from living out their sincerely held beliefs and from maintaining their religious character.

In addition to the complete absence of any sort of religious exemptions, the Equality Act partially repeals the Religious Freedom Restoration Act (RFRA), which was adopted by overwhelming bipartisan majorities and signed by President Bill Clinton in 1993. This is an unprecedented attack on religious liberty that deprives our member schools and others from even asserting that particular applications of the Equality Act substantially burden their religious exercise without adequate justification. Carving out exceptions to RFRA puts our country on a dangerous path away from its fundamental commitment to religious liberty.

The Equality Act's exclusion of religious exemptions and partial repeal of RFRA are utterly inconsistent with Justice Kennedy's declaration in Obergefell v. Hodges that a traditional view of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people." [1] Unfortunately, the Equality Act would dictate that traditional and religious views of human sexuality essentially have no place in civil society.

The Equality Act also alters the general principle that schools which do not accept government funding are not subjected to government regulation. Under this bill the many religious colleges that participate in federal grant programs would clearly be forced to adopt SOGI ideology. It seems likely that passage and implementation of the Equality Act would mean that Christian schools would be considered a place of "public accommodation" that "provides a good, service, or program." Under this determination, Christian schools would be forced to hire teachers and accept students who are unwilling to abide by biblical sexual ethics. It is

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possible that Christian schools would be permitted to continue teaching the biblical ethic of human sexuality, but they most certainly would be prohibited from expecting teachers and students to practice those beliefs. Our members would also be forced to include puberty blockers, cross-sex hormones, and sex reassignment surgery in their employee health plans, in violation of their religious convictions and contrary to our understanding of the best medical responses to gender dysphoria. The Equality Act would also require our schools to allow boys who identify as girls to use girls' restrooms, locker rooms, and other appropriately sex-separated private facilities. Our single-sex and boarding schools would be forced to admit and house together biologically male students with female students. Christian schools would effectively lose the freedom to operate according to the teachings of their faith.

The coercive nature of the Equality Act places it in stark disharmony with the Constitution's protections for religious freedom and free speech. By mandating a universal sexual ethic, the government eradicates the right of people to speak freely and without fear on issues core to one's conception of truth—like competing views of sexuality. By explicitly prohibiting use of RFRA to protect against government coercion concerning sincerely held beliefs about reality, the government sends a clear message that dissenting views, including those espoused by Christian schools, do not deserve equal protection in society.

The Equality Act offers a grave picture of an America loose of her constitutional moorings. While America has always welcomed diverse thoughts and beliefs, and peaceful discourse concerning them, the Equality Act would enforce one government-sanctioned ideology and punish those who do not conform to it. Coercing Christian schools and countless other citizens of good will to affirm same-sex marriage and transgender ideology does not make for a more pluralistic, tolerant society; instead, it fosters contempt and mistrust between the government and those practicing the constitutional right to exercise one's religion.

Forcing the American people to choose between their religious beliefs and government retaliation is unconstitutional and denigrates our Republic to the rule of powerful perceived majorities. We urge Congress to reject the Equality Act and any other proposal that inflicts similar destructive harms on our nation.

Thank you for your consideration, and for your service to our great country.

Sincerely,

Mike Rouse

Dr. Mike Rouse
President

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[i] Justice Kennedy, Obergefell v. Hodges, majority opinion.

April 8, 2019

Hon. Suzanne Bonamici, Chairwoman
House Education and Labor Committee
Subcommittee on Civil Rights and
Human Services
2176 Rayburn House Office Building
Washington, DC 20515

Hon. James Comer, Ranking Member
House Education and Labor Committee
Subcommittee on Civil Rights and
Human Services
2010 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Bonamici and Ranking Member Comer:

The Association of Christian Schools International (ACSI) takes this opportunity to express its concern about H.R. 5, the Equality Act, which has sharply negative implications both for the common good and for the First Amendment rights of all Americans of all stripes. The legislation's hostility to religious faith is revealed in its fundamental requirement that all must adhere to a single understanding of human sexuality. H.R. 5 does not permit any variation, objection or even mere concern. It thus is a threat to the very diversity of American political and cultural debate.

The bill achieves this mandate of uniformity of belief by two principal means: first, its elimination of any exemption for genuine religious viewpoints to the contrary; and, second, its explicit ban on the use of the Religious Freedom Restoration Act (RFRA) to assert a religious viewpoint contrary to government mandate.

In the first case, the overwhelming majority of sexual orientation / gender identity laws at the state and local level make a point of including religious exemptions. This bare-minimum approach at least has the advantage of allowing *some* Americans the capacity to live in accord with genuine faith-based viewpoints related to human sexuality. The legislation before you does not even do that and is thus in conflict with basic American principles of fairness.

In the second case, the legislation combines the threat inherent in the deliberate exclusion of a religious exemption with an explicit rejection of recourse to RFRA when government policy and religious faith are in conflict. Under RFRA, the government must show that it has a compelling state interest in a policy which restricts religious liberty and it must show that it uses the least restrictive means to implement that policy. A religious entity is not *guaranteed* its liberty when policy and faith conflict, but it *is* given a chance to make its case in court. The Equality Act, by explicitly rejecting even this safety valve, imposes a draconian approach that brooks no objection.

This has already been happening. Some state and local governments have *already* banned faith-based adoption agencies from their vital role. Others use sexuality-based policies to suppress the participation of religious schools in programs of general applicability. Remarkably, rather than allow all to participate in providing adoption and foster care services, including those who

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operate in accord with their religious convictions, government entities choose to ban any participation whatsoever by religious entities based purely on the faith-based conviction of those entities that seek to place children in families in accord with their faith. Such policies of exclusion harm the very children that faith-based entities seek to assist. The Equality Act would impose very similar policies nationwide in a variety of circumstances.

Among many others, Christian schools face serious negative repercussions from the Equality Act. The legislation could turn a school into a public accommodation which would, in turn, compel Christian schools to admit students who disagree with Christian convictions about how best to promote human flourishing and student conduct standards that reflect those convictions. Christian school health plans would have to include sex reassignment surgeries and other treatments for gender dysphoria that conflict with schools' understanding of the best medical practices. The legislation would compel Christian schools to allow mixed use of rest rooms, locker rooms and other sex-separated facilities, including boarding school arrangements.

Further, the legislation almost certainly would extend into the regulation of curriculum and teaching practices of faith-based schools. If a Christian school is prohibited in all these other ways of living out its faith, government policy surely will not leave the school alone to teach contrary to what the government has just forced it to comply with in every other way. In essence, a Christian school may be left to hold its beliefs but have no way to live them out under the law. Freedom of thought needs no protection but freedom of expression and the ability live in conformity with a viewpoint does.

This bill does not simply attempt to raise certain identity-based labels to a protected status, it also seeks to silence all religious objection. This silencing of dissenting views is a significant risk and has much broader implications than just to human sexuality. It poses a significant risk to public debate on these and other issues to which RRFA has historically appealed in order to balance the government's ability to choose ideological winners and losers. This bill would give too much unchecked authority to government to silence religious viewpoints without recourse and sets a terrible precedent of how to deal with future dissenters of the approved viewpoint – by silencing them. This bill goes beyond protecting one group and includes an effort to harm religious groups by further empowering government to choose ideological winners and losers without appropriate recourse by citizens.

These very real concerns implicate the many benefits that Christian schools provide to their communities. According to a *CAPE Outlook* article, a 2017 Gallup poll showed 63% of parents gave religious schools a "good" or "excellent" rating. The National Center for Education Statistics (NCES) reports that 78% of private school students choose faith-based options. Families are willing to make significant economic and other sacrifices to ensure their children receive a faith-based education.

Parents who voluntarily choose a Christian school education are actively seeking a genuinely Christian approach to human flourishing which includes a well-founded, reasonable approach to marriage and sexuality. Christians believe that God has created us for joy, that His loving standards are designed to promote an "abundant life" of "joy inexpressible". The Equality Act, by contrast, does not merely promote a different view, it also mandates that view by eliminating any

religious exemptions or even an appeal to RFRA. Such an approach is a radical departure from America's tradition of enhancing the common good by protecting diverse viewpoints and religious conscience under the First Amendment's First Freedom.

Thus, the Association of Christian Schools International (ACSI), on behalf of our nearly 3000 member schools in the United States, respectfully urges you to oppose the Equality Act with its one-size-fits-all mandatory approach to human sexuality issues. ACSI is the largest Protestant school association that includes nearly 24,000 member schools around the world. Together, member schools educate 5.5 million children worldwide.

Thank you for your consideration and for your dedication to public service.

Respectfully submitted,

Thomas J. Cathey

Thomas J. Cathey, EdD
Chief of Staff

April 8, 2019

House Committee on Education & Labor
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Scott and Committee:

Family Policy Alliance is a national pro-family organization that partners with a network of over 40 state-based family policy groups. Together, we advance policy at state capitols and in Washington, D.C., elect statesmen who share our values, and equip churches and grassroots networks to advocate for family-centered policies. Together, we represent hundreds of thousands of American families.

We urge this committee to vote against H.R. 5[1] for three reasons.

First, we are concerned about the impact H.R. 5 would have upon the historical, national, and educational value of the Civil Rights movement for the country, especially students.

"We hold these truths to be self-evident, that all men are created equal."[2] Those aren't just hollow words. Those words birthed a nation unlike any other and inspired its leaders and soldiers to give their very lives in the most sacred of blood oaths to uphold truth.

Those words sustained a country during its deepest sin and gave us the framework to begin anew. Those words are just as true today as they were when the great American experiment began.

Indeed, our nation has a rich history of fighting for equal rights for all.

One of the most intense examples of this is the story of racial desegregation in schools—because the pursuit of equal rights for all affected every family and child. Even kindergartners experienced firsthand the rocky road to equality, and their parents were along for the ride whether they liked it or not.

Ultimately, in 1954, the Supreme Court ruled in *Brown v. Board of Education* that segregation in public elementary and secondary schools was unconstitutional, violating

[1] Equality Act of 2019, H.R. 5, 116th Cong. (2019).
[2] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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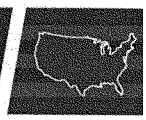

A Public Policy Partner of Focus on the Family

equal rights.[3] And the Civil Rights Act in 1964 added the full weight of the federal government to the process of desegregating schools—including federal funding and even military intervention in K-12 schools.[4]

But the fight didn't start with the famous *Brown* case. There were many cases centered in higher education leading up to *Brown*, but four in particular from 1938 to 1950 that laid the groundwork.

Along the way to full desegregation, civil rights leaders carefully constructed their legal strategy to prove first that black students must be offered the same educational opportunities as white students, even if in segregated schools and programs.[5]

Next, they were able to prove that it is very difficult for separate schools to be considered equal if black students are prohibited from interacting and sharing ideas with white students, especially when the white students would be the majority of the population in their future career fields.[6]

Finally, they proved that even when black students were admitted to the same schools, doctoral programs, and classrooms as white students—yet still subject to segregation—there was, in fact, no equality.[7]

At the University of Oklahoma in 1950, for instance, black students attended the doctoral education program with white students, but they were forced to sit in designated rows in class or designated tables in the cafeteria.[8] At the University of Oklahoma in 1950, for instance, black students attended the doctoral education program with white students, but they were forced to sit in designated rows in class or designated tables in the cafeteria.[9]

Declaring that this treatment could never be equal, the Supreme Court stated that "[t]here is a vast difference—a constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. The removal of the state

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[3] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
[4] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), *See e.g.* Sec. 705; 707 granting power to federal agencies to utilize the services of local agencies to carry out the purposes of the act; *See also*, EXEC. ORDER NO. 10730: Desegregation of Central High School, 22 Fed. Reg. 7628 (1957).
[5] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948).
[6] *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).
[7] *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950).
[8] *Id.*
[9] *Id.*

restrictions will not necessarily abate individual and group predilections, prejudices, and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."[10]
In other words, the state cannot stop people from separating into their own groups, but neither can they require them to be separate.

This case was a critical turning point for black civil rights, and four years later, *Brown* turned the tide for K-12 schools—and the country. Desegregated schools were one example of many hard-fought victories on the road to racial equality in America, but the impact was profound.

Today's H.R. 5 is based on the premise that just as black children were literally and forcefully segregated from white children, so are LGBT children segregated from all other children in schools—creating an oppressed, unequal class of American children.

There are two obvious problems with that premise.

First, the group for whom H.R. 5 claims to protect civil rights—LGBT-identifying individuals—constantly changes their own personal identities, with new categories constantly being added to the group as a whole. This makes it extremely difficult to advance civil rights, as the public can't accurately identify the group that is receiving protection, and what type of protection is needed on a given day.

Second, unlike the days of racial segregation, LGBT-identifying children are not in fact being forced by the government to attend segregated schools or sit in separate sections of class.

Supporters of H.R. 5 ignore the first problem and attempts to fix the second by claiming something oddly similar to the 1950 University of Oklahoma case. They claim that LGBT-identifying students are treated unequally in schools not because they are forced to sit in different areas, but because the nation as a whole does not permit transgender students to use the restrooms and locker rooms of the opposite sex, does not require featuring LGBT people and ideas in school, and doesn't teach children about the social and experimental medical ways to "transition" to another sex.

In other words, they believe the state is complicit in "separating" LGBT students from the student body by not reinforcing their ideology in the classroom.

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[10] *Id.* at 641–42.

The racial desegregation of America's schools was about upholding the truth: that all men are created equal and deserve to be treated equally.

H.R. 5 by its very nature is not about achieving equal educational opportunities for all. It's about forcing every administrator, teacher, child, and parent involved in schools to give any person who identifies as LGBT a platform in our schools, and special rights above and beyond everyone else.

If "all men are created equal" now means ensuring young children are informed that "little boys can become little girls," then the centuries of power contained in those words end with H.R. 5.

The Civil Rights movement, especially the effort to desegregate schools, will ultimately be debased by H.R. 5. As a sexualized political agenda is compared to one of the most hard-fought racial civil rights battles in history, our country will not honor as it should the violence, physical segregation, human devaluing, and many other horrors faced by Blacks during the Civil Rights era. Even worse, students who are taught that championing the right of men and boys to use girls' restrooms and locker rooms is the same kind of "civil rights movement" as was racial desegregation in schools do not receive education. They receive indoctrination.

H.R. 5 will fundamentally change what it means to achieve equal rights for all in America. Our students, who will no longer be able to distinguish between the heroism and sacrifice of Reverend Martin Luther King, Jr. and the rainbow flag poster on their school wall, deserve better.

Second, problematic guidance from the Obama Administration on Title IX has already hinted at the major impact H.R. 5 would have on school policies and curriculum.

In 2016, the Obama Administration issued a letter alerting schools that the Administration intended to interpret Title IX, the federal statute passed to ensure equal education opportunities for women, as including "gender identity" within the definition of "sex."[11] The Administration threatened loss of federal funding if schools did not allow transgender-identifying individuals to access the intimate facilities and sports teams of the opposite biological sex, as well as forced school personnel to use transgender-specific language.

[11] Dep't of Educ. & Dep't of Justice, Dear Colleague Letter on Transgender Students (May 13, 2016).

As a result, schools terrified of losing federal funding worked quickly to institute transgender policies in line with the Obama Administration letter. Parents were often not informed of the policy changes and shocked to learn after-the-fact about changes in their daughters' bathroom policies, their children's curriculum, and girls' sports teams. Parents across the country were outraged, and researchers are now citing the "social contagion" phenomenon of transgender ideology impacting public schools.[12]

Lawsuits against the government also started swirling[13]—even including one filed by female prisoners who had been living in the shadow of their own transgender policy in prison and found it to be dangerous, fundamentally unfair, and a deep violation of their privacy and bodily integrity[14]. These female inmates were horrified at the government's willingness to compromise our children's safety and privacy in schools.

Thankfully, as one of his first acts as President, the Trump Administration withdrew the Obama transgender mandate for schools in 2017.[15] But the damage was already done. Still today, schools cite the original Obama letter as their rationale for instituting radical gender-identity policies.

The Obama letter resulted in massive policy changes in schools—and it was just a letter. It was not a federal statute, court ruling, or even an official administrative rule.

H.R. 5 would institute sweeping changes into every aspect of our laws and lives because it is a proposed statutory change to the Civil Rights Code, which impacts nearly every area of life. The changes and reinterpretation of what a "civil right" will be are not even comprehendible.

If H.R. 5 were to become law, the changes to schools the Obama Administration ushered in through their letter on Title IX would pale in comparison to the power the government would hold over those who do not espouse transgender ideology. Once a group of people receives "civil rights status," there is no room for disagreement, and the full weight of the federal government exists to ensure compliance.

Third, states with laws similar to H.R. 5 have already demonstrated extremely concerning curriculum changes for parents and families.

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[12] Lisa Littman, *Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria*, PLOS ONE 14(3): e0214157 (2018).
[13] *See, e.g. G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd*, 822 F.3d 709 (4th Cir. 2016); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018).
[14] Bill Hanna, *Transgender bathroom battle smolders in Fort Worth federal prison*, FORT WORTH STAR-TELEGRAM (February 22, 2017), http://www.star-telegram.com/news/local/community/fort-worth/article134353039.html.
[15] Dep't of Educ. & Dep't of Justice, Dear Colleague Letter: Notice of Language Assistance (Feb. 22, 2017).

Finally, we believe it is important to consider for families the practical implications of H.R. 5 for public schools. For starters, major changes in children's curriculum are expected, creating "equality winners and losers" in schools.

H.R. 5 hopes to ensure "equality" by requiring "LGBT sexual experiences" to be included in schools. Colorado already requires that even young children learn about LGBTQ sexual experiences.[16] And California sex education guidelines include teaching children about having *multiple sexual partners*,[17] and warning children about "religion abuse" that would include "forcing others to adhere to rigid gender roles [or] [n]ot allowing a partner to do things they enjoy."[18]

Both of these states' curricula derive from laws requiring LGBT inclusion in sexual education.[19] Sexual education used to be for the purpose of helping students understand human biology and reproduction, which by nature includes everyone. H.R. 5 elevates LGBT sexuality and gives it special emphasis in the classroom.

And the "equality losers"? Parents and teachers who don't believe the material is appropriate for their children for health, moral, religious, or other reasons.

As if that weren't bad enough, California prohibits any teaching that would reflect adversely on the LGBT community.[20] And Colorado has introduced legislation that refers to traditional perspectives on sexuality as shameful, fear-based, and bigoted.[21] The censoring of other viewpoints in the classroom exposes yet another reason H.R. 5's new version of equality cannot compare to the Civil Rights movement and racial desegregation of schools.

Racial equality and desegregation were about bringing truth to light—demonstrating that the value of humanity was not determined by skin color. The movement brought people together and encouraged understanding. H.R. 5 will seek to obscure differing viewpoints and silence opposition to the LGBT agenda. That is not education—that is indoctrination.

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[16] COLO. REV. STAT. § 22-1-128 (2019) (section 6 requires that schools offering education related to comprehensive human sexuality must teach the comprehensive human sexual education that is "culturally sensitive," which means that the sexual experiences of LGBT youth must be included).
[17] CAL. DEP'T. OF EDUC., *Health Educ. Framework: Chap. 5* (Nov. 2018).
[18] CAL. DEP'T. OF EDUC., *Health Educ. Framework: Chap. 6*, 41 (Nov. 2018).
[19] CAL. ED. CODE § 51930–51939 (Deering 2019).
[20] CAL. ED. CODE § 51501 (Deering 2019); *See also, Id.* at §51500.
[21] H.B. 19-1032, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019).

Sadly, the changes envisioned in H.R. 5 don't stop at sex education class. The idea is to weave LGBT-centric themes throughout the school's entire curriculum.

Take, for example, New Jersey's new "LGBT curriculum" policy[22]. Imagine a literature or history class where students are not just taught the historic contributions of literary giants like Emily Dickinson or former U.S. presidents, but the curriculum also questions the sexual preferences of our historic figures.

One textbook example ponders the fact that President James Buchanan may have been gay because he never married and maintained close male friends.[23] A former American president is reduced to the sort of suspect commentary found in *newspaper tabloids and gossip magazines*.

What's worse, parents really would have no opportunity to opt-out their children from exposure to this type of teaching or the topic of gender transition, because it is woven into every aspect of the curriculum.

The "equality losers" are, once again, teachers and parents who object—but especially children whose precious academic time will be consumed by nonsense speculation over what kind of sexual exploits any given historical figure was having.

That's not equal rights. That's ideology masquerading under the guise of rights. It is special rights for some at the expense of many others.

Our country endured unbelievable hardship and unrest to achieve racial desegregation. Those efforts should not be weaponized to create equality winners and losers in American schools. The memory of those children and civil rights leaders who achieved desegregation deserve better. American families entrusting their children to our schools deserve better. And our children deserve better than being forced to carry water for the LGBT agenda in their schools.

We respectfully request that you vote against H.R. 5.

Sincerely,

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[22] S.B. 1569, 218TH Legislature, Reg. Sess., (N.J. 2018) (enacted).
[23] FIRST CHOICE EDUC. PUB., E PLURIBUS UNUM: THE AMERICAN PURSUIT OF LIBERTY, GROWTH, AND EQUALITY, 1750-1900 (adopted by the California Department of Education to be used in Social Science classes (Nov. 9, 2007) https://www.cde.ca.gov/ci/hs/im/hssadoptedprograms.asp.).

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March 20, 2019

United States House of Representatives
Washington, DC 20515

Dear Representative:

We write to share our concerns with the Equality Act, H.R. 5. This proposed legislation does not accomplish what its supporters assert, but rather creates new difficulties and will hurt more people than its designers want to help.

As a nation we have a laudable history of confronting and overcoming unjust discrimination and attempting to balance the rights of various groups. As Catholics, we share in this work of justice. It is our firm belief that each and every person should be treated with dignity and respect. Part of that dignity, as Pope Benedict stated, is every person's right to gainful and decent employment free of unjust discrimination.[1] Also included is each person's right to services that address their needs for health and safety. In this, we whole-heartedly support nondiscrimination to ensure that everyone's rights are protected.

Rather than offering meaningful protections for individuals, however, the Equality Act would impose sweeping regulations to the detriment of society as a whole. The Act's definitions alone would remove women and girls from protected legal existence. Furthermore, the Act also fails to recognize the difference between the person – who has dignity and is entitled to recognition of it – and the actions of a person, which have ethical and social ramifications. Conflating the two will introduce a plethora of further legal complications. In brief, the Equality Act will:

- **Regulate thought, belief, and speech**.
  We treasure the First Amendment freedoms of speech, association, conscience, and religious exercise. The Equality Act puts these at risk by requiring uniform assent to new beliefs about human identity that are contrary to those held by many – believers of diverse faiths and non-believers alike.

- **Explicitly retract religious freedom**.
  By exempting itself from the bipartisan Religious Freedom Restoration Act of 1993 – an unprecedented move – the Equality Act represents an explicit departure from one of the founding principles of the United States, the freedom of religion.

- **Hinder quality health care**.
  Those experiencing gender dysphoria or incongruence must be treated with care and compassion and should receive from health care professionals the same quality of services and moral protection from harm that is due to everyone. The Equality Act, however, would force many health care professionals to perform certain treatments and procedures associated with "gender transition" against their best medical or ethical judgment with respect to a patient. As the Centers for Medicare and Medicaid Services under the Obama Administration noted in 2016,[2] "gender affirmation" has not been associated with greater long-term happiness. Tragically, related surgeries may exacerbate the long-term rate of suicide among those identifying as "transgender."[3] As Pope Francis has said,

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[1] Benedict XVI, Encyclical *Caritas in veritate*, no. 63, 2009.
[2] "Decision Memo for Gender Dysphoria and Gender Reassignment Surgery." CAG-00446N. 30 Aug. 2016.
[3] Cecilia Dhejne, et al., *Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS One (2011).

"biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated."[4] Insisting on doing so could deter some from practicing medicine in relevant fields, and add to the strain on the available health care workforce.

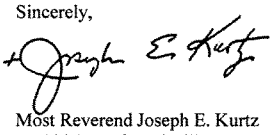
- **Endanger privacy**.
  The Equality Act contains no firm criteria for "gender identity," which creates a path for potential emotional or physical harm against individuals, particularly in highly personal sex-segregated spaces such as restrooms and locker rooms. This risk arises not so much from those who experience gender incongruence, but from others who would take malicious advantage of open-door policies in these private spaces.

- **Threaten charitable services**.
  The Equality Act would force a multitude of charitable services to either violate their principles or shut down. With the lack of gender criteria, shelters would be required to house vulnerable, sometimes traumatized, women with biological men. In addition, foster care and adoption agencies would be expected to place children with same-sex partners, regardless of some birth mothers' wishes and children's best interests.[5] The resulting closures of such charitable services would be unconscionable – especially when the opioid crisis is leaving more and more children in need of foster care.

- **Exclude people from various career paths and livelihoods**.
  Despite the U.S. Supreme Court ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) that the state must not be hostile to religion, the Equality Act would set up entrepreneurs of faith, who serve all people but cannot express messages with which they disagree, for destructive litigation nationwide.

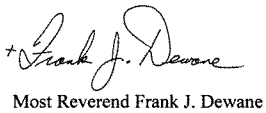
Given all of these effects, we strongly oppose the Equality Act and respectfully urge you to oppose it as well. We pray that wisdom will inform your deliberations on these matters and we readily stand with you, and are willing to assist you, in developing compassionate and just means to eradicate unjust discrimination and harassment from our country. May God bless you.

Sincerely,



Most Reverend Joseph E. Kurtz
Archbishop of Louisville
Chairman, Committee
for Religious Liberty

Most Reverend James D. Conley
Bishop of Lincoln
Chairman, Subcommittee for the
Promotion and Defense of Marriage



Most Reverend Frank J. Dewane
Bishop of Venice
Chairman, Committee on
Domestic Justice and Human
Development

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[4] Pope Francis, Apostolic Exhortation *Amoris Laetitia*, no. 56, 2016.

[5] Children raised by a married mother and father are statistically more likely to have positive social, economic, and health outcomes than those raised by same-sex couples. *See* D. Paul Sullins, *Invisible Victims: Delayed Onset Depression among Adults with Same-Sex Parents*, Depression Research and Treatment, Vol. 2016 (2016); D. Paul Sullins, *Emotional Problems among Children with Same-Sex Parents: Difference by Definition*, British Journal of Education, Society and Behavioural Science, Vol. 7 No. 2, 99-120 (2015); Mark Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study*, Social Science Research, Vol. 41 No. 4, 752-770 (2012).

April 8, 2019

The Honorable Suzanne Bonamici
Chair
Subcommittee on Civil Rights and Human Services
Committee on Education & Labor
United States House of Representatives
Washington, DC 20515

The Honorable James Comer
Ranking Member
Subcommittee on Civil Rights and Human Services
Committee on Education & Labor
United States House of Representatives
Washington, DC 20515

Dear Chairman Bonamici and Ranking Member Comer,

We write on behalf of millions of Americans who are deeply concerned about the harms of the Equality Act, which undermines religious freedom, and threatens charitable nonprofits and the people they serve, regulates free speech, hinders quality health care, and endangers the privacy and safety of women and girls. H.R. 5 does not accomplish what its supporters maintain, and it causes new problems and will hurt more people than its sponsors want to help.

As people of faith, we believe that all people should be treated with equal dignity and respect. Religious groups were at the forefront of upholding these principles during our country's civil rights movement, and people of faith continue to fight against the scourge of racism that unfortunately continues to this day.

People of faith serve the marginalized—and therefore uphold the dignity of every human person—through numerous charitable endeavors, including in the health care sector. H.R. 5 would unfortunately threaten the incredible work that faith-based hospitals and healthcare professionals do in the United States. While religiously affiliated hospitals routinely serve—and heal—patients of any background, including those who identify as LGBT, healthcare providers simply cannot perform every procedure that a patient requests. H.R. 5 would mandate that all health care professionals and providers perform gender transition procedures that go against many such providers' best medical judgment, not to mention their deeply held moral or religious convictions.

H.R. 5 would also unfortunately undermine civil rights for women and girls by opening restrooms, locker rooms, and shower facilities to biological males who identify as female. Women and girls deserve access to private spaces when they visit their local gym or use the restroom while dining out, but H.R. 5 would undermine legitimate privacy and safety concerns that women have about sharing sex-specific facilities with a biological man who identifies as a woman. H.R. 5 also threatens to halt the advances women's sports have achieved since the passage of Title IX in 1972 by allowing those with physical advantages to compete against women and obtain scholarships and other awards at the expense of women.

Americans highly value our First Amendment freedoms of speech, association, and the free exercise of religion. H.R. 5 puts these cherished liberties at risk first and foremost by explicitly carving out the Religious Freedom Restoration Act (RFRA), which would be the first time RFRA has ever been curtailed since President Clinton signed this important statute into law in 1993. H.R. 5 would also subject private employers and others to expensive lawsuits if they fail to adhere to strict preferred pronoun policies.

This would affect not only small, family-owned businesses but also charities and other nonprofits that are organized with a specific mission. H.R. 5 would cause mission-driven employers, including religious schools, to have to abandon their mission when it comes to hiring certain employees or having employee conduct standards. Under H.R. 5, women's shelters would be forced to house biological men who identify as women, despite the privacy and safety concerns that women staying in those shelters have about sharing sleeping quarters and other intimate facilities with the opposite sex. Faith-based adoption and foster care agencies would also have to face the unenviable choice of either abandoning the deeply held religious beliefs that inspired them to serve vulnerable children in the first place—or be shut down by government entities. The forced closures of such agencies make no sense at a time when the opioid crisis is increasing the number of children in need of foster care and adoption.

Because of these many concerns, and others, we oppose H.R. 5 and respectfully urge you to oppose it as well.

Sincerely,

Michael P. Farris
President, CEO, & General Counsel
Alliance Defending Freedom

Tim Wildmon
President
American Family Association

Mike Rouse, PhD
President
American Association of Christian Schools

Terry Schilling
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Mathew D. Staver
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Wyoming Catholic College

Wall Street Journal Opinion

The Transgender War on Women

The Equality Act sacrifices female safety in restrooms, locker rooms and even domestic-violence shelters.

By Abigail Shrier
March 26, 2019 6:51 p.m. ET

It has become rightly fashionable to ridicule the idea of "safe spaces," places where adults can hide and sulk like children avoiding ideas they find threatening. But women need actual safe spaces—not from intellectual challenge, of course, but from physical threat of harm from men. As a biological matter, most women are physically outmatched by men. Men are stronger and faster than we are, though we're better able to tolerate pain and tend to live longer.

House Democrats introduced a bill this month that would outlaw safe spaces for women. The Equality Act—so called because, to put it charitably, Democrats excel at branding—purports merely to extend protections of the Civil Rights Act of 1964 to people who are gay and transgender. Insofar as it would prohibit landlords from evicting tenants and employers from firing employees based on sexual orientation, it is no doubt long overdue.

But the bill goes further, proposing to prohibit discrimination based on "gender identity." That claim directly competes with the rights of women and girls. Any biological males who self-identify as females would, under the Equality Act, be legally entitled to enter women's restrooms, locker rooms and protective facilities such as battered-women's shelters. This would put women and girls at immediate physical risk.

Because courts typically interpret Title IX of the Education Amendments of 1972 according to the provisions of the Civil Rights Act of 1964, amending the latter would alter the understanding of the former. Biological boys who identify as girls would gain an instant entitlement to compete on girls' teams in all 50 states. No

more democratic discussion of accommodation, competing interest, sacrifice and fairness. No more debate about whether we should really allow girls' scholarships and trophies to go to male athletes who were unable to excel on the boys' teams. No more discussion about whether it's right to allow, as we have, biological men to pick off championships in women's and girls' powerlifting, cycling, wrestling and running. These emergent public discussions would be locked away in a vault of civil rights.

Part of the reason women have been reluctant to object to these incursions into their hard-won rights has to do with embarrassment at acknowledging our biological differences, which some leading feminists have denied for years. But women *are* biologically different from men, as the chromosomes in every cell of our bodies readily testify. (How absurd that this is necessary to point out.) And one source of many of our physical differences resides in our glands.
Boys undergo a testosterone surge during puberty that is 10 to 40 times what girls experience, conferring lifetime physical advantages: vastly greater muscle mass, bone density, more fast-twitch muscle fiber, larger hearts and lungs—all things that provide absolute and unbridgeable advantage in strength and speed.

As long as women had their own safe spaces, such disadvantages never mattered much. But that may soon change. Not because women and men have changed, but because of the progressive left's sudden rush to strip girls and women of separate facilities, sacrificing their rights to a group a notch or two higher on the intersectional pecking order. As Kara Dansky, media director of the Women's Liberation Front, put it to me, the Equality Act would eliminate "women and girls as a coherent legal category worthy of civil-rights protection." It would do so by redefining the category of "women" to include "women and those who say they are women"—which means women and people who aren't women at all.

Activists typically counter this argument with the claim that men wouldn't pose as men-who-believe-they-are-women unless they sincerely believed it. There are too many taboos, and the transgender life is too hard for anyone to want to fake it, they

claim. But under the Equality Act, pretending to be transgender would sometimes be rational.

It doesn't strain the human imagination to picture a male convict renaming himself "Sheila" and heading for the women's prison. Nor would it surprise anyone if rapists began to "identify" as women—no physical alteration is required to change your gender identity—to gain free access to women's showers. What pedophile wouldn't want open access to girls' bathrooms? And many a biological man with no place to sleep would prefer the quieter, gentler confines of a shelter for battered women to the dodgy enclosure of one for homeless men.

Are there sincere transgender people who ought to be accommodated with appropriate facilities? Of course. But their need, however real, doesn't justify the immediate transfer of the hard-won rights of women and girls. No comparable sacrifice is asked of boys and men, who are unlikely to feel threatened by a biological woman in the restroom. No top male athletes are likely to lose competitions to biological women competing as men. Only women are made to sacrifice for the sake of this new "equality." And what women and girls are being coerced to cough up isn't an unfair privilege but a leveler they require.

The bill is unlikely to become law while Republicans control the Senate or White House. But this isn't the first time the Democrats have introduced the Equality Act, and it won't be the last. It's a proposal worth taking seriously because it provides a glimpse of the left's willingness to sacrifice women and girls to those wolves in sheep's clothing—transgender or not—who would take advantage of them.

Chairwoman BONAMICI. Without objection.

Mr. COMER. Thank you, Madam Chair, and I yield back.

Chairwoman BONAMICI. Thank you.

I recognize myself for the purpose of making a closing statement.

Thank you again to our witnesses for taking part in this important discussion.

Every day LGBTQ Americans across the country are living without the guarantee of basic civil rights protections. As we heard throughout this hearing, that vulnerability is not merely theoretical. LGBTQ Americans and their families, like Kai and her mother Kimberly, like Ella I mentioned back in Oregon, and millions across the country continue to face discrimination because of who they are. This is wrong, plain and simple.

The Equality Act is our opportunity to right that wrong. By amending civil rights legislation to explicitly include gender identity and sexual orientation as protected characteristics, the Equality Act would ensure that LGBTQ Americans can be safe, secure, and free from discrimination.

There will likely be a time, perhaps in the near future, when we will look back at this moment with a sense of inevitability. As with many civil rights victories of the past, we will say that history was always on our side and that the guarantee of protections for LGBTQ Americans was only a matter of time.

But we must acknowledge that the arc of the moral universe does not bend toward justice on its own. It is our responsibility, now, today, it is time to make clear that all Americans should be able to have full confidence in their rights regardless of who they love, or who they are, or how they identify.

I look forward to working with my colleagues to reaffirm our commitment to civil rights and to forge a country where everyone has the right to be who they are free from discrimination.

And if there is no further business, without objection, the committee stands adjourned.

[Additional submissions by Chairwoman Bonamici follow:]

April 3, 2019

The Honorable Robert C. "Bobby" Scott, Chairman
The Honorable Virginia Foxx, Ranking Member
Committee on Education and Labor
U.S. House of Representatives

The Honorable Suzanne Bonamici, Chair
The Honorable James Comer, Ranking Member
Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

Re: Equality Act's proposed amendments to Title IV of the Civil Rights Act of 1964

Dear Mr. Scott, Ms. Foxx, Ms. Bonamici, and Mr. Comer:

This letter addresses the importance of amending Title IV of the Civil Rights Act of 1964 – which already addresses discrimination on the basis of sex – to expressly include sexual orientation and gender identity as relevant classifications, as proposed by Section 5 of the Equality Act.[1]

Although I submit this letter in my personal capacity, my views about the importance of Title IV are shaped by my experience in the federal government. I served for seven years in the Civil Rights Division at the U.S. Department of Justice as a career attorney and later served for five years at the Office for Civil Rights at the U.S. Department of Education as a political appointee. In each of those positions, I have seen the important role Title IV can play in public education.

Title IV currently provides two tools for the federal government to promote non-discrimination on the grounds of race, color, national origin, religion, and sex in public schools and public colleges and universities: technical assistance by the U.S. Department of Education and lawsuits by the U.S. Department of Justice. Both would also be valuable tools in promoting non-discrimination on the basis of sexual orientation and gender identity.

Amending Title IV to add classifications that are being added to other civil rights laws would be consistent with Congress' prior amendment to Title IV. As originally enacted in 1964, Title IV did not address sex discrimination. But when Congress enacted Title IX of the Education Amendments of 1972, prohibiting sex discrimination in education programs receiving federal financial assistance, Congress also amended Title IV to add "sex" to the types of discrimination the Department of Education could address through technical assistance, and the Department of Justice could address through litigation.[2] According to Senator Bayh of Indiana, sponsor of the amendments, the purpose of amending Title IV was to close "loopholes in the Civil Rights Act" by giving the Department of Justice the same power with respect to discrimination based on sex that it already had with respect to discrimination based on race, color, religion or national origin.

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[1] H.R. 5, 116th Cong., 1st Sess. (introduced March 13, 2019).

[2] Pub. L. No. 92-318, title IX, § 906(a), 86 Stat. 375 (June 23, 1972).

Such an amendment was also necessary, he explained, "so that the Justice Department can help develop case law in such a vitally important area."[3] Those reasons apply equally to amending Title IV through the Equality Act to expressly include sexual orientation and gender identity as relevant classifications.

Technical assistance: Title IV authorizes the Department of Education to provide "technical assistance" (including training) to school districts regarding "desegregation," which is defined to mean the assignment of students to schools, and within schools, "without regard to their race, color, religion, sex, or national origin."[4]

The Department of Education provides such technical assistance through four regional Equity Assistance Centers (EACs).[5] Each EAC is awarded about $1.6 million a year from the Department.[6] As explained by the Department, typical activities include disseminating information on successful educational practices and on legal requirements related to nondiscrimination in educational programs. In FY 2017, for example, the EACs provided intensive assistance to 20 State educational agencies, 48 local educational agencies (LEAs), and 8 schools in 33 States, the District of Columbia, and Guam in areas such as creating a positive and safe school climate, improving family engagement, increasing teacher diversity, and implementing instructional practices that reach all students. EACs also developed new resources on a variety of topics, such as addressing health disparities, supporting English learners, and implementing socioeconomic integration strategies. They also provided assistance to 20 LEAs to meet requirements stipulated in resolution agreements with the Department of Education's Office for Civil Rights, consent decrees with the Department of Justice, or in carrying out desegregation orders.[7]

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[3] 118 Cong. Rec. 5808 (Feb. 28, 1972) (Sen. Bayh) ("There are, of course, other loopholes in the Civil Rights Act [of 1964] where sex was not mentioned. To correct one more, this amendment would permit the Attorney General to initiate litigation concerning the denial on the basis of sex of admission to or continued attendance at a public college, and to intervene in litigation already commenced by others regarding the denial of equal protection of the laws on the basis of sex. The Attorney General already has both these powers in regard to discrimination on the basis of race, color, religion, or national origin; again sex was left out. President Nixon's Task Force on Women's Rights and Responsibilities recommended that these loopholes in the law be closed, so that the Justice Department can help develop case law in such a vitally important area."); *see also United States v. Massachusetts Mar. Acad.*, 762 F.2d 142, 149 (1st Cir. 1985).

[4] 42 U.S.C. §§ 2000c-2, 2000c(b).

[5] 34 C.F.R. pt. 270.

[6] 81 Fed. Reg. 46,820, 46,821-822 (July 18, 2016), available at https://www.federalregister.gov/d/2016-16809/p-48; U.S. Department of Education, *2016 Grant Award – Equity Assistance Centers*, available at https://www2.ed.gov/programs/equitycenters/16awards.html.

[7] All the information and text in this paragraph is drawn from or is paraphrasing the President's budget requests for the Department of Education. For Fiscal Year 2019, see Volume 1, C-44 (Feb. 2018), available at https://www2.ed.gov/about/overview/budget/budget19/justifications/c-sip.pdf, and for Fiscal Year 2020, see Volume 1, C-44 (March 2019), available at https://www2.ed.gov/about/overview/budget/budget20/justifications/c-sip.pdf.

Litigation: Title IV also authorizes the Department of Justice, on written complaint by a parent or student, to bring a civil action challenging discrimination in public schools or public colleges or universities by reason of race, color, national origin, religion, or sex.[8]

Title IV is one of a handful of federal statutes that authorizes the Department of Justice to bring a lawsuit to enforce constitutional protections against discrimination in education. It thus allows the Department of Justice to move with speed and independently of other federal agencies. It also allows suits without regard to whether the discriminating public school or college receives federal funds (although admittedly the universe of public education institutions that do not receive federal funds is likely extremely small). The Department of Justice has used its Title IV litigation authority to bring significant cases challenging state and local discrimination in public education, including the suit to open the Virginia Military Institute (VMI) to women.[9]

Finally, if Congress does not amend Title IV's reference to "sex," while it amends adjacent statutory civil rights provisions to expressly add sexual orientation and gender identity, it could be argued (albeit unsuccessfully) that such an omission could draw into question the existing Department of Education Title IV regulation that defines sex to expressly include gender identity and some forms of sexual orientation.[10]

For all these reasons, amending Title IV of the Civil Rights Act of 1964 to include sexual orientation and gender identity would serve important ends.

Please feel free to contact me if I can be of any assistance.

Sincerely,

Seth Galanter

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[8] 42 U.S.C. § 2000c-6(a).

[9] *United States v. Virginia*, 518 U.S. 515 (1996).

[10] 34 C.F.R. § 270.7.

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

April 8, 2019

TO THE MEMBERS OF THE UNITED STATES CONGRESS:

The U.S. Chamber of Commerce supports H.R. 5 and S. 788, the Equality Act, introduced by Representatives David Cicilline and Brian Fitzpatrick, and Senator Jeff Merkley. It would update federal law to prohibit discrimination in the workplace and in commerce on the basis of sexual orientation or gender identity.

Equality under the law fosters an environment where America's diverse workforce can reach its full potential without fear of discrimination.

Embracing equality has a profoundly positive impact on business performance. A recent report from the U.S. Chamber of Commerce Foundation found that LGBT-inclusive companies enjoy higher revenue margins, attract better talent, and have lower employee turnover.

Existing federal law and the laws of many states fail to protect against discrimination on the basis of sexual orientation or gender identity. Providing such protections will help further extend the promise of equal opportunity that is the bedrock of the United States.

The Chamber looks forward to the enactment of the Equality Act.

Sincerely,

Neil L. Bradley

April 8, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education & Labor
U.S. House of Representatives
Washington, D.C. 20515

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education & Labor
U.S. House of Representatives
Washington, D.C. 20515

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Susan Herman
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Ronald Newman
National Political Director

Statement of the American Civil Liberties Union (ACLU) in Support of H.R. 5, the Equality Act

Dear Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee on Civil Rights and Human Services:

The American Civil Liberties Union (ACLU) strongly supports H.R. 5, the Equality Act. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country. With more than 2 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, sex (including sexual orientation and gender identity), disability, national origin, or record of arrest or conviction.

H.R. 5, the Equality Act, is landmark civil rights legislation. It is grounded in the principle that all people in this country should be able to fully participate in public life and not be judged based on characteristics like sexual orientation or gender identity. Everyone deserves a fair chance to support themselves, provide for their family, and live as their true selves free from the fear of harassment or discrimination. The harsh reality – despite increasing support among the public and representation in popular culture – is that discrimination remains a persistent

problem for LGBTQ people across the country. From discrimination and harassment of transgender youth in our nation's schools to older same-sex couples denied housing in retirement communities because of their sexual orientation, this is something that LGBTQ people confront throughout their lives and in every corner of the country.

This is why the Equality Act is so critically important. It would provide LGBTQ people with consistent, explicit, and nationwide nondiscrimination protections across all of the key areas of daily life, including employment, housing, and access to public spaces and services. It would do this by explicitly prohibiting discrimination based on sexual orientation and gender identity in our nation's federal civil rights laws, including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, and the Jury Selection and Service Act. This approach would give LGBTQ people the same protections that have long existed for other characteristics under federal law, such as race, religion, and national origin.

The Equality Act would also fill significant gaps in our federal civil rights laws. It would do this in several ways including:

- updating and modernizing the scope of public spaces and services covered in current law to include retail stores, services such as banks and legal services, and transportation service, such as airports, taxis, and bus stations; and
- expanding protections from sex discrimination by banning this type of discrimination in public spaces and services and in federally funded programs.

For the first time under federal law, it would be illegal to discriminate against individuals for "Shopping While Black" or "Flying While Brown." In addition, with the significant expansion in sex discrimination protections, the routine practice of mechanics charging women more than men for the same car services would be illegal under federal law.

As an organization that represents people who have experienced discrimination simply because of who they are, we feel it is important to share a few of our clients' stories, as they clearly speak to why the Equality Act's protections are so important.

Meagan Taylor

Meagan Taylor, a Black transgender woman, and her best friend, who is also Black and transgender, checked into a hotel in Iowa, on July 13, 2015 while traveling from Illinois to Kansas City for a funeral. Despite the fact that she and her friend had made reservations, the pair were sent a clear message that they were not welcome. Before finalizing the check-in, the front desk clerk – at the request of the general manager – asked to make a copy of Meagan's ID even though they had already

processed payment and checked her ID once. Like many transgender people, Meagan had not been able to update the name and gender on her ID so the identification listed her birth name and the sex she was assigned at birth.

At some point between Meagan's check-in and 8:30am the next morning, the hotel staff called the police to report that they suspected Meagan and her friend were engaging in prostitution because they were "men dressed like women."

As a result of the hotel's discrimination against her, Meagan was arrested and charged with possessing her hormone pills without a copy of the prescription – charges that were dismissed. There was never evidence of prostitution, and she was never charged with it. After her arrest, she was held for eight days in Polk County Jail before being bonded out, never making it to the funeral in Kansas City that she was traveling to attend.

In describing her experience, Meagan wrote the following:

> When I came out as transgender, I expected I would experience some discrimination, but I didn't know how strong it would be. When something bad happens, I try to think about things and sort out why they happened. When this all happened, I knew exactly what it was: the racial profiling, the transgender profiling, the harassment, the solitary confinement. I knew why it was happening, and I knew it wasn't right. I knew something had to change. To experience so many levels of discrimination makes you feel like less of a person.[1]

Gavin Grimm

Gavin Grimm, a 19-year-old young man who is transgender, was a student at Gloucester High School in Gloucester County, Virginia. When he was 15, Gavin came out to his family as a boy and transitioned to living in accordance with his male identity.

By the time Gavin began his sophomore year at Gloucester High School, he had legally changed his name and had begun using male pronouns. He wore his clothing and hairstyles in a manner typical of other boys and used men's restrooms in public venues, including restaurants, libraries, and shopping centers, without encountering any problems.

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[1] Meagan Taylor, *I Was Arrested Just for Being Who I Am*, ACLU, Nov. 10, 2015, https://www.aclu.org/blog/lgbt-rights/transgender-rights/i-was-arrested-just-being-who-i-am.

With the support of the school principal and superintendent, Gavin used the boys' restrooms at his high school for approximately seven weeks without incident. But in response to complaints from some adults in the community – including those without school-age children – the Gloucester County School Board overruled its own administrators and enacted a policy prohibiting students "with gender identity" issues from using the same restrooms as other students. The new, discriminatory policy directed transgender students to an "alternative appropriate private facility." This policy effectively banished Gavin from the boys' restroom and denied him the basic dignity of being recognized by his school as the young man he is.

As the school board meeting that led to the adoption of this discriminatory policy, Gavin and his parents sat while strangers pointedly referred to him as "a young lady" to deliberately undermine his gender identity. One speaker called Gavin a "freak" and compared him to a person who thinks he is a dog and wants to urinate on fire hydrants.

Throughout the rest of high school, Gavin was segregated from his peers by being forced to use separate restrooms that no other student was required to use. The degrading and stigmatizing policy singled Gavin out as unfit to use the same restrooms that were available to every other student. Shockingly, the school board continues to discriminate against Gavin to this day – even though he has now graduated – by refusing to update his official school transcript to match the male sex on his birth certificate. As a result, every time Gavin is required to provide a copy of his high school transcript to a college or potential employer, he must provide a transcript that – unlike all his other identification documents – wrongly declares that his sex is "female."

Following the adoption of the discriminatory policy by the Gloucester County School Board, Gavin wrote the following:

> I am boy, and it is important to me to live life like other boys do, including using the boys' bathroom. I am disappointed that the school board decided to ignore my best interest, including others in the same situation, and chose to adopt a policy that is discriminatory and spreads fear and misinformation. This needs to stop.[2]

Andre Cooley

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[2] Gavin Grimm, *'I'm a Boy, so Why Won't My School Allow Me to Use the Boys' Bathroom?'*, ACLU, Dec. 22, 2014, https://www.aclu.org/blog/speakeasy/im-boy-so-why-wont-my-school-allow-me-use-boys-bathroom.

Andre, a Black gay man, was a corrections officer for juvenile detainees at the Sheriff's Department in Forrest County, Mississippi. He was fired after his supervisors learned of his sexual orientation.

Andre was raised in the foster care system from birth. He became a corrections officer so he could serve as a mentor and positive role model for troubled teenagers. In November 2009, Andre began working at the Forrest County Sheriff's Department and was quickly promoted to senior corrections officer. At the time Andre was hired, he was told that he had a better resume than any other person who had applied for the job.

On June 14, 2010 while at home and off-duty, Andre called 911 after his boyfriend became physically violent. One of Andre's supervisors was among the officers responding to the call and learned at that time of Andre's sexual orientation. The day after the incident, for which Andre was identified in the police report as the "victim," Andre learned that despite having an exemplary record, he was being fired from his job. When Andre asked if he was being fired because he was gay, he was told "yes."

Andre did not receive a written explanation for his firing and was never charged or disciplined in connection with the domestic violence perpetrated by his former boyfriend. After firing Andre, the sheriff's department attempted to deny him unemployment benefits by alleging that Andre had engaged in unspecified "inappropriate conduct and behavior while off duty, unacceptable for an officer." After a hearing, an administrative law judge concluded that the sheriff's department failed to show that Andre committed misconduct of any kind.[3]

Patricia Dawson

Patricia Dawson is a transgender woman and licensed electrician who lives north of Little Rock, in rural Arkansas. She has worked in the field of electrical and mechanical maintenance for over 20 years. Despite her skills as an electrician, Patricia was fired from her job because of the objections of her boss to her transition.

Of her firing, Patricia wrote:

> The day after I got my new driver's license, I told my boss that I am a transgender woman. He looked shocked. He told me that I was one of his best people and that he

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[3] American Civil Liberties Union, *ACLU SUES SHERIFF'S DEPARTMENT ON BEHALF OF CORRECTIONS OFFICER FIRED FOR BEING GAY,* Oct. 18, 2010, https://www.aclu.org/news/aclu-sues-sheriffs-department-behalf-corrections-officer-fired-being-gay.

> would hate to lose me. I was stunned that his first reaction was that he might have to fire me.
>
> He didn't fire me right away, but he didn't let me come to work as a woman, either. He told me I couldn't discuss my transition with anyone at work or use my legal name, Patricia.
>
> Even though I didn't say anything, people at work noticed that I was transitioning. My hair was growing out, and I'd started hormone therapy. Some of my co-workers were kind to me, but others were cruel. Twice, co-workers tried to sabotage my work. One of those instances could have caused an explosion that could hurt or even kill someone. Fortunately, I discovered it in time, and no one was hurt.
>
> The more time passed, the more it became obvious that I am a woman. Eventually I felt brave enough to wear makeup and a blouse to work. I was on top of the world. I had a great job, and I was finally being myself. That week, my boss pulled me aside and said, "I'm sorry, Steve, you do great work, but you are too much of a distraction and I am going to have to let you go."
>
> I am not a distraction. I am a woman, and I shouldn't be fired for being who I am.[4]

Dave Mullins and Charlie Craig

Dave Mullins and Charlie Craig visited Masterpiece Cakeshop in Colorado in July 2012, with Charlie's mother, to order a cake for their upcoming wedding reception. Dave and Charlie planned to marry in Massachusetts and then celebrate with family and friends back home in Colorado (at the time, same-sex couples did not yet have the freedom to marry in Colorado). But the bakery's owner informed them that the bakery wouldn't sell wedding cakes to same-sex couples.

Describing the experience of being refused service in a business that is open to the public, Charlie's mom, Deborah Munn, wrote the following:

> What should have been a fun and special moment turned into a day I will never forget. The three of us walked into Masterpiece Cakeshop, and a man at the counter

[4] Patricia Dawson, *Fired for Being Trans*, ACLU, Feb. 23, 2015, https://www.aclu.org/blog/speakeasy/fired-being-trans.

> motioned for us to sit at a small table and then joined us. When the man asked whose wedding this was for, and my son said "it is for our wedding," the man said that he does not make cakes for same- sex couples' weddings or commitment ceremonies. When my son said "really?" the man tried to justify his stance by saying he will make birthday cakes or other occasion cakes for gays, just not a wedding cake.
>
> I just sat there in disbelief. All of the levity that we felt on the drive to the bakery was gone. As I left that bakery, my heart was breaking for my son and his fiancé. What should have been a joyous occasion had turned into a humiliating occasion.[5]

Joaquín Carcaño

Joaquín is a 30-year-old Latino, transgender man who is the Director of Community Organizing at the Latino Commission on AIDS. Until recently, he worked at the University of North Carolina at Chapel Hill at the Institute for Global Health and Infectious Disease, where he coordinated a project that provided medical education and services such as HIV testing to the Latinx population.

In March 2016, the so-called "Public Facilities Privacy & Security Act," commonly known as HB 2, was passed by the North Carolina General Assembly and signed into law by then-Governor Pat McCrory to respond to the City of Charlotte's enactment of an ordinance that extended existing municipal anti-discrimination protections to LGBTQ people. Advocates for these protections had spent years describing the significant degree of discrimination faced by LGBTQ people, particularly transgender people, to the City Council. Because North Carolina state law does not explicitly prohibit discrimination based on sexual orientation or gender identity, the many LGBTQ residents of Charlotte – as well as LGBTQ residents throughout the state like Joaquín – were exposed to significant discrimination in their day-to-day lives simply for being themselves. After two hours-long hearings, in which there was extensive public comment on both sides of the issue, the City Council voted to adopt the non-discrimination ordinance to protect LGBTQ people from discrimination in public spaces.

Before the Charlotte Ordinance could take effect, the North Carolina General Assembly rushed to convene a special session with the express purpose of passing a statewide law that would preempt Charlotte's move to protect its residents from discrimination. Lawmakers made no attempt to hide the purpose of their actions

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[5] Deborah Munn, *It Was Never About the Cake*, ACLU, Dec. 9, 2013, https://www.aclu.org/blog/lgbt-rights/lgbt-relationships/it-was-never-about-cake.

and instead openly and virulently made clear that HB 2 was targeted retaliation for what it called Charlotte's "radical" move to protect its residents from discrimination.

In addition to repealing the Charlotte ordinance, HB 2 also:

- forced transgender students to use restrooms and locker rooms that accord with the sex they were assigned at birth, whether or not that matches how they identify;
- forced transgender individuals to use restrooms and locker rooms in any government building, including public universities and colleges, that accord with the sex they were assigned at birth, whether or not that matches how they identify; and
- prohibited local governments from passing LGBTQ-inclusive non-discrimination protections.

Prior to the passage of HB 2, Joaquín was treated just like all other men at UNC-Chapel Hill. As part of his social transition, he had begun using the men's restroom at work and elsewhere in late 2015, which occurred without incident for the five months or so prior to the enactment of HB 2. Joaquín had used the multi-user men's restroom on his floor at work just like all of the other men on that floor. Indeed, the only restrooms on the floor where Joaquín works at UNC-Chapel Hill are multi-user and designed for either men or women. HB 2 thus excluded him from using the same restrooms used by his co-workers. Following the passage of HB 2, Joaquín generally used a single-user, gender neutral restroom in another building on campus, which was an approximately 20-30 minute roundtrip walk from his building. He was later informed by administrative staff in the building where he worked that there was a single-user, gender neutral restroom in that building – accessible only by using a special service elevator and located in a cubby in a part of the building used for housekeeping.

In describing what he had to endure simply to use the restroom at his job, Joaquín wrote the following:

> I feel humiliated by being singled out and forced to use a separate restroom from all my coworkers. Because using the special service elevator several times a day would attract even greater attention to the fact that I am not able to use the same restrooms as my coworkers, I have generally resorted to leaving the building and using a restroom in another building on-campus. I now have to plan out my trips to the restroom as part of my schedule. For example, I cannot simply make a quick trip to the restroom before a meeting is about to start, as my

> coworkers are able to do. All of this often causes me to delay or avoid going to the restroom, or to limit my fluid intake.[6]

These stories illustrate the many ways in which discrimination robs individuals of their education, employment, even their very liberty.

Unfortunately, the patchwork nature of current laws has left millions of people across the country subject to uncertainty and potential discrimination that impacts their safety, their families, and their day-to-day lives. Around 50% of LGBTQ people in the U.S. – approximately 8 million people – live in states that still lack explicit statewide legal protections, leaving their residents and visitors at risk of discrimination because of who they are.

The need for consistent, explicit, and nationwide civil rights protections for LGBTQ people – exactly what the Equality Act would provide – could not be clearer. This year, as we mark the 50th anniversary of the uprising at Stonewall – an event that launched the modern struggle for LGBTQ equality – we urge all Members of Congress to write the next chapter in our nation's civil rights history by passing the Equality Act.

Please reach out to Ian Thompson, ACLU senior legislative representative, with any questions at (202) 715-0837 or ithompson@aclu.org.

Sincerely,

Ronald Newman
National Political Director

Ian S. Thompson
Senior Legislative Representative

Cc: Members of the U.S. House Committee on Education & Labor

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[6] Decl. of Joaquín Carcaño at 4-5, Carcaño v. McCrory, 203 F.Supp.3d 615 (M.D.N.C. 2016) (No. 1:16-cv-00236-TDS-JEP).

April 8, 2019

Education and Labor Committee
U.S. House of Representatives
1102 Longworth House Office Building
Washington D.C. 20515

RE: The Impacts of Discrimination on LGBTQ Working Families in Employment, Child Care, and Child Welfare

Dear Chairman Scott, Ranking Member Foxx and Committee Members:

Thank you for the opportunity to provide a written statement for the Committee on the importance of the Equality Act for LGBTQ working families. As organizations focused on speeding equality for lesbian, gay, bisexual, and transgender, and queer (LGBTQ) people in the United States, we are particularly excited about the opportunity to share the key challenges facing LGBTQ people raising children and the urgent need for nondiscrimination protections so that LGBTQ people and their families can thrive.

First, this testimony will summarize what we know about LGBTQ-headed families, including the challenges they experience. Then the benefits of nondiscrimination will be discussed, highlighting the impact on LGBTQ-headed families. Finally, a listing of additional reports and resources is included for your information.

Many LGBTQ People Are Raising Children

Research finds that millions of LGBTQ people are currently raising children. For example, analysis of a nationally representative survey by the Williams Institute finds that 29% of LGBT-identified adults nationwide are raising a child under the age of 18.[1] This equates to approximately 3.2 million LGBT parents.[2] Data from the 2014-2016 American Community Survey conducted by the U.S. Census Bureau show that 24% of female same-sex couples and 8% of male same-sex couples were raising a child under the age of 18.[3] The 2015 U.S. Transgender Survey shows that 18% of transgender people reported having a child of any age.[4] The proportion of LGBTQ people raising children is likely to increase over time as younger generations of LGBTQ people are even more likely to be heading or to want a family: in a 2018 survey commissioned by the Family Equality Council, 77% of LGBTQ Millennials reported already

[1] Williams Institute. (2019). LGBT Demographic Data Interactive.
[2] In this letter, we generally refer to LGBTQ parents and people. However, there are some datasets that do not include options for individuals to identify as "queer." In those instances, this letter uses the specific language included in the survey (e.g. LGBT, LGB, transgender).
[3] Goldberg, S.K., & Conron, K.J. (2018). "How Many Same-Sex Couples in the U.S. Are Raising Children?" The Williams Institute.
[4] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. National Center for Transgender Equality.

being a parent or considering having children, which represents a 44% increase over LGBTQ people in older generations.[5]

Challenges for Working LGBTQ-Headed Families

Nationally representative surveys show that LGBTQ people and same-sex couples raising children face greater economic challenges compared to their non-LGBTQ peers. The challenges facing working LGBTQ parents are plentiful and include many of the challenges that working families in general face. However, there are several key issues that specifically impact working LGBTQ parents, including employment discrimination and access to child care free from discrimination, and access to paid family leave that is inclusive of LGBTQ people and their families.

Higher Rates of Economic Insecurity

Due to high rates of discrimination and other factors, LGBT families are more likely to report low incomes,[6] to live in poverty,[7] to experience food insecurity,[8] and to rely on safety net programs like SNAP,[9] Medicaid, unemployment benefits, and housing assistance.[10]

A comprehensive 2016 report[11] analyzing multiple nationally representatives surveys reveals consistent findings of food insecurity among LGBT people:

- One-third (33%) of LGBT people raising children have lacked enough money to buy food.
- LGBT adults raising children were 1.71 times more likely than non-LGBT adults raising children to have not had enough money for food in the previous year.
- LGB adults raising children were more than twice as likely as straight adults raising children to have received food stamps in the previous year.
- Same-sex couples raising children were almost twice as likely as different-sex couples raising children to have received food stamps in the previous year.

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[5] Family Equality Council (2019). LGBTQ Family Building Survey.

[6] Gates, G.J. (2013). LGBT Parenting in the United States. The Williams Institute; Krivickas, K.M., & Lofquist, D. (2011). Demographics of Same-Sex Couple Households with Children, SEHSD Working Paper 2011-11. U.S. Census Bureau.

[7] Albelda, R., Badgett, M. V. L., Schneebaum, A., & Gates, G. J. (2009). Poverty in the Lesbian, Gay, and Bisexual Community. The Williams Institute; Badgett, M.V.L., Durso, L.E., & Schneebaum, A. (2013). New patterns of poverty in the lesbian, gay, and bisexual community. The Williams Institute; Badgett, M. V. L. (2018). Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S. *Population Research and Policy Review*; Schneebaum, A., & Badgett, M.V.L. (2018). Poverty in US Lesbian and Gay Couple Households. *Feminist Economics.*

[8] Brown, T.N.T., Romero, A.P., & Gates, G.J. (2016). Food Insecurity and SNAP Participation in the LGBT Community. The Williams Institute.

[9] Brown, T.N.T., Romero, A.P., & Gates, G.J. (2016). Food Insecurity and SNAP Participation in the LGBT Community. The Williams Institute.

[10] Rooney, C., Whittington, C., & Durso, L.E. (2018). Protecting Basic Living Standards for LGBTQ People. Center for American Progress.

[11] Brown, T.N.T., Romero, A.P., & Gates, G.J. (2016). Food Insecurity and SNAP Participation in the LGBT Community. The Williams Institute.

A nationally representative survey conducted by the Center for American Progress in 2017[12] found that:

- LGBTQ people were more than twice as likely as non-LGBTQ people to report that they, their partner, or their child received SNAP in the past year. This disparity was particularly pronounced in the Midwest, where LGBTQ families were nearly four times more likely to receive SNAP.
- LGBTQ people were also more likely than non-LGBTQ people to report that they, their partner, or their child participated in Medicaid in the past year and more than twice as likely to report their family received public housing assistance.[13]
- Transgender people were five times more likely to report that they or their family received public housing assistance.

These higher rates of economic insecurity are due to, among other factors, high rates of discrimination in many areas of life, including employment and child care (discussed in next sections). There is also evidence that some LGBTQ-headed families are more economically vulnerable than others, in part because of the broader patterns of social inequalities for various demographic groups of people. For example, 77% of the same-sex couples raising children are female, and these families experience many of the challenges that women in the United States more generally experience, such as wage gaps, in addition to the challenges of being LGBTQ.[14] Additionally, people of color in same-sex couples are more likely to be raising children than white same-sex couples.[15] The well-documented experiences of economic insecurity and workplace discrimination experienced by people of color broadly in the United States also impact these same-sex couples raising children.

Employment Discrimination

All hardworking people—including those who are LGBTQ—should be treated fairly and equally in the job market and at work, and they should have the opportunity to earn a living and provide for themselves and their families. And yet it is still the case that there is no federal law explicitly prohibiting discrimination based on sexual orientation and gender identity in the workplace; furthermore, 26 states still lack explicit state laws prohibiting discrimination against LGBTQ workers.[16] The risk of discrimination on the job is particularly troubling for LGBTQ parents who are providing not only for themselves but for their children. This discrimination, compounded by discrimination against parents and caregivers, persistent discrimination against women, and pervasive discrimination against people of color, means that finding stable, secure employment can be challenging for many LGBTQ parents.

Studies find that total household incomes for families headed by female same-sex couples are considerably lower than the household incomes different-sex married couples and male same-sex

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[12] Rooney, C., Whittington, C., & Durso, L.E. (2018). Protecting Basic Living Standards for LGBTQ People. Center for American Progress.

[13] The term "public housing assistance" used in the survey did not refer to any specific program. For more information about this question wording, see Rooney, C., Whittington, C., & Durso, L.E. (2018). Protecting Basic Living Standards for LGBTQ People. Center for American Progress.

[14] Gates, G.J. (2015). Demographics of Married and Unmarried Same-Sex Couples: Analyses of the 2013 American Community Survey. The Williams Institute.

[15] Gates, G.J. (2013). LGBT Parenting in the United States. The Williams Institute.

[16] Movement Advancement Project. (2019). Equality Maps: Non-Discrimination Laws.

couples.[17] For female same-sex couples, both earners' wages are affected by the women's wage gap. Additionally, individual men in same-sex couples earn less in wages than similarly situated men in different-sex married couples, highlighting the impact of workplace discrimination.

While research about the employment discrimination experienced by LGBTQ parents specifically is sparse, research consistently finds that in general, both LGBTQ parents[18] and LGBTQ people[19] report high rates of employment discrimination. This is especially true for transgender people and LGBTQ people of color. For example, a nationally representative survey conducted in 2017 found that 25% of LGBT people reported experiencing discrimination based on sexual orientation or gender identity in the past year—half of whom said it negatively impacted their work environment.[20] A separate nationally representative survey conducted in 2017 showed that one in five LGBTQ people reported facing discrimination in hiring and slightly more reported experiencing discrimination in pay or promotions.[21] Data from a national survey of more than 25,000 transgender people showed that 27% of transgender workers reported being fired, not hired, or denied promotion.[22]

Access to Child Care and Discrimination

The high cost of quality child care is well documented. For LGBTQ-headed families seeking child care, however, the patchwork of nondiscrimination protections across the country can make finding child care even more difficult. Currently no federal law explicitly prohibits discrimination in places of public accommodation, including daycare centers or preschools. Only 20 states and the District of Columbia have explicit protections from discrimination in public accommodation based on sexual orientation and gender identity, while one additional state prohibits discrimination based only on sexual orientation.[23] The on-the-ground reality of this patchwork is that LGBTQ families risk being turned away from a child care facility simply because of what their family looks like.

Interactions with the Child Welfare System

Many LGBTQ people create families through foster care and adoption, particularly given the high cost of other pathways to parenthood. Data from the American Community Survey reveal that same-sex couples are seven times more likely both to be raising an adopted child and to foster a child than are

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[17] Movement Advancement Project & Center for American Progress. (2015). Paying An Unfair Price: The Financial Penalty for LGBT Women in America.

[18] Williams, J., Shames, S., & Kudchadkar, R. Ending Discrimination Against Family Caregivers. Work Life Law, American University Washington College of Law.

[19] NPR, Robert Wood Johnson Foundation, & Harvard T.H. Chan School of Public Health. (2017). Discrimination in America: Experiences and Views of LGBTQ Americans; James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. National Center for Transgender Equality.

[20] Singh, S. & Durso, L. E. (2017). Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways. Center for American Progress.

[21] NPR, Robert Wood Johnson Foundation, & Harvard T.H. Chan School of Public Health. (2017). Discrimination in America: Experiences and Views of LGBTQ Americans.

[22] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. National Center for Transgender Equality.

[23] Movement Advancement Project. (2019). Non-Discrimination Laws: Public Accommodations.

different-sex married couples.[24] Too little is known about the experiences of LGBTQ people seeking to become parents with the child welfare system in the United States, in part because of the lack of data collected by surveys like the AFCARS. That said, a growing number of states are allowing discrimination against families in the child welfare system under the guise of religious freedom, turning away otherwise qualified parents because they are LGBTQ, religious minorities, unmarried couples, or single parents.[25] In addition to these laws, far too few states and agencies have explicit nondiscrimination policies. For example, a recent Center for American Progress study found that fewer than a third of child placing agencies with websites in both Texas and Michigan had a posted nondiscrimination policy of any kind.[26] The U.S. Department of Health and Human Services recently granted a waiver to South Carolina to permit state-contracted agencies to discriminate based on religion.[27] By allowing agencies to decide which type of families to consider, these laws ultimately harm the hundreds of thousands of children in the child welfare system of discriminatory laws and policies.

In addition to this type of discrimination, there is a growing recognition of the ways in which LGBTQ youth and adults are disproportionately impacted by the child welfare system, particularly low-income LGBTQ parents and LGBTQ youth of color. For example, in a study of low-income African American mothers, those who identified as lesbian/bisexual (21.3%) were four times more likely than those who identified as heterosexual to have lost their children to the state in child welfare proceedings.[28]

Findings from related research are also illuminating. For example, a 2016 study of homeless and housing insecure young adults (18 to 24-years-old) in Harris County, Texas, found that 24% of the overall sample identified as LGBTQ, of whom 27% were parenting or pregnant.[29] Of those in the overall sample who were parenting or pregnant, 32% of the mothers, and 8% of the fathers, identified as LGBTQ. Research shows that even one experience of homelessness increases the risk of child welfare system involvement,[30] and that housing problems delay reunification for 30-50% of children in foster care.[31]

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[24] Goldberg, S.K., & Conron, K.J. (2018). "How Many Same-Sex Couples in the U.S. Are Raising Children?" The Williams Institute.

[25] Every Child Deserves a Family: State Foster Care & Adoption Resources.

[26] Bewkes, F. J. *et al.* (2018). Welcoming All Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children. Center for American Progress.

[27] Letter from HHS Secretary Azar to South Carolina Governor Henry McMaster, dated January 23, 2019.

[28] Harp, K.L.H. & Oser, C.B. (2016). Factors associated with two types of child custody loss among a sample of African American mothers: A novel approach. Social Science Research 60:283-296.

[29] Narendorf, S. C., Jennings, S. W., & Maria, D. S. (2016). Parenting and homeless: Profiles of young adult mothers and fathers in unstable housing situations. Families in Society: The Journal of Contemporary Social Services. 97(3), 200–211.

[30] Rog, D.J., Henderson, K.A., Lunn, L.M., Greer, A.L., & Ellis, M.L. (2017). The Interplay Between Housing Stability and Child Separation: Implications for Practice and Policy. American Journal of Community Psychology 60:114-124 (citing numerous studies).

[31] Fowler, P.J. & Schoeny, M. (2015). The Family Unification Program: A Randomized-Controlled Trial of Housing Stability. Child Welfare 94:167-187 (citing studies).

Despite making up only 5-10% of the general population nationwide, LGBTQ+ youth comprise as much as 25% of youth in foster care.[32] Transgender and gender non-conforming youth ("TGNC youth") are overrepresented in these systems at even higher rates than youth who identify as lesbian, gay, or bisexual. According to a federally-funded study in Los Angeles County, 5.6% of youth in foster care identify as transgender compared to only 1-2% of the general youth population, and 11% of youth in the study described themselves as gender non-conforming.[33] Over twenty-nine percent (29.2%) of those who identified as LGB had a child of their own.[34] The researchers found this to be "a larger than expected percentage," and indicated a need for services to prevent child welfare involvement of these youth as parents. Involvement in the child welfare system as a child is a risk factor for later facing a child welfare investigation as a parent.[35]

The Importance of Eliminating Discrimination Against LGBTQ People and their Families

The economic fragility of LGBTQ-headed families, coupled with the patchwork of protections against discrimination, underscores the need to take concrete steps to ensure that supports for working families are inclusive of family diversity and specifically address the unique challenges that LGBTQ working parents experience. A crucial and important step toward addressing the economic security of LGBTQ people and their families is passing clear, explicit federal legislation prohibiting discrimination based on sexual orientation and gender identity in a broad array of areas – employment, housing, credit, federal funding, public accomodations, and more - as H.R.5, the Equality Act, would do. This update to our nation's nondiscrimination laws is needed to ensure that everyone is treated fairly on the job, when finding housing, when accessing government programs, and when seeking child care and child welfare and family services, among other things. Updating our laws, substantial education and training for employers, and fully funding agencies charged with enforcing nondiscrimination laws would level the playing field for LGBTQ workers, as well as improve the experiences of all people in the United States. H.R.5, the Equality Act, would prohibit discrimination based on sexual orientation, gender identity, and gender expression in many areas of life, including those discussed here.

Thank you again for considering H.R.5, the Equality Act, and for the opportunity to provide written testimony for the Committee.

Family Equality Council
New York, NY
646-880-3047

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[32] Lambda Legal, Children's Rights, & Center for the Study of Social Policy. (2017). Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender Expansive Youth in Out-of-Home Care 2.
[33] The Williams Institute, Holarchy Consulting, & Westat. (2014). Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles.
[34] Dettlaff, A.J. & Washburn, M. Outcomes of Sexual Minority Youth in Child Welfare: Prevalence, Risk, and Outcomes. University of Houston.
[35] Browne, H.J. (2015). Expectant & Parenting Youth in Foster Care. Center for the Study of Social Policy (children of youth in foster care are five times more likely to spend time in foster care themselves than children of same-age parents in the general population).

Movement Advancement Project
(303) 578-4600

National Center for Lesbian Rights
Washington, DC
202-734-3545

Center for American Progress
Washington, DC
202-481-8176

Additional Resources

- Lourdes Ashley Hunter, Ashe McGovern, and Carla Sutherland, eds. (2018). Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All: A National Call to Action. New York: Social Justice Sexuality Project, Graduate Center, City University of New York.
- The LGBTQ Poverty Initiative gathers many reports that address challenges facing LGBTQ people and families.
- Sejal Singh and Laura E. Durso. (2017). Widespread Discrimination Continues to Shape LGBT People's Lives in both Subtle and Significant Ways. Center for American Progress.
- Caitlin Rooney, Charlie Whittington, and Laura E. Durso. (2018). Protecting Basic Living Standards for LGBTQ People. Center for American Progress.
- Shabab Ahmed Mirza. (2018). Disaggregating the Data for Bisexual People. Center for American Progress
- Katherine Gallagher Robbins, Laura E. Durso, Frank J. Bewkes, and Eliza Schultz. (2017). People Need Paid Leave Policies That Cover Chosen Family. Center for American Progress.
- Moira Bowman, Laura E. Durso, Sharita Gruberg, Marcella Kocolatos, Kalpana Krishnamurthy, Jared Make, Ashe McGovern, and Katherine Gallagher Robbins. (2016). Making Paid Leave Work for Every Family. Center for American Progress.
- Poverty Is An LGBT Issue: An Assessment of the Legal Needs of Low-Income LGBT People. (2017). Legal Services NYC.
- Catherine Hanssens, Aisha Moodie Mills, Andrea Ritchie, Dean Spade and Urvashi Vaid. (2014). A Roadmap for Change: Federal Policy Recommendations Addressing the Criminalization of LGBT People and People Living with HIV. Columbia Law School.
- Caitlin Rooney and Sarah Hassmer. (2019). Programs That Support Basic Living Standards for LGBTQ Women Should Be Strengthened – Not Cut. Center for American Progress and National Women's Law Center.
- National Women's Law Center. (2018). The Wage Gap: The Who, How, Why, and What To Do.
- National Women's Law Center. (2019). The Equality Act of 2019: Strengthening Our Federal Civil Rights Laws.

Alaska Air Group

April 9, 2019

The Honorable Suzanne Bonamici
Chairwoman
Subcommittee on Civil Rights and Human Services
House Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable James Comer
Ranking Member
Subcommittee on Civil Rights and Human Services
House Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

RE: H.R. 5, the Equality Act

Dear Chairwoman Bonamici and Ranking Member Comer:

Thank you for your consideration of H.R. 5, the Equality Act, and working to advance equal rights for all. As a member of the Human Rights Campaign (HRC) Business Coalition for the Equality Act, I am writing to offer support from Alaska Airlines and Horizon Air for this legislation. To continue to make progress and ensure full equality for LGBTQ individuals and families, Congress should swiftly act to pass this legislation.

At Alaska Airlines, our people and our communities make us who we are. We've grown fast, and since our roots in rural Alaska we've been innovators and pioneers. Today, we continue to connect our guests nationwide – whether from the Arctic to New York or Portland to St. Louis. Our values guide us to serve, to care, to hold safety above all else, and to do the right thing. These values inform our decisions and actions each day and have guided us to support this important piece of legislation.

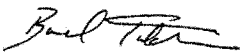
A clear federal standard on equality across the country is not only the right thing to do, but is also good for business and for our employees who travel frequently and live in many different states. We're committed to hiring the best in aviation from Alaska to the East Coast and celebrating the diversity of our workforce. Doing so sustainably will require enabling and empowering people from all backgrounds, regardless of sex, race, income, gender identity or sexual orientation, to have access to quality education and career paths.

We're encouraged by great progress toward equality over the past few decades. But we know that this continues to be a journey, and not without challenge. Alaska Airlines is committed to sharing our voice and our work toward creating an environment of equity. We will not tolerate discrimination based on sexual orientation, gender identity, or any other reason, within our operation, and we will continue to work toward full equality. A consistent and fully-equal work environment will fuel the future of business and economic opportunity.

PO Box 68900, Seattle, WA 98168

Again, we urge Congress to pass H.R. 5, the Equality Act and thank you for considering this important legislation in the House Education and Labor Subcommittee on Civil Rights and Human Services.

Sincerely,



Brad Tilden
Chairman and Chief Executive Officer
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UCLA School of Law Williams Institute

The Williams Institute
On Sexual Orientation and Gender Identity
Law and Public Policy

April 10, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott
Chair, Committee on Education and Labor
U.S. House of Representatives

Dear Chair Bonamici and Ranking Member Comer:

I am the Judicial Education Director of Williams Institute on Sexual Orientation Law and Public Policy at UCLA. I am also the current Vice-President of the National Association of State Judicial Educators, the organization for judicial education professionals working in the courts of the United States and internationally. I have trained over 5000 judges, court staff and related court professionals from virtually every state in the United States on sexual orientation and gender identity issues for nearly 15 years. Additionally, I am a Professor of Law at Western State College of Law in Irvine, California. I have studied the treatment and experiences of Lesbian, Gay, Bisexual, and Transgender [LGBT] people in courts and the judicial system for over twenty years and have published several book chapters, law review articles and studies on these topics.

I am writing to you about H.R. 5, the Equality Act introduced in the 116th Congress. As you know, this bill would prohibit discrimination based on sexual orientation and gender identity in public accommodations, including the courts, on juries, and court-related governmental services and facilities. In addition, the judicial system also serves as the employer for court personnel, judges and others. Accordingly, the bill would explicitly confirm the prohibition on sexual orientation and gender identity discrimination in hiring, firing and other employment decisions in those contexts. I have reviewed over two decades of surveys, reports and studies of the experiences of LGBT people in the legal system as both court users and employees. Research findings make two main points that document the need for this legislation.

First, research shows a widespread pattern of disparate and unequal treatment and experiences faced by LGBT court users, witnesses, and parties in courtrooms, jury rooms and other segments of the judicial system. There are two statewide studies of state court systems

exclusively focused on sexual orientation; those studies were conducted by the courts of California and New Jersey. The California and New Jersey studies' documentation of discrimination in the courts build upon and confirm the findings of other studies of the judicial system conducted by state or local bar associations, and other groups. In addition, the U.S. Transgender Study contained important findings that, like LGB people, transgender and gender nonconforming persons faced discrimination and unequal treatment in courts and judicial systems across the United States.

- The California Judicial Council, Access and Fairness Committee (2001) conducted a statewide study of the experiences and treatment of sexual orientation minorities in the California courts. That report found significant examples of unequal treatment of lesbians and gay men in the California judicial system. When lesbian and gay court users were involved in sexual orientation issues in court, 25.5% of lesbian and gay court users reported they were treated differently from everyone else, and 29.6% of lesbian and gay respondents felt those who knew their sexual orientation did not treat them with respect. In that same contact, 39% of lesbian and gay court users believed that their sexual orientation was used to devalue their credibility.
- A 2001 study by the New Jersey Supreme Court Task Force on Sexual Orientation Issues found that 45% of lesbian and gay court users reported experiencing or observing litigants or witnesses treated disadvantageously because they were or were perceived to be gay or lesbian. Sixty-one percent of gay or lesbian New Jersey court users believed that sexual orientation bias affected the outcome of a case in which they were involved or which they observed. Compared to all N.J. respondents, sexual minorities reported significantly more incidents in which gay litigants or clients of gay lawyers fared worse in the family or criminal courts because of sexual orientation.
- More recently, the Florida Supreme Court Standing Committee on Fairness and Diversity (2008) found that 14% of litigants in the Florida courts reported that the courts did not show fairness and respect to people without regard to sexual orientation. Nine percent of attorneys, 8% of judges, and 4% of staff reported seeing or experiencing unfair treatment of individuals in the courts based on sexual orientation.
- The State Bar of Arizona Gay and Lesbian Task Force, *Report to the Board of Governors*, (1999) and its findings detail evidence of discrimination typical of that found in the bar association reports. That report demonstrated that lesbians and gay men are substantially disadvantaged as participants in the justice system because of sexual orientation bias. Thirteen percent of the judges and lawyers surveyed observed judges in open court negatively treating those perceived to be lesbians or gay men; 47% heard disparaging remarks about lesbians or gay men in courthouse public areas. Further, 8% percent of court personnel and 4% of litigants, jurors, and witnesses indicated they preferred not to work with lesbian or gay lawyers.
- The 2015 U.S. Transgender Survey found that, when they believed that staff knew or believed they knew about their transgender status, 13% of transgender and gender nonconforming people reported having one or more of the following experiences in courts and courthouses: being denied equal treatment or service (8%), verbally harassed (8%), or physically attacked (<1%) because of being transgender. Legal name changes

are an important step in ensuring that identification documents match gender identity. Because name changes in most states take place via court order, transgender people's experiences in those court proceedings are particularly significant. In name change proceedings, when transgender people believed that judges and/or court staff thought or knew they were transgender during their interaction, 22% felt they were only sometimes treated with respect, and 2% felt they were never treated with respect.

Most Americans' experiences with courts and the judicial system come from their being called for or serving on a jury. Studies involving jury service experiences by LGBT people document a significant number of cases and data on disparate or discriminatory treatment during those experiences which affect people throughout the nation. Accordingly, the provisions of H.R. 5, the Equality Act, that amend 28 U.S.C. Chapter 121 – Juries; Trial by Jury to confirm the prohibition on sexual orientation and gender identity discrimination on juries are particularly needed.

- Shay (2014) collected cases and reports of other documented experiences where jurors and litigation parties were unequally and discriminatorily treated based on sexual orientation and gender identity. These cases and reports ranged from voir dire questioning on sexual orientation matters, attempts to discredit potential witness and party testimony because of their sexuality, to reports of juror prejudice in decision making.
- Brower (2011) reported that over 10% of lesbians and gay men experienced disparate treatment during their jury service experience in court; nearly 20% believed they were not treated respectfully, and over 13% stated that their sexual orientation was used to devalue their credibility. Some study participants reported being dismissed from the venire panel because of their sexual orientation. Brower also collected juror attitude studies in which jurors chronicle being unable to be fair or impartial to sexual minority litigants at a higher rate than reported unfairness toward racial or ethnic minority litigants.

Second, LGBT lawyers and others working in courts are confronted with a far-reaching array of employment decisions evidencing discrimination on the basis of sexual orientation or gender identity. Each study documents numerous experiences of being fired, being denied a job, given disparate work assignments or evaluations, or experiencing some other form of unequal treatment in the workplace that stemmed from these individuals' sexual orientation or gender identity.

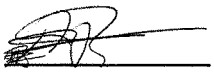
- California lesbian and gay court employees were over five times more likely to experience negative actions, discrimination, or hear comments based on sexual orientation than were heterosexual employees: 25% of lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their work place based on their sexual orientation; conversely, a mere 2% of the non-LGBT employees reported being discriminated against based on sexual orientation. If a person is suspected of being lesbian or gay, 17.3% of California court employees stated that it is harder to be hired for a job at the court; 13.4% agreed that sexual orientation is used to devalue the credibility of some gay or lesbian court employees; and 9.8% believed that anti-gay prejudice is widespread in the courts as a workplace.

- Thirty percent of New Jersey judicial branch employees of all sexual orientations and 78% of lesbian and gay employees heard a co-worker, supervisor or judge make a derogatory statement or inappropriate joke about homosexuals. Moreover, lesbian and gay court employees themselves were often the target of that treatment: 14% of all judicial employees and 49% of lesbian and gay workers heard those remarks or jokes about a person in the office because that person was or was perceived to be lesbian or gay.

Finally, research suggests that reported cases and administrative complaints underreport the amount of discrimination experienced by LGBT people. Brower (2014) found that in each of the court employee studies he reviewed, a significant number of sexual minority court employees who experienced discrimination and unequal treatment did not report it for fear of greater, more widespread exposure as gay or lesbian, which would have increased and exacerbated their discriminatory treatment. Sexual minority court workers are reluctant to "out" themselves further by filing complaints and facing state administrators and supervisors who have been hostile to their claims. In addition to documenting underreporting of LGBT discrimination in court, those court studies evidence the fact that LGBT court employees (and court users) often do not at all reveal their sexual orientation or gender identity in court settings because they fear discrimination and unequal treatment. Both of these factors suggest that discrimination against LGBT workers in the judicial system could be even greater than the degree suggested by the studies discussed earlier.

In sum, more than two decades of research finds ample evidence of discrimination against LGBT persons in public accommodations like courts and the judicial system and in those same public institutions as workplaces. These patterns of discrimination demonstrate the need for, and importance of, the Equality Act, H.R. 5.

Sincerely,



Todd Brower

The Williams Institute *Advancing critical thought in the field of sexual orientation and gender identity law and public policy.*
UCLA School of Law Box 951476 Los Angeles, CA 90095-1476 T (310)267-4382 F (310)825-7270 williamsinstitute@law.ucla.edu

April 11, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott
Chair, Committee on Education and Labor
U.S. House of Representatives

Dear Chairman Bonamici, Ranking Member Comer, and Members of the Subcommittee on Civil Rights and Human Services:

1. I am writing with information for the record of H.R. 5, the Equality Act. My and other scholars' research has shown repeatedly and consistently that social conditions such as discrimination adversely impact the health and well-being of lesbians, gay men, bisexuals, and transgender (LGBT) people. This research suggests that should the Equality Act should become law, it could improve the health and well-being of LGBT people in the United States and reduce health disparities related to sexual orientation and gender identity.

2. I am a Distinguished Senior Scholar of Public Policy at the Williams Institute at UCLA School of Law. I am also Adjunct Professor of Community Health Sciences at the Fielding School of Public Health at UCLA and a Professor Emeritus of Sociomedical Sciences at Columbia University's Mailman School of Public Health.

3. For over 25 years I have been studying the impact of prejudice and stigma on the health and well-being of LGBT people. I developed a model of minority stress that describes the relationship of social stressors and physical and mental disorders and helps to explain LGBT health disparities1. The model has guided my and other

[1] Meyer, I. H. (2003). Prejudice, social stress and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence. *Psychological Bulletin, 129*(5), 674-697.

investigators' population research on LGBT health disparities by identifying the mechanisms by which social stressors impact health and describing the harm to LGBT people from prejudice and stigma.2 I am also currently Principal Investigator of two National Institutes of Health-funded studies, examining stress, identity, health, and health care utilization in LGBT populations.

4. Growing research over the past 25 years, using a variety of methodologies, has consistently demonstrated in various population of LGBT people that they are subject to greater stigma, prejudice, and discrimination than heterosexual cisgender people.[3] Research has further shown that stress resulting from stigma, prejudice, and discrimination—including discrimination in employment—is associated with adverse physical and mental health outcomes and the observed health disparities between LGBT and heterosexual cisgender people.[4] The federal government, in Healthy People 2020, determined that reducing health disparities is a core goal for the Department of Health and Human Services. The document notes specifically that

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[2] Institute of Medicine [IOM]. (2011). *The health of lesbian, gay, bisexual, and transgender people: Building a foundation for better understanding.* Washington, DC: The National Academies Press.
[3] Meyer, I. H., Schwartz, S., & Frost, D. M. (2008). Social patterning of stress and coping: Does disadvantaged social statuses confer more stress and fewer coping resources? Social Science & Medicine, 67(3), 368-379.
[4] Citations, partial list:
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"Social determinants affecting the health of LGBT individuals largely relate to oppression and discrimination." Identifying specifically, among other things, "Legal discrimination in access to health insurance, employment, housing, marriage, adoption, and retirement benefits."[5]

5. In a recently conducted study my colleagues and I found evidence of this continued exposure to discrimination. The study gathered data from cisgender heterosexuals and cisgender lesbians, gay men, and bisexuals in a sample that is representative of the United States population. Gallup, Inc., collected the data in contract with UCLA. Data were gathered at two times in February and November 2018 from a sample of 1,131 people. The sample was a nationally representative study of United States residents who were age 18 and over. The study was fielded via mail using an address-based sample (ABS) design. Results (Table 1) show that compared with heterosexuals, LGB people are significantly more likely to have been fired from a job or denied a job, denied a promotion or received a negative evaluation, prevented by a landlord or realtor from moving into or buying a house or apartment, and many more LGB than heterosexuals were often bullied before age 18.

Table 1. Cisgender heterosexual and LGB in total U.S. probability sample (N = 1,110), 2018, Data shows weighted percent

	Cisgender heterosexuals	Cisgender LGB people	Statistics
Fired from a job or denied a job	40%	60%	$F = 8.44$, $p = 0.004$
Denied a promotion or received a negative evaluation	32%	47%	$F = 5.80$, $p = 0.016$
Prevented by a landlord or realtor from moving into or buying a house or apartment	6%	15%	$F = 5.85$, $p = 0.016$
Often bullied before age 18	14%	41%	$F = 28.28$, $p < 0.001$

6. This study's results, together with accumulating evidence from other varied sources, suggest that despite some improvement in social conditions, such as greater public acceptance and the availability of marriage to same-sex partners, LGBT people continue to be subject to discrimination and are therefore at risk for the adverse mental and physical health impact of such discrimination.

[5] https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health. Accessed April 1, 2019.

7. Studies in the United States and Europe have also shown that when LGB people receive legal protections and other measures of improved social conditions, their health improves. For example, researchers assessed the impact of several laws protecting LGB people against discrimination based on sexual orientation in Sweden.[6] Particularly relevant here is the protection of sexual minorities from discrimination in the workplace.[7] Using health data for 2005, 2010, and 2015, from a nation-wide representative sample, the researchers found that psychological distress has declined among lesbians and gay men, and that " the sexual orientation disparity (gay men/lesbians vs. heterosexuals) in psychological distress was eliminated."

Sincerely,

Ilan Meyer

Ilan H. Meyer, Ph.D.

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[6] Hatzenbuehler, M. L., Bränström, R., & Pachankis, J. E. (2018). Societal-level explanations for reductions in sexual orientation mental health disparities: Results from a ten-year, population-based study in sweden. Stigma and Health, 3(1), 16-26. http://dx.doi.org/10.1037/sah0000066.

[7] Swedish Code of Statutes: Law (1999:133) prohibiting employment discrimination based on sexual orientation (1999).

April 12, 2019

The Honorable Suzanne Bonamici
United States House of Representatives
Subcommittee on Civil Rights and Human Services
2231 Rayburn House Office Building
Washington, DC 20515

The Honorable James Comer
United States House of Representatives
Subcommittee on Civil Rights and Human Services
1037 Longworth House Office Building
Washington, DC 20515

Dear Chairwoman Bonamici and Ranking Member Comer:

On behalf of the members of HR Policy Association, I write in support of the Equality Act.

HR Policy Association is the leading organization for Chief Human Resources Officers of more than 390 of the largest employers in the United States, and our members have long recognized the fundamental role that an inclusive culture plays in enabling their organizations to attract, motivate, and develop the caliber of talent needed. Our members have a longstanding commitment to diversity and inclusion, and they take proactive steps to ensure their companies are fostering positive and respectful cultures, free from any form of discrimination.

The HR Policy Association urges Congress to pass the Equality Act, and we look forward to helping policy makers throughout the legislative process ensure that final measure achieves its purpose and is consistent with the progressive practices that large companies have long embraced.

Sincerely,

Daniel V. Yager
President and Chief Executive Officer

UCLA School of Law Williams Institute

The Williams Institute
On Sexual Orientation and Gender Identity
Law and Public Policy

April 12, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott
Chair, Committee on Education and Labor
U.S. House of Representatives

Dear Chairperson Bonamici, Ranking Member Comer, and members of the Committee on Education and Labor,

I am writing in support of H.R. 5 which proposes to extend nondiscrimination protections to all U.S. residents in many domains of life, including education. As a social epidemiologist, my research focuses on sexual orientation and gender identity-based differences in socioeconomic status. According to my estimations, there are over 3.5 million LGBT students ages 15 and up in the United States [1].

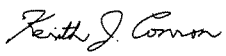
Of these, 2.1 million students across 36 states would obtain protection from sexual orientation and gender identity discrimination through the passage of H.R. 5, because their state currently does not have a civil rights law that explicitly includes sexual orientation and gender identity. Research documents that these students are vulnerable to discrimination, harassment, and bullying that negatively impacts not only their education, but has lasting negative consequences for lifelong economic well-being, health, and civic engagement [1-15].

Several studies find higher rates of bullying in high school [2-4], and sexual and other physical violence victimization in college [5-9], among LGBT compared to heterosexual peers. Research also notes harassment of LGBT students by school staff and administrators at secondary and post-secondary levels [10-12]. Lastly, institutional policies and climate have also been found to vary widely in their inclusion and protection of LGBT students [10, 13-16].

Harassment and discrimination, at multiple points in the life course, are among the leading contributors to sexual orientation- and gender identity- based differences in educational attainment and economic well-being. For example, lower levels of education and higher rates of poverty have been observed among lesbian and bisexual women, bisexual men, and transgender adults compared to heterosexual, cisgender (non-transgender) peers in several population-based studies [17-24].

In summary, it is critical to extend for H.R. 5 to extend federal protections to LGBT students.

Sincerely,



Kerith Jane Conron, ScD, MPH
Blachford-Cooper Research Director and Distinguished Scholar

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Economics Department

April 17, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott
Chair, Committee on Education and Labor
U.S. House of Representatives

Dear Chair Bonamici and Ranking Member Comer:

I am a professor of economics and a faculty member in the School of Public Policy at the University of Massachusetts Amherst. I am also a senior scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA. I have studied employment discrimination based on sexual orientation, gender identity, race, and gender for more than twenty-five years and have published three books and numerous studies on this topic.

I am writing to you about H.R. 5, the Equality Act. As you know, this bill would expand protections against discrimination based on sexual orientation and gender identity in employment and other important areas of life. Decades of research in economics and other fields demonstrate that employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) employees is common in both the public and private sectors in the United States.

I base this opinion on my own research and my review of many existing studies. Other reviews of the research by economists come to similar conclusions, including a 2017 review by Dr. Marie-Anne Valfort for the OECD. The evidence in these studies comes from reports of discrimination by LGBT people, wage gaps for gay and bisexual men, experiments that show differential treatment of LGBT job applicants, and charges of sexual orientation and gender identity discrimination filed against employers.

First, many LGBT people report experiences of discrimination when asked. Recent surveys by the Pew Research Center (2013) and by NPR, the Robert Wood Johnson Foundation, and the Harvard School of Public Health (2017) show that about one in five LGBT Americans have experienced discrimination at some point in their lives when applying for jobs, seeking promotions, or in their wages.

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Second, many studies show a significant pay gap for gay and bisexual men when compared to heterosexual men who have the same productive characteristics. Looking across those studies, Prof. Marieka Klawitter of the University of Washington found that gay and bisexual men earn from 11% to 16% less than similarly qualified heterosexual men. Lesbians generally earn the same as or more than heterosexual women, but lesbians earn less than either heterosexual or gay men and research discussed later shows lesbians face discrimination. These sexual orientation and gender wage gaps are likely responsible for the fact that recent studies have found greater vulnerability to poverty for some groups of LGBT people than for similar heterosexual people, particularly for transgender and bisexual people and for people in same-sex couples.

Third, several scholars have conducted experiments to assess the degree of discrimination by employers in the hiring of LGBT applicants. Typically, the researchers send out a job application for an LGBT applicant and a very similar heterosexual or non-transgender applicant to see if employers treat them differently. The degree of discrimination observed is striking in some studies. To get one job interview, a gay male applicant would need to apply to fourteen jobs, but a heterosexual man would only need to apply to nine. A similar study in New York City sent pairs of real people—one transgender applicant and one cisgender (non-transgender) applicant—to apply for retail sales jobs. In about half of the stores, the cisgender applicant got a job offer but the transgender person did not; in only one case was that pattern reversed.

Fourth, charges filed against employers alleging sexual orientation or gender identity discrimination demonstrate a high degree of perceived discrimination. Since 2013, the EEOC has allowed workers to file sex discrimination charges that allege sexual orientation or gender identity discrimination. With several colleagues, I have analyzed more than 9,000 such charges filed with the EEOC or a state or local agency. The types of discrimination alleged are serious, and about half of the charges include claims of discriminatory discharges and harassment. We found that a wide range of employees file such charges, with particularly high rates being filed by African American workers and men for sexual orientation charges and by women and White workers for gender identity. Many of these charges are filed against employers in low wage industries, such as the retail sector and the food services industry.

Finally, based on my research in this area, I conclude that the patterns of discrimination are similar in the public and private sector. For example, 1,151 discrimination charges were filed against employers that are state and local government agencies. That accounts for 12% of charges, while LGBT people make up only about 10% of state and local employees. That quantitative finding in the charge data is consistent with the many reported court cases in fields such as law enforcement, corrections, health care, and education, all fields disproportionately made of up of state and local employees.

To summarize, more than twenty-five years of research finds ample evidence of discrimination against LGBT workers. These patterns of discrimination demonstrate the need for and importance of the Equality Act to help our country end harmful discrimination.

Yours truly,

M. V. Lee Badgett, Ph.D.
Professor of Economics

Public Policy Faculty

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April 17, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott, Chair, Committee on Education and Labor, U.S. House of Representatives

Dear Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee on Civil Rights and Human Services of the Education and Labor Committee:

We are writing this letter as three experts in the physical and mental health and health care experiences of lesbian, gay, bisexual, and transgender (LGBT) people in the United States. We conduct health-focused research on how stigma and discrimination based on sexual orientation and gender identity negatively influence the health and health care experiences of LGBT people. We represent researchers from both the School of Public Health and the School of Nursing at the University of Michigan, as well as the Center for Sexuality & Health Disparities (where Dr. Stephenson is the Director) at the University of Michigan; and between us we have over 300 articles published in the peer-reviewed scientific literature on issues of LGBT health and discrimination.

We are writing to you about HR 5, the Equality Act. As you know, the bill would expressly prohibit sexual orientation and gender identity discrimination across the country in a variety of settings. Based on research that we and others in the scientific community have conducted on the health of LGBT populations, we would like to highlight three points that demonstrate the need for this legislation.

First, research shows that experiences of stigma and discrimination targeted at LGBT populations are pervasive in the United States. These adverse experiences cause health inequities and negative health outcomes, with LGBT populations being more likely to experience poor mental health (such as depression and anxiety), suicide, substance use disorders, and HIV when compared with the general population.

Second, protections against discrimination suffered by LGBT populations matter for health. Studies have found that state-level policies that protect LGBT people, and social environments that promote the acceptance of LGBT people help to improve the mental and physical health of LGBT populations. These policies can also have strong economic benefits, as the lack of specific protections against discrimination has been associated with excessive health care usage, under-insurance, and employment absenteeism among LGBT people.

- Numerous studies by Dr. Mark Hatzenbueler and colleagues have found that policies that are protective of LGBT populations can help to improve the health of LGBT people. For example, one study found that lesbian, gay, and bisexual people living in states that extend non-discrimination protections to include sexual orientation were less likely to have mental health disorders (for example, anxiety and post-traumatic stress disorder) that are specifically related to stigma against their sexual orientation.
- Research data from the CDC's Behavioral Risk Factor Surveillance System show that living in states with more protective policies for transgender people was associated with better mental health outcomes, less substance use, and more use of primary health care among transgender people.

Finally, living in states that have more LGBT protective policies and fewer discriminatory ones has been found to matter for access to health care. Being able to access health care is essential to preventing and treating the numerous adverse health outcomes that are associated with LGBT stigma and discrimination. We, as well as other researchers, have conducted several recent national studies examining the links between policies specific to transgender populations in the U.S. and the use of health care. These studies demonstrate that:

- Discrimination based on gender identity limits access to health care, and policies that provide specific protections can help to increase use of needed health care.

- Policies can directly influence access to health care. For example, health insurance policies related to the coverage of transgender-specific care can determine a transgender person's ability to pay for care.

- Policies not specifically focused on health care, such as civil rights protections, influence the political and social environment in ways that either create barriers to health care or make it easier to access health care.

We analyzed data from the U.S. Trans Survey, which had more than 27,000 transgender respondents across the U.S. Our study examined the links between health care use and state-level policies, including non-discrimination protections, religious exemption laws, private health insurance policies, Medicaid policies, gender marker change requirements on state government identification, and legal name change requirements. We found that these policies were linked with general experiences of health care use and with the use of mental health care and hormone replacement treatment (among individuals who wanted or needed to access these types of care).

- Transgender people living in states with more protective policies and fewer harmful ones were less likely to report delaying health care due to fears of mistreatment.

- Transgender people living in states with more protective policies and fewer harmful ones were more likely to report accessing needed mental health services.
    - Transgender people living in states that have explicit inclusion of transgender-related care as part of Medicaid coverage were 21% more likely to access mental health care, and transgender people living in states that exclude transgender-related care were 28% less likely to access mental health care.
    - In addition, transgender people living in states that have broad religious exemption laws were 14% less likely to report using mental health services.

- Among transgender people who wanted hormone replacement treatment, those living in states that include gender identity in their non-discrimination protections were 21% more likely to report accessing hormones.

To summarize, extending civil rights laws to include specific protections based on sexual orientation and gender identity can help to improve the health of LGBT people, has direct consequences for the provision of health care, and has clear linkages to key economic outcomes. Unfortunately, LGBT discrimination is common in the U.S., but extending civil rights laws can go a long way to reduce its negative effects on health. Experiences of stigma and discrimination have serious consequences and result in LGBT health disparities.

By reducing stigma and discrimination, the Equality Act will help to improve health outcomes and increase access to health care for LGBT people. Reducing the health disparities LGBT people experience is also in alignment with the Healthy People 2020 goal to "Improve the health, safety, and well-being of lesbian, gay, bisexual, and transgender individuals" and will be a significant step toward creating a healthier U.S. population.

Sincerely,

Tamar Goldenberg, MPH, PhD(c)
Research Associate
School of Public Health
University of Michigan

Gary W. Harper, PhD, MPH
Professor
School of Public Health
University of Michigan

Rob Stephenson, PhD, MSc
Chair and Professor
School of Nursing
University of Michigan

UCLA School of Law Williams Institute

The Williams Institute
On Sexual Orientation and Gender Identity
Law and Public Policy

April 18, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott
Chair, Committee on Education and Labor
U.S. House of Representatives

Dear Chair Bonamici, Ranking Member Comer, and Members:

I am writing in support of H.R. 5, the Equality Act. Research has consistently shown that there is persistent and pervasive discrimination against lesbian, gay, bisexual, and transgender (LGBT) people, on the basis of their sexual orientation and/or gender identity, across multiple spheres of activity that are addressed under the Equality Act. That research further documents the harmful effects of the discrimination on the health and well-being of LGBT people. The Equality Act, which would confirm that discrimination on these bases violates federal law, is critically needed to protect the rights of LGBT people and ensure them equal opportunity under the law.

This letter focuses on the discrimination to which LGBT people have been subjected in one particular area covered under the Equality Act: health care. I am currently the Executive Director of the Williams Institute, an academic research institution affiliated with the UCLA School of Law that conducts independent, rigorous research and analysis of issues affecting the LGBT community. Prior to my tenure at the Institute, I served as the Director of the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services from August 2014 until January 2017. In that role, I spearheaded and oversaw the issuance of regulations implementing Section 1557 of the Affordable Care Act, which, among other things, bars sex discrimination in federally funded health care and health coverage.

These regulations, issued in final form on May 18, 2016, explicitly interpret the underlying statute to bar discrimination based on sex stereotyping and gender identity. The government adopted this interpretation based in part on the extensive record of discrimination against LGBT people that was submitted in response to the Notice of Proposed Rulemaking issued in September 2015. Even a small sampling of the evidence submitted to the public record demonstrates the breadth and persistence of the adverse treatment and stigma to which LGBT people have been subjected in health care:

- In 2011, the Institute of Medicine (IOM) issued a study on *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding, available at* http://www.ncbi.nlm.nih.gov/books/NBK64806/pdf/Bookshelf_NBK64806.pdf, which discussed evidence of stigma, discrimination, and violence against LGBT people because of their sexual orientation or gender identities. The Institute of Medicine explained that "[s]ome LGBT individuals face discrimination in the health care system that can lead to an outright denial of care or to the delivery of inadequate care. There are many examples of manifestations of enacted stigma against LGBT individuals by health care providers. LGBT individuals have reported experiencing refusal of treatment by health care staff, verbal abuse, and disrespectful behavior, as well as many other forms of failure to provide adequate care." *Id.* at 62. Furthermore, "[f]ear of stigmatization or previous negative experiences with the health care system may lead LGBT individuals to delay seeking care." *Id.* (discussing "felt stigma"); *see also id.* at 63-64 (discussing "internalized stigma" and other personal barriers to care). *See Comments Submitted by Scholars Affiliated with the Williams Institute, UCLA School of Law* (November 9, 2015), available at https://www.regulations.gov/document?D=HHS-OCR-2015-0006-0001.

- According to comments received by OCR, in response to a survey conducted by Lambda Legal to assess health care discrimination against LGBT people and people living with HIV, more than half of all respondents reported that they had experienced at least one of the following types of discrimination in care: being refused needed care; health care professionals refusing to touch them or using excessive precautions; health care professionals using harsh or abusive language; being blamed for their health care status; or health care professionals being physically rough or abusive. *See* Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* 5 (2010), available at http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt- caring_1.pdf (explaining that "almost 56 percent of lesbian, gay or bisexual (LGB) respondents had at least one of these experiences; 70 percent of transgender and gender-nonconforming respondents had one or more of these experiences; and nearly 63 percent of respondents living with HIV experienced one or more of these types of discrimination in health care. In almost every category, transgender and gender-nonconforming respondents reported higher levels of discrimination by health care providers."). *See Comments Submitted by National Center for Lesbian Rights* (November 9, 2015), available at https://www.regulations.gov/document?D=HHS-OCR-2015-0006-0001.

The regulatory record further contains evidence of persistent discrimination against subgroups of LGBT people. For example, according to commenters, LGBT people of color and people with lower socioeconomic status experience particular barriers to accessing health care. According to one report,

- Only 64 percent of LGB Latino adults had health insurance coverage compared to 77 percent of all LGB adults and 82 percent of the heterosexual adult population.

- Thirty percent of LGB African-American adults were likely to delay or not get needed medication compared to 19 percent of African-American heterosexual adults.
- Twenty-six percent of LGB Latino adults did not have a regular source for basic health care.
- Only 35 percent of LGB African-American women had had a mammogram in the prior two years, compared to 57 percent of all LGB women and 62 percent of all heterosexual women.

See Center for American Progress, *Health Disparities in LGBT Communities of Color: By the Numbers* (2010), available at https://www.americanprogress.org/issues/lgbt/news/2010/01/15/7132/health-disparities-in-lgbt-communities-of-color/.

Commenters also noted that lesbians encounter significant barriers to accessing health care. For example, studies have shown that lesbians get less routine health care than other women, including colon, breast, and cervical cancer screening tests. Commission on Health Care for Underserved Women, Am. Coll. Of Obstetricians and Gynecologists, *Health Care for Lesbians and Bisexual Women, Committee Opinion No.* 525 1 (2012), *cited in Comments Submitted by National Center for Lesbian Rights* (November 9, 2015), available at https://www.regulations.gov/document?D=HHS-OCR-2015-0006-0001. Moreover, while lesbians and bisexual women are as likely as heterosexual women to develop cervical cancer, they are up to ten times less likely to undergo regular screening for the disease. The Fenway Institute, *Policy Focus: Promoting Cervical Cancer Screening among Lesbians and Bisexual Women* 1 (2013), available at http://www.lgbthealtheducation.org/wp-content/uploads/Cahill_PolicyFocus_cervicalcancer_web.pdf,. *cited in Comments Submitted by National Center for Lesbian Rights* (November 9, 2015), available at https://www.regulations.gov/document?D=HHS-OCR-2015-0006-0001. Lesbians are less likely to access preventive care compared to other women, and both lesbians and bisexual women are less likely to be insured compared to other women. And lower rates of regular screening put lesbians at greater risk of late diagnosis, when the disease is less treatable. *Fenway Institute* at 2; *see generally Comments Submitted by National Center for Lesbian Rights* (November 9, 2015), available at https://www.regulations.gov/document?D=HHS-OCR-2015-0006-0001.

Many of the public comments recounted individual experiences of discrimination in health care and health coverage. For example, instances of discrimination reported in the comments filed by the National Center for Transgender Equality included:

- one transgender person, who described recurring and invasive harassment in emergency rooms: "I've have doctors call in other doctors to gawk, and even ask to take photos [of my body parts]...and one asked to bring her class to my room."
- Another transgender person who shared similar experiences: "I've experienced forced pelvic exams from health care professionals because they wanted to see my [genitals]. I was billed for this even though I was seeking care for allergies and tonsillitis."

- A transgender man hospitalized in a gynecological unit for treatment of uterine cancer who reported that "even though I was not there for anything trans related, several nurses repeatedly asked me about my "sex change operation." They went out of their way to remind me that I was a man on the gynecological unit and my pages for nurses often went answered last. I had one nurse ask me incredibly personal questions related to being trans hours after I was wheeled out of surgery. It was degrading, triggering, and wholly unwelcomed. I had to deal with this all while recovering from cancer. No one could see me as a person; they saw me as an intruder."
- Another transgender man who described being exploited by an endocrinologist while recovering from a traumatic brain injury: "[the endocrinologist] massaged my breasts...for a long time—not for any medical reason, but because he was curious to feel how testosterone and binding had changed my chest. He did not ask consent for this. Then, he asked me to describe my clitoris to him in great detail. After I did...he asked me to remove my pants and underwear so that he could inspect my clitoris and see my vagina...."

See Comments Submitted by the National Center for Transgender Equality (November 9, 2015), available at https://www.regulations.gov/document?D=HHS-OCR-2015-0006-0001

Case law and administrative complaints also demonstrate the types of discrimination to which LGBT people report they have been subject in health care. For example, in *Prescott v. Rady Children's Hospital*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017), plaintiffs alleged a pattern of misgendering and harassment of a transgender boy that ultimately led to his suicide. *See also Rumble v. Fairview Health Services*, 2015 WL 1197415 (D. Minn. 2015) (alleging harassment, physical abuse and misgendering when transgender man sought care at a hospital); U.S. Department of Health and Human Services, *Voluntary Resolution Agreement Between the U.S. Department of Health and Human Services Office for Civil Rights and the Brooklyn Hospital Center* (2015), available at https://www.hhs.gov/ sites/default/files/ocr/civilrights/activities/agreements/ TBHC/vra.pdf (resolving claim that hospital had failed to assign patient to a room consistent with her gender identity); Center for American Progress, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial* (outlining claims made in 31 complaints of gender identity discrimination filed with OCR between March 23, 2010 and January 20, 2017), available at https://cdn.americanprogress.org/content/uploads/2018/03/06122027/ACAnondiscrimination-brief2.pdf (2018).

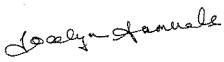
Moreover, research suggests that supportive policies for LGBT people improve the uses of health care by this community. For example, one recent study has determined that, when examining a policy index including state-level transgender-specific policies (non-discrimination protections, religious exemption laws, private health insurance policies, Medicaid policies, changing a gender marker on a state ID, and requirements for a legal name change), living in states with more protective policies (and fewer stigmatizing ones) was associated with fewer reports of non-use of healthcare due to fears of mistreatment. For each additional point on the policy index indicating a more protective policy, there was a 3% decrease in the likelihood of not using care due to fear of mistreatment. Goldenberg, T., Harper, G.W., Reisner, S., Gamarel, K., Kahle, E., & Stephenson,

R, *State-level transgender-specific policies, race/ethnicity, and health care use among transgender and gender diverse people in the United States.* (April 2019) (paper to be presented at the Population Association of America 2019 Annual Meeting, Austin, TX).

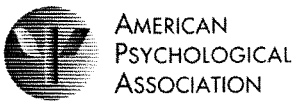
Although comments in the record for the rulemaking proceeding under Section 1557 do not break out discrimination in public, as opposed to private, health care facilities, I have no reason to believe that the patterns of adverse treatment and stigma are any different between the two.

The foregoing is a sample of some of the challenges that LGBT people face in accessing health care and is a testament to the critical need for the Equality Act to provide redress for discrimination in this sphere.

Sincerely,



Jocelyn Samuels, J.D.



April 19, 2019

The Honorable Suzanne Bonamici
Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Representative Bonamici:

On behalf of the American Psychological Association (APA), I am writing to extend our appreciation to you for holding the April 9th hearing on *The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination.* We would like to take this opportunity to provide you with APA's position on the issue and offer further relevant scientific information. APA bases its nondiscrimination position on psychological research showing that adequate legal protections are essential for sexual and gender minority Americans due to the detrimental impact that discrimination has on their mental health and well-being.

APA is a scientific and professional organization representing psychology, with 118,400 members and affiliates across the United States and internationally. APA works to advance the creation, communication, and application of psychological knowledge to benefit society and improve people's lives. Many of our members serve sexual and gender minorities through the application of psychology, including research, education, clinical care, and consultation. APA has a longstanding commitment to ending discriminatory practices based on sex, sexual orientation, and gender identity. Most notably, in 2007 APA adopted a resolution on *Opposing Discriminatory Legislation and Initiatives Aimed at Lesbian, Gay, and Bisexual Persons*, and in 2008, a resolution on *Transgender, Gender Identity, and Gender Expression Non-Discrimination.*

Discrimination harms mental and physical health

An estimated 4.5% of U.S. adults identify as a sexual or gender minority,[1] and 10.2% of them are married.[2] As many as 2 million to 3.7 million children in the United States have sexual or gender minority parents.[3] A substantial body of research has shown the negative impacts of stress, including discrimination-related stress, on the physical and mental health of sexual and gender minority people[4] and their families.[5]

The conceptual framework best utilized to understand the negative impact of discrimination on individuals who hold minority identities is known as *minority stress*[6,7]. The minority stress model explains how discrimination, prejudice, and stigma produce social environments that are both stressful and hostile to minority individuals, and how the experience of living in these environments contributes to multiple health disparities for sexual and gender minorities including increased rates of mental and physical health disorders.[8] For example, one study showed that following the implementation of state-

level bans on marriage for same-sex couples, sexual minorities in these states experienced an increase in psychological and alcohol use disorders, including a 248% increase in Generalized Anxiety Disorder.[9] Without the federal protections set forth by the Equality Act, sexual and gender minority Americans are faced with a patchwork of state-level protections across the country that put them and their families at risk for increased exposure to minority stress as they move from one state to another.

These problems are heightened by discriminatory federal policies. For example, The Department of Education's announcement that its Office of Civil Rights would no longer investigate complaints from transgender students who are barred from using restrooms consistent with their gender identity will likely lead to negative mental health outcomes for transgender students.[10] Some research shows that psychological distress has increased among sexual and gender minorities since 2016.[11, 12]

Supportive legislation benefits mental and physical health
Conversely, a growing body of research finds that the presence of non-discrimination legislation and/or the adoption of equal rights legislation for sexual and gender minorities may have positive health impacts. Non-discrimination legislation which protects sexual and gender minorities is associated with better mental health, fewer medical care visits, and reduced healthcare costs.[13] For example, the implementation of state policies permitting marriage for same-sex couples was associated with a 7% decrease in adolescent suicide attempts,[14] and sexual and gender minorities living in states with policies protecting sexual minorities against workplace discrimination and hate crimes reported lower rates of psychological disorders.[15]

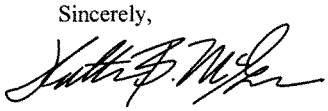
Transgender and gender nonconforming people are particularly vulnerable
Transgender and gender nonconforming individuals are those whose gender identity does not align with the sex they were assigned at birth[16]. Population estimates indicate that 0.6%, or 1.4 million Americans identify as transgender[17] and 0.7%, or 150,000 youth ages 13 to 17 identify as transgender.[18] Having a gender identity that differs from one's sex assigned at birth does not meet the criteria of a mental health diagnosis. However, many transgender people experience gender dysphoria, which is listed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* and may be alleviated by medical or psychological interventions. APA recognizes the efficacy, benefit, and medical necessity of transition related treatments – which may include psychotherapy, hormone therapy, and a variety of surgical treatments - for appropriately evaluated individuals

Transgender and gender nonconforming Americans experience similar symptoms of minority stress to sexual minorities but their experience of stress is more closely aligned with their gender identity and expression.[19] Transgender and gender nonconforming people have experienced a history of marginalization, pathologization, and discrimination within society.[20] This has led to prejudice and discrimination in schools, public accommodations, employment, housing, healthcare, and the criminal justice system.[21] These experiences are exacerbated by a lack of legal protections, leading to increased risk of physical and mental health disparities.[22, 23] Arguments that protections for transgender

and gender nonconforming Americans would somehow offer certain individuals increased privileges – in sports, restrooms, or shelters, for example - are not supported by evidence and in fact illustrate the bias experienced by these individuals. Nondiscrimination protections and equal treatment under the law are essential for the well-being of transgender and gender nonconforming Americans.

Again, we thank you for holding this hearing and for taking the time to consider additional research supporting the Equality Act. Should you have any questions or need further information, please contact Gabriel Twose, Ph.D., in our Public Interest Government Relations Office at 202-336-5931 or gtwose@apa.org.

Sincerely,



Katherine McGuire
Chief Advocacy Officer

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April 22, 2019

Dear Chairman Scott and Members of the House Education and Labor Committee:

On behalf of our 800,000 members, Equality California writes to express our strong support for H.R. 5, the Equality Act. We urge Congress to pass this critical legislation and respectfully request that our statement is included in the public record.

Equality California is the nation's largest statewide lesbian, gay, bisexual, transgender and queer (LGBTQ) civil rights organization. We bring the voices of LGBTQ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just and fully equal for all LGBTQ people. We advance civil rights and social justice by inspiring, advocating and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve.

The Equality Act would add "gender identity" and "sexual orientation" to the classes protected against discrimination by the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act and several laws regarding employment with the federal government — to explicitly include sexual orientation and gender identity as protected characteristics. Passage of the Equality Act would provide broad and consistent federal protections to millions of LGBTQ people in employment, housing, public accommodations, jury service, education, legal services, federal programs and credit.

According to a report by the Public Religion Research Institute (https://www.prri.org/research/americans-support-protections-lgbt-people/), large majorities of Americans across the political spectrum — 79% of Democrats, 70% of independents, and 56% of Republicans — say they favor laws to shield LGBTQ people from various kinds of discrimination.

This support is reflected across the religious spectrum as well. More than three-quarters of Americans who identify with New Age religions (86%), Jews (80%), Hindus (79%), religiously unaffiliated Americans (78%), and Buddhists (75%) support protections for LGBTQ people. Similarly, robust majorities of Mormons (70%), Hispanic Catholics (72%), white mainline Protestants (71%), white Catholics (71%), other non-white Catholics (68%) and Americans who identify with other religions (67%) favor LGBTQ nondiscrimination protections, along with majorities of black Protestants (65%), other non-white Protestants (61%), Muslims (60%), Hispanic Protestants (60%), Orthodox Christians (59%), white evangelical Protestants (54%) and Jehovah's Witnesses (53%).

That said, even though Californians are largely protected from discrimination on the basis of state law, there are occasions where LGBTQ people have encountered refusals of service and bias in arenas of daily life in the Golden State, including the workplace, schools, medical facilities and pharmacies, emergency shelters and other areas of public accommodation. And, of course, when Californians travel or move to 29 other states, they face a patchwork of local and state laws that do not clearly and explicitly protect them.

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Juan Camacho
Andrea Casalett
Jason Chan
Andrea Cubitt
Jason Daniels
Rob Darby
Sue Dunlap
Jeff Freitas
Laurie Hasencamp
Boe Hayward
Dolores Huerta
Leslie Katz
Mandy Lee
Jeren Miles
Stuart Milk
C. Scott Miller
Doug Moreland
Rich Poppen
Alex Randolph
Chris Robert
Ernie Schmider
Yale Scott
Nancy Sutley
John Tedstrom
David J. Tsai
Hillary Whittington
Hon. James Williamson

Equality California
3701 Wilshire Blvd, Suite 725
Los Angeles, CA 90010

Passage of the Equality Act is particularly critical in light of the Supreme Court's announcement today that it will consider three Title VII cases resting on the key question of whether the Civil Rights Act prohibiting sex discrimination applies to discrimination on the basis of sexual orientation and gender identity. [*Altitude Express Inc v. Zarda* is on behalf of a now-deceased skydiving instructor Donald Zarda, who was fired from his job because of his sexual orientation. Gerald Lynn Bostock, who filed *Bostock v. Clayton County*, was fired from his job as a county child welfare services coordinator when his employer learned he is gay. The third case, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, involves gender identity and was filed by Aimee Stephens, a transgender woman, who was fired as a funeral director when she took steps to express her gender identity.]

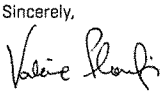
Being able to live and work free from discrimination is embedded in American core values of who we are as a country and embedded in the laws of many states. Yet millions of LGBTQ people around the country are subjected to mistreatment, harassment and violence — living in fear that they will be fired, attacked or evicted from the classroom, bathroom, restaurant, homeless shelter or healthcare facility simply because of who they are or whom they love.

Systemic anti-LGBTQ bias contributes to disparate rates of educational and employment achievement that have cascading effects that too often lead to poverty among LGBTQ people — particularly transgender people, LGBTQ people of color and LGBTQ immigrants.

The Equality Act would ensure that the same standards of protection from discrimination are applied to millions of people and make explicitly clear something that the American public already agrees with: that discrimination on the basis of sexual orientation and gender identity are not and should not be lawful.

Passage of the Equality Act is desperately needed and overdue. Equality California urges you to pass this historic piece of legislation.

Sincerely,



Valerie Ploumpis
National Policy Director

SNOWMASS ASPEN MOUNTAIN ASPEN HIGHLANDS BUTTERMILK

ASPEN SNOWMASS.
ASPEN SKIING COMPANY

April 22, 2019

United States House of Representatives
Committee on Education and Labor
Subcommittee on Civil Rights and Human Services

The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination

Chairman Scott and the Members of the House Education and Workforce Committee,

On November 6, 2018, more than 150 LGBTQ+ individuals were elected to public office. If you are a Member of Congress, or work for the body, some of these people are now your peers and coworkers. Of course, if you are one of these elected officials, they are *you*. Congress is now as diverse as it's ever been and therefore better reflects the populace it is tasked with representing.

We lack national, express, and enduring legal protections for LGBTQ+ individuals from institutional discrimination. Despite being fit enough to make decisions on behalf of the United States, LGBTQ+ Members of Congress can still be evicted from an apartment, fired from a job, and denied public services in many parts of the country simply because of their sexual orientation or gender identity. That's not only wrong, it's also bad business.

Aspen Skiing Company is guided by community- and environment-based values, including the commitment to staying in business forever. We cannot do that by alienating a portion of our population. Based on surveys by the Small Business Majority, 65 percent of small business owners believe an LGBTQ+ individual should not be denied goods or services by a business based on the owner's religious beliefs. We couldn't agree more.

Since the late 1970s, Aspen Skiing Company has supported and later partnered with Aspen Gay Ski Week, one of our area's most iconic celebrations. The event brings thousands of attendees to our community and our business, and over the last five years has raised over $500,000 for AspenOUT, a local philanthropic organization that supports LGBTQ+ youth in the area.

To be the best in the business, we need the best employees in the business. We are an Equal Opportunity Employer and do not discriminate against candidates for employment based on their sexual orientations or gender identities. The Equality Act would ensure that other businesses cannot discriminate in employment. It should be unacceptable that, if this bill doesn't become law, some businesses could do so in the 21st century.

And it's not just about the employees. If their spouse, child, or sibling is subject to discrimination, that stress and fear can weigh on an employee at work. Recently, an Aspen Skiing Company ski school coordinator, Andrea Chacos, wrote a piece for our website about accepting her transgender daughter. "... I paused to absorb the enormity of knowing my daughter will endure a struggle in society that puts her at an increased risk of hurt, humiliation,

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depression, addiction, and death. Transphobia will deprive her of employment, housing, healthcare, and other opportunities most people take for granted."

No parent should have to fear for their child's safety or future because of who that child is. How could we, as Andrea's coworkers, expect her to come to Aspen Skiing Company ready to work and communicate effectively while she is so rightly worried about her child? That's why we gave her a platform to voice her concerns: to remind people that these issues are not confined to politics or social media—they're in the office one door down.

Promoting tolerance and acceptance has become part of Aspen Skiing Company's brand story. We launched The Aspen Way in 2017, a campaign promoting the values of Love, Unity, Respect, and Commitment. This national ad campaign turned our company-wide devotion to equality, environmental protection, and other issues into a message to our customers. Through our Give a Flake campaign, which began in 2018, we have publicly and politically staked out our stance on those issues and more. In January, we initiated a postcard campaign in support of the Equality Act. These cards, addressed to Speaker Pelosi and Representatives Buck, Gardner, and Simpson, called out the lingering bigotry the Equality Act aims to address.

All of these actions have elicited varying degrees of both support and outcry from guests and employees. We've received questions and pushback from individuals who argue that we should "stick to skiing." Those people don't realize that's exactly what we're doing. Our deeply ingrained love of skiing and the outdoors is at the center of all our work around equality. Every day, Aspen Skiing Company's guests and employees feel the benefits and importance of this sport and its community–and we know that is not an exclusive right. Anyone and everyone should be able to come to our mountains, our hotels, our restaurants, and feel connected to this place and each other without fear of prosecution or bigotry here or at home. As we stated in The Aspen Way promotion, "The mountains don't discriminate. Neither do we. Neither should anyone."

In 2015, Congress tried unsuccessfully to pass the Equality Act. You're about to take another shot. To get a sense of the progress that's been made in the country's attitudes around LGBTQ+ acceptance, look no farther than the makeup of the body you are serving in. Voters across the country have made it clear they care about LGBTQ+ rights and the Equality Act. It's time for Congress to do the same. I urge you to turn the bill into law.

Sincerely,

Auden Schendler
Senior Vice President, Sustainability and Community Engagement

UCLA School of Law Williams Institute

The Williams Institute
On Sexual Orientation and Gender Identity
Law and Public Policy

April 22, 2019

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott
Chair, Committee on Education and Labor
U.S. House of Representatives

Dear Chairperson Bonamici, Ranking Member Comer, and Members of the Committee on Education and Labor:

I am a Senior Scholar of Public Policy at the Williams Institute at UCLA School of Law. I have over 15 years' experience working with lesbian, gay, bisexual, and transgender (LGBT) youth as a professor, social scientist, and a direct service provider. I am the lead author of the first representative large scale survey study of foster youth that assessed the role of sexual orientation and gender identity in child welfare outcomes.

I am writing with information for the record of H.R. 5, the Equality Act. My and other scholars' research has shown consistently that bias and discrimination within the child welfare and foster care system adversely impact the health and well-being of LGBT youth. Taken together, this research indicates that the Equality Act, which would prohibit discrimination based on sexual orientation and gender identity, has the potential to improve the health and well-being of LGBT people in the United States who have had any contact with the child welfare system.

Only four states have laws against discrimination based on sexual orientation, gender identity, and gender expression in the context of child welfare services, which includes:

a. outlawing both discriminatory practices in out-of-home placement
b. prohibiting all adults certified to interact with children in the system (e.g., foster parents and group home workers) from using derogatory terms based on that child's sexual orientation or gender identity or expression.[i]

Unfortunately, we know that this type of discriminatory and biased behavior happens, and it hurts children and youth. Evidence that this type of discrimination exists is seen in a series of studies that have documented the overrepresentation of LGBT youth in out-of-home care and the poor outcomes they experience.

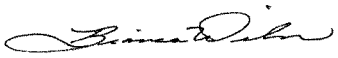
In 2014, my colleagues and I published a study conducted under the Administration of Children & Families Permanency Innovations Initiative.[ii,iii] The purpose of the study was to determine the percentage of Los Angeles County foster youth population who are LGBT, and to document whether their experiences in foster care were different from those of their non-LGBT peers.

- We found that nearly 20 percent of youth ages 12-21 in foster care in Los Angeles were LGBT, which is nearly twice the number of LGBT youth estimated to be living outside of foster care.
- We also found that LGBT youth experienced worse conditions and outcomes in foster care than non-LGBT youth.
    a. LGBT youth had a higher number of foster care placements and were more likely to be living in a group home, both problems for efforts toward finding permanent homes.
    b. Over twice as many LGBT youth reported being treated poorly by the foster care system compared to non-LGBT youth, and they were also more likely to have become homeless.
- Further, both the Los Angeles study and two more recent statewide and national studies of LGB youth showed that LGB youth in foster care were more likely to experience psychological distress than non-LGB youth, as well as poor educational outcomes and substance use issues at higher rates[iv].

Youth across the child welfare system are clearly vulnerable to discrimination and the harmful effects of individual staff biases. At least in states with existing anti-discrimination laws, there is a structure for planning to reduce these disparities and a legal standard against which the state and state-funded entities (e.g., foster care agencies) can be held accountable. However, youth in the majority of the states are especially vulnerable to sanctioned discrimination by state child welfare workers and foster care services.

In the absence of federal law that makes discrimination related to sexual orientation and gender identity in public accommodations and among publically funded entities illegal, we leave almost 90,000 LGBT youth (i.e., 20% of approximately 438,000 in foster care nationwide) without federally supported protections in the course of their care by the state.

Sincerely,



Bianca D.M. Wilson, Ph.D.
Senior Scholar of Public Policy
Associate Researcher

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[i] *See for example* Center for the Study of Social Policies, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration.* 2016 https://www.cssp.org/pages/body/Out-of-the-shadows-current-landscape.pdf

[ii] Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST. (Aug. 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf

[iii] Wilson BDM, Kastanis AA. (2015). Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. Child Youth Services Review, 58, doi:10.1016/j.childyouth.2015.08.016.

[iv]Baams, L., Wilson, B. D. M., & Russell, S. T. (2019). LGBTQ Youth in Unstable Housing and Foster Care. Pediatrics, 143(3), e20174211. http://doi.org/10.1542/peds.2017-4211; Dettlaff, A. J., Washburn, M., Carr, L. "Christian," & Vogel, A. "Nikki." (2018). Lesbian, gay, and bisexual (LGB) youth within in welfare: Prevalence, risk and outcomes. Child Abuse & Neglect, 80, 183–193. http://doi.org/10.1016/J.CHIABU.2018.03.009

UCLA School of Law Williams Institute

The Williams Institute
On Sexual Orientation and Gender Identity
Law and Public Policy

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

April 22, 2019

The Honorable James Comer
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
U.S. House of Representatives

CC: The Honorable Bobby Scott
Chair, Committee on Education and Labor
U.S. House of Representatives

Dear Chairperson Bonamici, Ranking Member Comer, and Members of the Committee on Education and Labor,

I am a Scholar of Public Policy at the Williams Institute, UCLA School of Law. For the past 15 years, my research has focused on the prevalence and impact of discrimination against transgender people in the United States. In addition to my other studies about transgender people's demographics, health, and experiences, I served on the research team and as a co-author for the 2008-09 National Transgender Discrimination Survey (NTDS), which was the first large national survey of transgender people in the U.S.[1] I then served as the Co-Principal Investigator for the follow-up to the NTDS, the 2015 U.S. Transgender Survey (USTS).[2] The USTS is the largest survey of transgender people in the U.S. to date, with nearly 28,000 respondents. I currently serve as a Co-Investigator on the U.S. Transgender Population Health Survey ("TransPop") (R01-HD090468-01, Ilan Meyer, PI), which will produce the first nationally-representative sample of transgender people in the U.S. These studies provide valuable information about the lives, health, and experiences of transgender people in the U.S.

I am writing to you with information for the record on H.R. 5, the Equality Act. This bill expands protections against discrimination based on sexual orientation and gender identity across important areas of life, including in employment and education. Years of research, including the studies listed above, demonstrate that transgender people experience discrimination across the important areas of life included in the Equality Act. Discrimination harms transgender people's health and well-being, and to the extent that discrimination against this population can be reduced, health and well-being will be improved.

According to the USTS, transgender people report discriminatory experiences in employment, in

[1] Grant, J.M., Mottet, L.A., Tanis, J., Harrison, J., Herman, J.L., & Keisling, M. (February 2011). *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington, DC: The National Gay and Lesbian Task Force and The National Center for Transgender Equality.
[2] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (December 2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

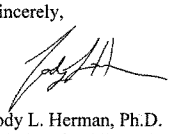
the workplace, and at school that hinder their ability to learn, to work, and to receive the benefits of education and employment. More than three-quarters who were out as transgender, or perceived to be transgender, at school reported one or more negative experiences in K through 12 because they were transgender. These included such experiences as verbal harassment, physical or sexual assault, and expulsion. For some (16%), these experiences were so severe that they had to leave their schools. Those who reported these experiences were more likely to experience serious psychological distress and attempt suicide, among other negative outcomes.

USTS respondents also reported experiencing discrimination when seeking employment and while at work. Nearly one third (30%) who had held a job in the year prior to the survey reported being fired, denied a promotion, or experiencing mistreatment in the workplace, such as being harassed or physically assaulted. Other negative workplace experiences included being forced to resign, being removed from contact with clients, and being forced to work in the wrong gender, among other negative experiences. Experiences like these often result in transgender workers taking steps to avoid negative experiences at work, such as hiding their gender identity, not seeking promotions, and even quitting their jobs. Although the USTS did not differentiate between public versus private employment, we have no evidence to suggest that the prevalence of discrimination would differ for employees of public versus private employers. Given these findings, it is unsurprising that we found triple the rate of unemployment and double the prevalence of living in poverty among USTS respondents, compared to the U.S. population.

These experiences of discrimination reach into area of public accommodation, including public transportation, government agencies, and the court system. Nearly one-third (31%) of USTS respondents who utilized places of public accommodation, including restaurants, hotels, retail establishments, and other places, experienced being denied equal treatment, verbal harassment, and/or physical assault because they are transgender. Respondents also reported having one or more of these experiences in the past year when using public transportation (34%), when visiting public assistance offices or other government benefits offices (17%), Departments of Motor Vehicles (DMV) (14%), a courtroom or court house (13%), and a Social Security office (11%). In the 2008-09 NTDS, 13 percent of respondents with children reported that their relationships with their children were limited or stopped by the courts because they are transgender.

The need for the Equality Act is clear. Transgender Americans report experiences of discrimination that are pervasive across all important areas of life. These experiences harm transgender people's health, well-being, and ability to thrive. By prohibiting discrimination, the Equality Act would be an important step forward for transgender people and for our country.

Sincerely,



Jody L. Herman, Ph.D.
Scholar of Public Policy
The Williams Institute
UCLA School of Law

The Leadership Conference on Civil and Human Rights

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Vanita Gupta

April 22, 2019

The Honorable Bobby Scott, Chairman
Committee on Education & Labor
United States House of Representatives
Washington, DC 20515

The Honorable Virginia Foxx, Ranking Member
Committee on Education & Labor
United States House of Representatives
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

On behalf of The Leadership Conference on Civil and Human Rights, I write to express our support for The Equality Act (H.R. 5/S. 788) which would clarify nationwide protections against discrimination in housing, credit, education, and employment, for the LGBTQ community, and would provide protections against discrimination for all groups of people in public accommodations. Multiple taskforces of The Leadership Conference coalition have identified the Equality Act as a top priority for the 116th Congress. We thank you for the hearing you convened on this legislation, and we urge you to support this important measure to provide comprehensive civil rights protections to the LGBTQ community.

The Leadership Conference firmly believes that passage of the Equality Act is a crucial step in fulfilling our nation's commitment to civil and human rights. Despite the progress we have seen on LGBTQ rights in recent decades, the inconsistent nature of current laws leaves millions of LGBTQ individuals subject to uncertainty and discrimination. All people in America should be able to earn a living, further their education, and engage in public spaces without fear of harassment or discrimination. It is imperative that Congress act to protect the civil and human rights of all individuals, including LGBTQ individuals, in America.

Two-thirds of LGBTQ individuals in America report having experienced discrimination in their daily lives.[1] The Equality Act seeks to remedy this by explicitly clarifying that sexual orientation and gender identity are protected against discrimination, just as other covered characteristics under our federal civil rights laws are protected.

Today's Supreme Court's decision to consider challenges to existing employment discrimination protections later this year does not obviate the need for Congress to pass the Equality Act. We need passage of the Equality Act to clarify protections against

[1] https://www.hrc.org/resources/the-equality-act

discrimination under several different laws because comprehensive protections are what is needed for every person in America to be treated fairly.

We are committed to ensuring that the Equality Act does solely what it is intended to do: clarify and strengthen existing federal civil rights protections for every person in America.

No person should be discriminated against simply because of who they are. The Equality Act will help ensure equal opportunity and dignity for all LGBTQ individuals in America. The Leadership Conference urges you to support this important legislation to pass long-overdue. If you have any questions, please reach out to Rob Randhava at randhava@civilrights.org or 202-466-6058.

Sincerely,

Vanita Gupta
President & CEO

April 22, 2019

The Honorable Robert C. "Bobby" Scott, Chair
The Honorable Virginia Foxx, Ranking Member
Members of the Committee on Education and Labor
U.S. House of Representatives

Re: **The Equality Act, H.R. 5**

Dear Chairman Scott, Ranking Member Foxx, and Members of the Committee:

We write on behalf of Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") in support of H.R.5, the "Equality Act," which will provide clear, immediate, comprehensive, and national protections against discrimination based on sexual orientation and gender identity that are long overdue and critically important for the approximately 11.3 million American adults who identify as lesbian, gay, bisexual and transgender ("LGBT").[1] Founded in 1973, Lambda Legal is the nation's oldest and largest legal organization dedicated to achieving full recognition of the civil rights of LGBT individuals through impact litigation, policy development and advocacy, and public education. We were counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), co-counsel in *Romer v. Evans*, 517 U.S. 620 (1996), and co-counsel in *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2017 (2015), the three most important cases ever decided by the U.S. Supreme Court addressing sexual orientation and the law.

It is difficult to overstate the importance of establishing clear, explicit protections against the widespread discrimination still faced by LGBT people throughout their daily lives and in all corners of the United States. By passing the Equality Act, Congress finally will provide both comprehensive protections and effective remedies for anti-LGBT discrimination in employment, housing, education, healthcare services, access to credit, jury service, public accommodations and federally funded programs and services. By doing so,

[1] The Williams Institute, *Adult LGBT Population in the United States* (UCLA School of Law, Feb. 2019), *available at* https://williamsinstitute.law.ucla.edu/research/lgbt-adults-in-the-us/.

Congress also will make a powerful statement of principle regarding the equal place LGBT people of all backgrounds deserve within our American family.

The Equality Act is drafted to codify the many federal court decisions and decisions of the EEOC, which recognize that the existing sex discrimination prohibitions in federal law, when properly understood, must forbid discrimination based on sexual orientation or based on gender identity as forms of sex discrimination. The Act also updates the existing federal civil rights laws by adding "sex" to the nondiscrimination provisions governing public accommodations and federally funded programs and services.

Recent actions by the Supreme Court underscore the importance and the urgency of enacting the Equality Act. Just today, the Supreme Court granted review in three Title VII cases addressing whether the Civil Rights Act's prohibition against sex discrimination applies to discrimination on the basis of sexual orientation and gender identity:

- In *Altitude Express Inc v. Zarda*, the Second Circuit held *en banc* that Title VII does provide a claim that may be brought on behalf of a now-deceased skydiving instructor Donald Zarda, who was fired from his job because of his sexual orientation. 883 F. 3d 100 (2nd Cir. 2018). In so doing, the Second Circuit agreed with the Seventh Circuit's *en banc* ruling in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (2017), and the EEOC's analysis in *Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).
- In *Bostock v. Clayton County,* the Eleventh Circuit disagreed, holding that Title VII provides no claim to Gerald Lynn Bostock, who was fired from his job as a county child welfare services coordinator when his employer learned he is gay. 723 Fed. Appx. 964 (11th Cir. 2018), *rhg. en banc* denied, 894 F.3d 1335 (2018).
- *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens,* was filed by Aimee Stephens, a transgender woman, who was fired as a funeral director when she took steps to express her female gender identity. The Sixth Circuit agreed with Ms. Stephens, the EEOC, and numerous circuits that discrimination based on gender identity is a form of unlawful sex discrimination. 884 F.3d 560 (2018).

The Supreme Court's agreement to consider these questions at least raises the specter of a decision reversing the considerable and growing body of federal court case law recognizing that federal protections against sex discrimination protect LGBT people.

The Supreme Court's denial of review in *Rhines v. Young*, Case No. 18-8029, on April 15, 2018, presents another example of urgent need for passage of the Equality Act because it appears that Mr. Rhines may well have been sentenced to death, rather than to life in prison, due to anti-gay bias on the part of members of the jury. Multiple jurors explained after the fact that they had concluded, based on knowing him to be gay, that he would enjoy being sentenced to a lifetime of imprisonment with other men. As a result, they voted to impose the death penalty. Ensuring that LGBT people are treated equally with respect to jury service is essential for all participants in our jury system – prospective jurors, attorneys, witnesses, civil litigants, and, indeed, criminal defendants.

The Urgent Need

Lambda Legal operates a legal help desk, through which we respond directly to members of the communities we serve who are seeking legal information about and assistance regarding discrimination related to sexual orientation or gender identity. While Lambda Legal has always received such requests throughout its 46-year history, we now have four full-time lawyers dedicated solely to handling the thousands of calls we receive each year.

Our staff retains records of these assistance requests, which are kept in a searchable electronic database spanning five years. Between 2014 and 2018 (our current data set), we received 9463 inquiries concerning the areas of law covered by the Equality Act. On average, we received 1892 inquiries per year on covered issues, and these inquiries came from every state in the country. It is notable that, during this period, calls to the Help Desk seemed to reflect growing violence against members of the LGBT community. Although workplace discrimination continued to rank consistently at or near the top of the problem areas for all demographic groups, harassment and violence now are among the top issues for African American, Caucasians and Latinx callers. Twelve percent of callers overall reported an income level below the federal

poverty line, with those percentages markedly higher for LGBT African American and Latinx callers than for Caucasian callers. These racial disparities are consistent with results of studies conducted by Lambda Legal[2] and by leading researchers in this field[3] which have found both disproportionate poverty affecting LGBT people and still further elevated rates affecting LGBT people of color.

In the pages that follow, we aim to provide a more detailed picture of the denials of service, loss of jobs and homes, and other discrimination problems – ranging from indignity to violence – that confront LGBT people who are simply trying to make it through the day. We do so with aggregate Help Desk figures for the 2014-2018 time period, together with a representative sampling of the help requests received during 2018 alone, concerning problem areas covered by the Equality Act. Confidentiality concerns preclude our providing names or other identifying information about individual Help Desk callers, let alone details of the information or guidance we provided. However, this compilation of specific problems reported to us nonetheless can provide this Committee a fuller understanding of the nature and pervasiveness of the discrimination against LGBT people, even though this method of illustrating the problem provides only sketches and necessarily understates the overall situation.

An overview of discrimination in the private sector is provided first, with examples grouped by category in the following order: employment, education, healthcare, public accommodations, housing, access to credit, and federally

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[2] *See, e.g.*, Lambda Legal, *Protected and Served?* (2012) (publishing results of national survey exploring discrimination by police, courts, prisons and school security against LGBT people and people living with HIV in the United States), *available at* http://www.lambdalegal.org/protected-and-served.

[3] *See, e.g.*, *LGBT Demographic Data Interactive* (Williams Institute, UCLA School of Law, Jan. 2019), *available at* https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#about-the-data; Taylor N.T. Brown, *et al.*, *Food Insecurity and SNAP Participation in the LGBT Community* (Williams Institute, UCLA School of Law, July 2016), *available at* https://williamsinstitute.law.ucla.edu/research/lgbt-food-insecurity-2016/; Angeliki Kastanis, *The LGBT Divide in California: A Look at the Socioeconomic Well-being of LGBT People in California* (Williams Institute, UCLA School of Law, Jan. 2016), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/California-LGBT-Divide-Jan-2016.pdf.

funded programs and services. Examples of discrimination by government are provided in a separate compilation thereafter.

Employment Discrimination

Throughout this period, we consistently received more calls regarding anti-LGBT workplace discrimination than any other single issue, with the inquiries totaling just under 3,700. In 2018 alone, these calls included:

- the Arizona psychiatrist fired when his boss learned he is gay, with the boss calling him "a sinner who would compound his sins to his eternal peril" and a "vile sociopath."
- the California woman who is a teacher and transgender, who repeatedly was told to cut her hair and not to wear a skirt, and then had her contract not renewed.
- the gay Georgia man who was working for McKesson and then was fired upon reporting harassment based on his sexual orientation.
- the transgender woman who was working at a car detail shop in Illinois, and was told she was not allowed to transition socially on the job.
- the New Mexico lesbian who was told by her supervisor that she "should be sucking dick because of Adam and Eve."
- the Omaha, Nebraska resident who was promoted repeatedly until he came out as a transgender man, after which he was passed over nine times.
- the transgender woman who was hired by the Boys and Girls Club of Greensboro, North Carolina based on her application papers filled out with her legal name (which was still male), for whom the employment offer was revoked when her transgender identity was understood.
- the auto insurance agent in Texas who had been steadily climbing within the business until she came out as a transgender women, at which point co-worker harassment began and escalated until she felt driven out.

In addition, numerous examples of discrimination in public sector employment are detailed on page 19 below.

Moreover, based on our experience with our Legal Help Desk, we can say with confidence that the 3,700 help request figure understates the problem. Over the years, we have learned many reasons why employees choose not to seek legal guidance and remedy, including that many have known that legal remedies are limited in their jurisdiction, and many others are afraid to disclose their LGBT identity and thus refrain from even considering legal action.

Furthermore, this issue's resonance goes far beyond numbers. People define themselves in large part by the work they do. They spend significant portions of their time in the workplace, and they depend on their jobs to support themselves and their families and to gain access to health care and other benefits. The emotional investment people have in their jobs means that it not only is devastating when one loses a job, is denied a promotion or otherwise is subjected to adverse job actions due to discrimination, but it also takes a significant toll simply to know that one can face harassment or discrimination at any moment and have no redress. The Equality Act would strengthen the workforce of tomorrow by establishing that everyone has the ability to pursue the career of their choosing and be judged based on their performance and that alone.

Discrimination in Educational Settings

From 2014-2018, our Legal Help Desk received 2224 calls for help concerning discrimination problems in education. Many of these incidents arose in public education settings, representative examples of which are set forth at pages 16-19 below. Examples of discrimination problems in private educational settings during 2018 alone include:

- a boy expelled from his private school in Florida upon coming out as gay.
- a trans male student in middle school in Coeur d'Alene, Idaho, who experiences bullying in the locker room, has been physically attacked, and receives no support from teachers or school staff.

- a Boston University student enduring constant harassment from roommates due to the student's gender identity, without assistance from university housing authorities.
- a Michigan girl with multiple disabilities experiencing bullying because her parents are a gay male couple.
- a transgender student in Missouri who was terrified of parental rejection after a trusted teacher outed the student to the student's parents without the student's knowledge or consent.
- a 6th-grade girl in Texas being bullied because her father is gay.
- a gay boy in Texas who was picked on continuously by other students and school officials for behavior seen as gender nonconforming.
- a 17-year-old Virginia girl removed from her school's color guard team when she came to be known as a lesbian.

Discrimination in Healthcare Services

From 2014-2018, our Legal Help Desk received 1568 calls for help concerning discrimination in healthcare services. In 2018 alone, the callers included these examples:

- a trans man in Arkansas who was receiving in-patient psychiatric care, but was housed as a female with a female roommate despite having a full beard, deep voice and in other ways being indistinguishable from cisgender men; this placement caused the patient enormous anxiety and distress.
- a married lesbian couple in Colorado, both of whom are nurses, one of whom needed six weeks of hospital recovery for preeclampsia after delivery of their child, during which the hospital staff refused to keep her wife informed about her condition or to consult with her wife about their baby's care.
- a gay man who was a patient at a cancer hospital in New Haven, Connecticut. During his post-surgical recovery, his husband came in to visit. When Caller mentioned to a couple of the medical staff that the person visiting was his husband, one staff laughed, the mood changed, and the quality Caller's care deteriorated. Caller was not

bathed, given utensils with his food, helped to operate his bed, or given proper pain medication.

- a gay male couple in Florida whose daughter needed pediatric care for a high fever, and who were required to provide legal proof of their parentage for care would be provided, unlike how the office treats different-sex parents.
- a Georgia resident transgender man who went to the hospital due to severe stomach pain. He received friendly, respectful care until he revealed his transgender identity. Thereafter, the staff largely abandoned him in the hospital room for hours, while referring to him audibly from outside his room as "he/she."
- a transgender woman in Indiana who had gone into anaphylactic shock and was brought to the emergency room of a Methodist hospital; upon reviving, she saw the nursing staff parading by her room and staring at her; she overheard one say about her, "Yeah, I knew what it was when it came through the door." Then, another nurse pulled the IV drip out of her arm forcefully and left it to bleed.
- a lesbian couple who went to a health clinic in Maryland because one of them felt ill and was running a fever; upon revealing their relationship, the doctor insisted the woman had an STD. The couple left and sought care at an emergency room, where the ill one was diagnosed with a kidney infection requiring a blood transfusion.
- a Michigan-resident transgender man who was getting a routine screening at his insurance company's request, which was abruptly terminated when the doctor learned the man is transgender.
- a transgender man admitted to a New York hospital for a week of essential care, during which he was ridiculed by the staff, consistently addressed with improper pronouns, and his requests to have inaccurate information removed from his chart were refused. Upon discharge, he saw the primary diagnosis in his chart was noted as "female to male transgender person."
- a gay man in Texas who was admitted to the hospital for an infection in his hand, which then spread and became serious; the nursing staff

shunned him for long periods, withheld the food he requested, and at one point refused to help him up when he had fallen.

- a Texas woman who is transgender, who was admitted to a hospital following a car accident. When she answered the nurse's question about menstruation dates by explaining why she does not menstruate, she was given a patient wrist band identifying her as male and the nurse began calling her "sir."
- a lesbian couple in Wisconsin who took their son to an Ascension Health urgent care center and presented their insurance information, only to have the front desk clerk ask, "but who is the parent?" and refuse to admit the child for care unless they produced either his birth certificate or an adoption order.
- a married gay man who was transported to a hospital in Kenosha, Wisconsin, which then refused to let the man's husband visit him once he was admitted.

These examples are not outliers. Over the years, we have seen such problems arise persistently both in private medical practices and clinics when individual doctors or other health care providers refuse to provide care based on the patient's sexual orientation or gender identity, and also when institutional medical providers enforce blanket denials of certain services that are of particular importance to LGBT patients.[4]

Discrimination in Places of Public Accommodation

From 2014-2018, our Legal Help Desk received 803 calls for help concerning discrimination in places of public accommodation. The rate of these calls has been fairly consistent year-to-year. In 2017, we reviewed more than 800 Help Desk records of public accommodation complaints for the

[4] See the discussions in Letter of Jennifer Pizer, *et al.* to Office of Civil Rights, U.S. Dep't of Health & Hum. Svcs. (Sept. 30, 2013)(responding to HHS Requests for Information 0945-AA02 & 0945-ZA01), *available at* http://www.lambdalegal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services, and in Lambda Legal, *When Health Care Isn't Caring* (2010)(analyzing results of first-ever national survey to examine refusal of care and barriers to healthcare among LGBT and HIV communities), *available at* https://www.lambdalegal.org/publications/when-health-care-isnt-caring.

preceding five-year period, together with discrimination reports compiled by the Family Equality Council. A representative sampling of these reports is presented and discussed in Lambda Legal's *amicus* brief to the U.S. Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[5]

The records of public accommodation discrimination problems for the following year, 2018, included:

- a gay man and his husband, who were considering buying a membership in a private RV resort in Menifee, California. When they bought their membership from a different property owned by the same company, the head sales person at the first location called them "faggots." When they tried to use their membership soon thereafter, the manager told them it had been canceled and they had to leave immediately. They were deeply distressed by the experience, especially Caller's husband, an Iraq veteran with PTSD.
- a transgender woman, who was chased out of the women's restroom at a California Greyhound bus station by staff asserting she is a man.
- a transgender woman who visited a McDonald's in Hollywood, California, and was using the women's restroom when she was dragged out physically by a security guard, who told Caller she did "not look female enough." Caller asked to talk to the manager who reiterated the same position, that she did not "pass" as a woman in their view.
- a woman who is transgender and was denied access to a public unisex restroom as a paying customer at a grocery store in Florida, while her cisgender friend was allowed to use the restroom without incident.
- a gay man who was walking around holding hands with his boyfriend at Sally Beauty, a cosmetics chain, in Dawsonville, Georgia; the general manager told them to stop holding hands or they would be

[5] Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., Family Equality Council, *et al.*, In Support of Respondents, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (Oct. 30, 2017), *available at* https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/16-111bsaclambdalegaletal.pdf.

ejected from the store because, the manager said, she didn't "want customers to get the wrong impression."

- a gay father in Illinois, who was refused enrollment of his son with a day care provider when they realized the father is gay.
- a married gay man, who was shopping with his husband in a Habitat for Humanity resale shop in Illinois. When Caller's husband put his arm around Caller, a woman approached them and said "We don't allow homosexual behavior in this store." Caller complained and received an apology from management, but then was advised not to return to the shop.
- a Caller who worked for a startup in Chicago that was awarded an "LGBT Chamber of Illinois" award. But, when the company tried to submit the award to a public relations distribution service, the service rejected it, saying they do not work with any LGBT-related content.
- a transgender woman who had changed her legal name and notified her Illinois bank of the change, only to have the bank place a hold on her accounts anyway, claiming a concern about fraud. Caller had to produce all of her legal paperwork in order to regain access to her accounts.
- a transgender woman who was working as a truck driver, and suffered severe harassment and abuse at one of her refueling stops in Louisiana, which caused her to have a panic attack. She contacted local management, but they told her not to come back, forcing her to go out of her way to another fuel stop and pay out of her own pocket. She then contacted the truck stop company, which refused to do anything.
- a transgender woman who had been refused service multiple times by local managers of fast food restaurants in New Jersey because of her gender identity.
- a lesbian couple in New York, who were refused service by staff at Walmart's auto department because of their sexual orientation, and who reported the problem to management but with no results.

- a lesbian who was discriminated against by a funeral home hired for her father's funeral in Ohio. One of the funeral home's employees engaged in so much homophobic verbal abuse that the police had to be called. Yet, the funeral home still excluded Caller and her partner from the planning of her father's funeral.
- a transgender individual who was refused a refill of a hormone replacement therapy prescription by a pharmacist in Oregon, who claimed a religious objection to that therapy.
- a Texas man with a 13-year-old son who is transgender and whose primary joy was karate. But the owner of the dojo was hostile and sent an email to all parents stating that the dojo was being overrun with "transgender talk" and "he would not tolerate it." In order to continue with his favorite activity, Caller's son agreed to answer to his previous female name in the dojo. Then the dojo owner ejected a family with a transgender mother, sending her vulgar threats by text. Then the owner expelled Caller's son, saying "...our values are not in alignment & this has become an unhealthy relationship. Your family is no longer welcome here."
- a transgender teenager who had full family support and had been filling his testosterone prescription at a local Albertson's near the family home in Battle Ground, Washington. But when a new pharmacist arrived, the teen's prescription suddenly was repeatedly refused and flu-shots also were denied.
- a gay man in Wisconsin, who was rudely denied when he tried to make an appointment with his dentist for his husband; he was told that office policy only permitted immediate family members to make appointments for others.

In addition, examples of discrimination in public and governmental settings are detailed in pages 19-21 below.

Housing Discrimination

From 2014-2018, our Legal Help Desk received 700 calls for help concerning housing discrimination. In 2018 alone, the callers included:

- a woman who is transgender and her partner, who live in a trailer park in Arizona. Neighbors within the park harass them, often urged on by the property manager, who yells things about them such as, "who the hell are these two gay men dressed in women's clothing?"
- a caller who lived in Connecticut and was evicted from her home because she is transgender; the eviction left her homeless.
- a gay man in Florida, who was living in a 55+ mobile home park, and was told by park management that his husband could not move into the park with him after they married.
- a gay man and his husband, who went to a Florida retirement community to hear the presentation for potential new members, and then were told they would have to purchase separate condos because they would not be permitted to live together, despite being married.
- a gay man and his boyfriend, who had made an appointment to see an apartment advertised for rent in Coral Gables, Florida. The owner did not appear and did not answer the phone. The person showing the apartment then told them the owner said he would not show them the apartment because he did not rent to gay couples.
- an older same-sex couple who had been together for at thirty years and were living in a mobile home/RV park in Florida. They were told to remove the gay pride flag hanging on their trailer. When they refused, they were evicted.
- a gay man in Chicago, who had been living in a senior living center for ten years when a new manager came in and began to harass him. His rent check was returned. He was denied the services provided to everyone else. Eventually he gave up and moved out.
- a disabled gay man in in Illinois lived in the same building as his partner, but in separate apartments. Caller had to endure constant harassment by a neighbor, who left notes under his door saying things like "get out fag." Feeling threatened, Caller requested police help multiple times, but to no avail. Caller also sought help from the building management, without success. The management then started retaliating against the couple, serving Caller's partner with arbitrary lease violations.

- a married lesbian couple in Illinois, who were threatened with eviction because they are married to each other.
- a gay man in Mississippi, who applied to live in a mobile home park and was denied; he asked for a written explanation and was refused. The seller of the trailer then was recorded cursing at Caller, calling him "cxxk-sucker." The property manager also told Caller that "people like him" are not wanted in the park.
- a married lesbian couple in Ohio, who attempted to buy a house together. After the initial contract was signed, the seller's realtor told Caller's realtor that the seller "had prayed about it," would not accept the offer, and it was not about the money. Caller surmised that the rejection must have been due to their sexual orientation.
- a lesbian in Pennsylvania who was pushed out of her elder care facility due to her sexual orientation.
- a gay man in Pennsylvania who was harassed and then evicted due to having posted material in his window indicating he is gay. He had lived there for a year without incident but a new property manager said he was making neighbors uncomfortable. The manager began harassing Caller in various ways and then evicted Caller.
- a lesbian in Pennsylvania who was told she could not have her wife move into her trailer in the park where she had been for seven years. Caller reported that the park managers falsified information in their background check of her wife, and took other steps to drive Caller out. Caller lost her trailer and the couple became homeless.
- a transgender woman in Texas who had moved into a trailer park, only to have the landlord tell her not to wear "girly shorts" and that she had to present as male outside of her trailer, and who also withheld the key to the communal bathroom for weeks. The landlord told other tenants he "can do whatever he wants" because there were no legal rules preventing his behavior.

In addition, examples of discrimination in public sector housing are detailed on page 21 below.

Discrimination in Access to Credit

From 2014-2018, our Legal Help Desk received 414 calls for help concerning discrimination in access to credit. In 2018 alone, the callers included:

- multiple transgender individuals in California, Maryland and Texas who were denied credit because their credit reports were flagged as fraudulent due to names and gender markers not matching the earlier years of their reports, despite matching Social Security numbers, as tracked by TransUnion, Experian and Equifax. The callers reported impossibly difficult experiences attempting to get their credit reports updated and the fraud alerts lifted.
- a trans man in Pennsylvania had a similar experience, being denied a credit card by Chase bank, and then being told by Chase that TransUnion had said he had only had credit for six months (due to having only one credit card with his new legal name). Despite having the one Social Security number, TransUnion did not credit him for his prior twenty years of good credit history.
- a transgender woman in Texas was denied an apartment lease because Equifax had flagged her Social Security number for fraud due to a disconnect between her prior name and her new legal name.
- a gay man in Illinois, who had excellent credit and a large income, was applying for a new car loan; the loan agents were approving his application smoothly and quickly, until they learned he is gay, at which point the agents simply stopped speaking with him.
- a transgender woman in Illinois who was refused a car lease, with GMAC financing telling her that her credit score has dropped due to her legal name change.
- a gay man in Maryland, who reported that changing his bank account to a joint account with his partner caused his credit score to drop considerably; his bank also ended his line of credit after he added his partner to his checking account.
- a gay couple in Texas, who already had a mortgage for their home and farm, applied for an additional loan for which they had ample

assets as security. Unlike their prior, uneventful experience, after having mentioned to a loan agent that they now are married, they had to put in multiple new applications, endure protracted delays, deal with "the run-around," and hear continual comments discouraging them from pursuing the loan.

Discrimination in Federally Funded Programs and Services

From 2014-2018, our Legal Help Desk received 63 calls for help concerning discrimination in federally funded programs and services. In 2018, homeless shelters featured prominently among them, including these typical examples:

- a lesbian couple in a homeless shelter in New York, who were being bullied by the staff and other clients, including being called "faggot" by an intimidating former prisoner housed in the same shelter. The staff refused to take action.
- a transgender woman staying at a homeless shelter in Anaheim, California, who asked to use all-gender restrooms but was told she had to have medical documentation. Eventually she had to leave the program.

Anti-LGBT Discrimination by State and Local Government

When evidence of discriminatory practices in the public sector is abundant, it is proper for Congress to enact remedies that abrogate the sovereign immunity of the states. Evidence of discrimination in the private sector is relevant to this inquiry when the congressional record reflects that the problems are similar in the private and public sector.[6] Unfortunately, it most certainly is the case that the public sector discrimination problems are strikingly similar to those in the private sector, although they perhaps have even worse impacts because they occur with the imprimatur of official government policy.

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[6] *Tennessee v. Lane*, 541 U.S. 509, 528 (2004); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728-733 (2003).

As noted above on page 2 at note 2, Lambda Legal conducted a national survey in 2012 of the experiences of LGBT people which set out to determine whether our governmental institutions – including police, courts, prisons and school security – are properly protecting and serving members of this community. A total of 2,376 people completed the survey, which was a national first of its kind and included questions and an opportunity to share accounts of one's own experiences when interacting with these agencies of government. The results are presented in the report entitled *Protected & Served?*, which includes both individual stories and analysis of the aggregate data.[7] The rates of discrimination against LGBT people by each of these areas of government activity are alarming, with even more disturbing disparities correlated to race and ethnicity, transgender status, low-income status, and HIV status.

To update and complement the findings of the *Protected & Served?* report, what follows here is a representative sampling of instances of anti-LGBT discrimination in the public sector described by callers to Lambda Legal's Help Desk attorneys during 2018.

Education

- *Adverse action = verbal harassment and physical intimidation*: Caller attends a public high school in Arizona. Since coming out as transgender, he has been verbally harassed repeatedly including in front of teachers, with no protection or support. When attempting to use the boys' restroom during a high school football game, he was stopped by a group of 12 other boys, threatened and kept from entering the restroom. His repeated requests to school administrators for help have yielded nothing. Because he and other LGBT students on campus hear other people say "awful things" about them, they don't feel safe. Caller says, "I'm scared to go to school, even to walk the halls by myself."
- *Adverse action = ejection from school lacrosse team*: Caller's daughter is a student-athlete at a public university in Arizona. She was a pre-med bio major and on the women's lacrosse team. She, along with other student-athletes, heard that their coach had asked the team's captain to compile a list of the gay players on the team. After caller's daughter was outed to the coach as

[7] Visit http://www.lambdalegal.org/protected-and-served.

a lesbian, she began to be subjected to harsh criticism by the coach. At the end of the season, Caller's daughter was cut from the team.

- *Adverse action = refusal to use proper name and pronouns*: Caller's partner is transgender and is encountering ongoing problems as a medical student at a public university in Florida, with improper pronoun usage, use of partner's deadname, and lack of access to the school's free mental health services.
- *Adverse action = bullying and other discrimination*: Caller's daughter is transgender with Asperger's in Prince George's County, Maryland. She has been unable to attend the public school due to bullying and discrimination. She is anxious and has needed in-patient treatment for suicidal ideation due to the bullying at her schools.
- *Adverse action = bullying and threats*: Caller is a transgender boy attending a public high school in Ohio. Male classmates made "jokes" about raping him and beating him if he went into "their" restroom, causing Caller to fear entering the gender-appropriate restroom. A teacher who overheard the threats also made "jokes" about hurting Caller. Although the students' and the teacher's conduct was reported to the principal, no action was taken against either the teacher or those students.
- *Adverse action = verbal abuse and ostracism*: Caller is a transgender boy attending a public high school in Ohio, who reported, "I was bullied throughout my entire life at school. People always called me every name in the book they could think of. … The hardest moment was when I first entered High School the kids started making an awful comment that's still stuck with me. They would say whenever I walked by, "What is that, what do we call it?" and then went on to laugh and high five each other while they mentally beat down another human being like I'm nothing." Caller could not participate in sex-segregated activities including sports. School officials refused to use Caller's preferred name. He was denied appropriate restroom use. When fellow students made anti-LGBT comments, Caller's teacher supported them, saying things like "there's no room for those people in heaven, I hope those poor souls will realize this someday."
- *Adverse action = bullying and other discrimination*: Caller is a transgender boy who attends an inner-city public high school in Ohio. He reports that some school officials are accepting of transgender students, but the other students are not. Caller has been choked 3 times at school and reports that a transgender girl at the school had her face bashed into a wall because she is trans. Caller reported the attacks on him and provided video

evidence, but the school officials merely admonished the student body as a whole over the school intercom. Caller had a bible thrown at him with other students yelling that he is "going to hell." He is scared to use the men's restroom because he has been threatened with rape if he does, so he only feels safe using the restroom at my home and "always [does his] best to stay hidden when [he's] at school."

- *Adverse action = denial of access to gender-appropriate facilities*: Caller is a transgender boy who attends a public high school in Pennsylvania. He is being denied usage of the boys' locker room and the boys' restroom, though he had done both things previously without incident. He was told to stop using the boys' restroom because an adult teacher said he was "in the wrong bathroom."
- *Adverse action = physical abuse and verbal harassment*: Caller has a 15-year-old son who is a student in a public school in Texas. Her son was perceived as gay and forcibly dry humped by another student. Later, after the son came out as gay on social media, the other students were vicious. They told him they would "beat his ass" and that he should kill himself. School officials were made aware of the threats but did nothing for a long time. Eventually, after numerous complaints, the school resource officer filed a police report.
- *Adverse action = refusal to use proper name and pronouns*: Caller has an adopted 8-year-old son. She says the adults at the Texas public school he attends refuse to call him by his male pronoun or use his preferred name, even though the parents are in the process of changing his name legally. His counselor and doctor wrote a letter asking the school to refer to the child as male because it is detrimental to his mental health to continue to refer to him as a female. The son has had suicidal ideation and suicide attempts. Per caller, son looks like a boy. Another boy in his class referred to him with male pronouns and in front of the class, the teacher reprimanded the other boy for doing so. The school officials said they would be abusing caller's son if they referred to him as male, and that they won't do so until they receive a court order changing his name. But caller says even after the name change, the school will not refer to the child as male because his gender marker would not have been changed.

Employment

- *Adverse action = harassment; physical assault*: Caller is a gay male who worked for a school district in Southern California. When he began wear an "Out for Safe Schools" badge, he became the target of certain students, and subject to verbal and physical assaults. His complaints to school officials were unavailing.
- *Adverse action = discriminatory clothing allowance policy*: Caller works for a small Georgia town. Prior to her gender transition, she was allowed to purchase clothes/uniforms with city funds. Once caller transitioned and purchased a skirt, caller was disciplined and the town retrieved the money for the purchase from caller's next paycheck.
- *Adverse action = marginalization*: Caller identifies as transgender and works in the public works department of the City of Des Moines, Iowa, where co-workers treat Caller with hostility which interferes with Caller's ability to work. The City's human rights specialist has ignored Caller's requests for help.
- *Adverse action = termination*: Caller was fired from a program managed by Iowa State University for helping to ensure the rights of LGBT youth. *See* USA news article https://www.usatoday.com/story/news/nation-now/2018/08/03/lgbtq-policy-iowa-4-h-alarms-conservatives-director-fired/900070002/
- *Adverse action = termination*: Caller was fired from her job teaching at a public charter school in Texas because of her sexual orientation.

Public Facilities

- *Adverse action = ejection from shelter*: A gay male caller and his husband were ejected from a homeless shelter in Colorado after reporting anti-LGBT discrimination. A municipal police officer assisted the management of the private agency which ejected the couple based on the agency's religious beliefs, leaving the couple at risk of severe weather.
- *Adverse action = denial of access to all-gender restroom*: The caller is a transgender woman who was sheltered at the Pahoa public shelter on Hawaii during the volcanic eruption, together with 700 other evacuees. The shelter was established in a county gymnasium and staffed by county employees. It had a unisex/disability access restroom, which Caller repeatedly asked to

use. The staff refused to open it for her, instead keeping it locked and using it as a closet.

- *Adverse action = public humiliation by gratuitously revealing transgender identity*: Caller is a transgender woman who reports having been badly mistreated at two Social Security offices in Kansas by staff who gratuitously revealed her transgender identity, subjecting her to public humiliation, and who refused to handle her case appropriately.
- *Adverse action = denial of parental visit with child*: A lesbian couple living in New Mexico have an adopted child, but Caller is the only parent on the adoption decree. Their son is now 17 years old and has been incarcerated at a juvenile detention center, which is refusing to allow the non-adoptive mother to visit their son.
- *Adverse action = ejection from Amtrak train*: Caller and her friends were harassed by an Amtrak employee who overheard them use the word "lesbian" in their private conversation. The Amtrak employee then called local police officers, who required that Caller and her friends leave the train.
- *Adverse action = verbal assault*: Caller reported that a U.S. postal worker verbally assaulted him and his partner with homophobic language and told them the Postal Service would never deliver their mail again. Caller reported the incident was covered on the local news.
- *Adverse action = harassment*: Caller's daughter is transgender and was harassed when going through TSA security at Portland International Airport.
- *Adverse action = harassment and refusal to change gender marker on driver's license*: Caller is a transgender man who was refused proper service and treated in a hostile manner by staff of the Texas Department of Public Safety in Houston. Caller's new license had been issued properly with an updated "male" gender marker consistently with his updated Social Security information. The DPS employee changed the gender marker back to "female," creating a discrepancy with caller's name, refused to consider caller's full set of documents confirming his gender change, and treated caller in a harassing manner throughout the interaction.
- *Adverse action = refusal of ability to board train to meet wife*: Caller, a lesbian, was blocked from boarding an Amtrak train in Washington after mentioning to the ticket taker that her wife was saving her a seat. The ticket taker made her wait, while letting others who had arrived later board the train. The

train then left the station without Caller having been permitted to board. Caller was re-ticketed for a later train, which ended up being delayed for nearly 8 hours, leaving Caller to wait in the rural train station area until nearly midnight before the delayed train finally arrived. Her wife, who been on the original train, was panicked when Caller did not board and meet her on the first train as they had planned.

Housing

- *Adverse action = eviction threats*: Caller is a transgender woman who is a Section 8 recipient living in Indiana. After having rented her home without incident for more than a year, the management changed. The new manager began harassing her immediately, sending frequent eviction notices and attempting to drive her out.
- *Adverse action = denial of housing*: Caller, a Texas resident, reported that the local HUD Housing Authority property manager kept skipping over Caller, who had been at the top of the list for nearly two years. But the manager kept finding reasons to not place Caller in one the many available apartments. Caller reports, "I have tried not to believe that she is discriminating against me, but it is painfully obvious that she is and I am one step from homeless."

Social Science Research Confirms Anti-LGBT Discrimination Is Pervasive

The accounts of discrimination set out above are consistent with years of social science research documenting pervasive, persistent, harmful discrimination against LGBT people in this country.[8] More recent surveys have resulted in similar, deeply troubling findings.[9] Moreover, the thousands of calls to Lambda Legal's Help Desk confirm that there is widespread, persistent

[8] For an overview of research studies as of 2012, see Jennifer C. Pizer, *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012).

[9] For example, see Sandy James, *et al.*, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2016), *available at* http://www.ustranssurvey.org/report; Lambda Legal, *Protected & Served?*, *supra* note 2 and discussion on page 16.

discrimination in the areas covered by the Equality Act by state and local governments, with no discernable differences between the patterns of anti-LGBT discrimination in the public sector and in the private sector, and no notable differences in the patterns of such discrimination by state versus local government agencies.

Congress Must Act

The Equality Act appropriately codifies the substantial body of case law confirming that existing federal prohibitions on sex discrimination, properly understood, necessarily forbid discrimination because of sexual orientation or gender identity because such adverse treatment cannot be understood as other than "because of sex."[10] Congressional action to codify this case law is needed for at least three reasons:

1) Although these court decisions apply Supreme Court precedent, the Court has not yet taken up these specific questions and ruled definitively upon them;
2) Because the Trump administration now disagrees with these court decisions, having reversed the positions taken by the Obama administration, which had been consistent with both these courts and with the EEOC;[11] and
3) Because public confusion remains.

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[10] As examples, consider the application of the sex discrimination bans in Title VII, Title IX, the Fair Housing Act, the Equal Credit Opportunity Act, and the Affordable Care Act in: *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018) (en banc) (sexual orientation discrimination in employment); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (same); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (gender identity discrimination in employment); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017) (gender identity discrimination in education); *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856 (7th Cir. 2018) (sexual orientation discrimination in housing); *Smith v. Avanti*, 249 F.Supp.3d 1194 (D. Colo. 2017) (gender identity discrimination in housing); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir.2000) (gender identity discrimination in credit); *Rumble v. Fairview Health Services*, No. 14–cv–2037, 2015 WL 1197415 (March 16, 2015, N. D. Ill. 2015) (gender identity discrimination in health services).

[11] *See, e.g.*, *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012); *Baldwin v. Foxx*, No. 0120133080 (E.E.O.C. July 15, 2015); *Lusardi v. McHugh*, No. 0120133395 (E.E.O.C. March 27, 2015).

In addition, this appropriate understanding of federal bans on sex discrimination does not protect LGBT people from discrimination in public accommodations, public facilities, or federally funded programs and services, because Titles II, III, and VI of the Civil Rights Act of 1964 do not currently forbid discrimination based on sex.[12] The Equality Act's provisions updating those titles to include this protection are urgently needed by society at large, not just by LGBT Americans.

It is beyond dispute that great progress has been made with the passage of many state and local laws protecting LGBT Americans from discrimination. However, it could take years, or even decades, to protect *all* LGBT Americans without Congressional action. While 20 states and the District of Columbia now provide express statutory protection against sexual orientation discrimination and 19 plus the District of Columbia expressly forbid discrimination based on gender identity as well,[13] in some of those states the coverage is incomplete[14] and in others the remedies provided are limited.[15] In still others, progress has been agonizingly slow.

In sum, congressional action is imperative not only because the right to pursue one's livelihood, secure housing, an education, and life's necessities free from discrimination is a shared American value, but also because the current gaps in discrimination protection most severely affect the most vulnerable. For example, while approximately half of the overall population lives in

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[12] *See* 42 U.S.C. 2000a, 42 U.S.C. 2000b(a), and 42 U.S.C. 2000d, respectively.

[13] Movement Advancement Project, *Non-Discrimination Laws*, *available at* http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

[14] For example, Utah's nondiscrimination protections cover employment and housing, but not places of public accommodation.

[15] *See*, e.g., *Herman v. United Broth. of Carpenters and Joiners of America, Local*, 60 F.3d 1375, 1386 (9th Cir. 1995) (". . . we have construed Nevada law as precluding emotional distress claims in the employment context."); Wisconsin Department of Workforce Development, "Remedies at a Glance" (neither compensatory damages for emotional harm nor punitive damages are available under the Wisconsin Fair Employment Law); *available at* http://dwd.wisconsin.gov/er/discrimination_civil_rights/publication_erd_11055_p.htm#3.

jurisdictions covered by state sexual orientation nondiscrimination statutes,[16] fewer than 35% of African-Americans do.[17] As noted repeatedly above, there are compounding impacts of the multiple forms of discrimination that reinforce and disproportionately burden LGBT people of color. They create an urgent moral cry to pass this bill as soon as possible.

Conclusion

For all of the above reasons, Lambda Legal gives its strongest possible support to the Equality Act and respectfully urges you to support its passage. We would be pleased to answer any questions you may have about the information provided herein, and to provide any further information that might be of assistance to you.

Respectfully submitted,

Jennifer C. Pizer, Law & Policy Director
jpizer@lambdalegal.org

Gregory R. Nevins, Employment Fairness Project Director
gnevins@lambdalegal.org

[16] *See* Movement Advancement Project, *Non-Discrimination Laws*, *supra* note 13.

[17] *See* http://www.census.gov/compendia/statab/ranks/rank12.html

April 22, 2019

The Honorable Suzanne Bonamici
Chair
House Committee on Education and Labor, Subcommittee on Civil Rights and Human Services
Washington, D.C. 20515

The Honorable James Comer
Ranking Member
House Committee on Education and Labor, Subcommittee on Civil Rights and Human Services
Washington, D.C. 20515

Dear Chair Bonamici and Ranking Member Comer,

We write to provide the views of ADL (the "Anti-Defamation League") for the April 9 Subcommittee on Civil Rights and Human Services hearing on "The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination." We would ask that this statement be included as part of the official hearing record.

ADL is a leading anti-hate organization that has been working to secure justice and fair treatment for all since its founding in 1913. In seeking to protect civil rights for all, ADL recognizes the importance of comprehensive laws prohibiting discrimination on the basis of immutable characteristics, including sex, sexual orientation, and gender identity. We support the Equality Act and believe its enactment would be a watershed moment in our nation's history and an appropriate recognition that we will no longer tolerate discrimination against LGBTQ Americans in education, health, housing, public spaces, or employment.

While there has been significant progress towards LGBTQ equality and rights in this country in recent years, there have also been some unfortunate setbacks. Last summer's Supreme Court ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* – allowing, under those particular circumstances, a Colorado baker to refuse to sell a wedding cake to a same-sex couple – was a wake-up call, and underlined the need for further legislative action. That narrow Court decision, while disappointing, reaffirmed the rights of LGBTQ individuals to be free from discrimination, and left Colorado's nondiscrimination protections in place. But it also left us fearing that *even when there were specific laws in place to protect LGBTQ communities* – which is too often not the case – those laws were vulnerable to additional challenges.

Just today, the United States Supreme Court agreed to hear three cases pertaining to workplace discrimination against LGBTQ Americans. The Court granted writs of certiorari in *Bostock v. Clayton County*, *Altitude Express v. Zarda*, and *Harris Funeral Homes v. EEOC*. At issue in each of these separate cases is whether Title VII of the Civil Rights Act of 1964 protects LGBTQ individuals from workplace discrimination. In each of these cases, courts previously ruled that Title VII of the Civil Rights of 1964 covers sexual orientation discrimination as a form of gender stereotyping that is impermissible. The uncertainty in current law underscores the essential need to codify the full range of protections afforded by the Equality Act. ADL joined coalition

amicus briefs making this point in *Altitude Express v. Zarda* [1], and *Harris Funeral Homes v. EEOC* [2].

There are many reasons for the LGBTQ community to feel particularly vulnerable in America in 2019. The current administration has been noticeably hostile to LGBTQ rights, for example by rolling back previous guidance to schools that discrimination on the basis of gender identity is prohibited under Title IX, opposing efforts by transgender students to use bathrooms corresponding to their gender identity, banning transgender individuals from military service, and arguing in court briefs that Title VII of the Civil Rights Act does not protect gender identity. The administration has also continued to propose and enforce policies that allow for discrimination against LGBTQ people in the name of religion, reflected most recently in two administrative directives. One, from the Department of Labor, allows religiously affiliated organizations receiving federal funding to discriminate in hiring and other employment decisions. The second, from the Department of Health and Human Services, permits a government-funded, faith-based adoption agency to discriminate on the basis of religion in choosing foster care and adoption services program beneficiaries.

Unfortunately, too few states have comprehensive laws that can serve as bulwarks against these disturbing directives from Washington. Today, LGBTQ individuals remain unprotected from discrimination in 30 states and are facing troubling levels of hostility and prejudice across the country. Lawmakers in many states are continuing to strip LGBTQ rights or to consider legislation that would sanction government discrimination. For example, Tennessee House Bill 563, currently pending, would immunize private employers and businesses from local laws which prohibit discrimination against LGBTQ individuals. Another pending bill, Texas Senate Bill 17, is a sweeping piece of legislation which would empower and protect discriminatory behavior across hundreds of professional activities by creating dangerous "religious exemptions." If an occupation holder were to claim that a discriminatory action was motivated by a "sincerely held religious belief," the licensing agency that oversees the occupation would have no recourse to remedy that discrimination.

It is important for us to note that ADL believes deeply in the religious freedom mandated by the First Amendment. However, we believe that mandate must be viewed as a shield protecting individuals from government actions against them, and not as a sword to be used to thwart anti-discrimination laws or violate the civil rights or the dignity of others. The government has a clear, compelling interest and responsibility to take firm action against discrimination, and the Equality Act is an appropriate and important step in fulfilling that responsibility.

Throughout our history, ADL has understood that civil rights legislation serves more than one purpose. First and foremost, this kind of legislation provides necessary protections for the most vulnerable in our society. And, also importantly, such legislation sends a message that Americans care, that we believe in the fundamental principles of justice and equality on which this nation was founded and the basic dignities of all Americans.

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[1] https://www.adl.org/education/references/amicus-briefs/zarda-v-altitude-express-inc-usca-2nd-circuit-2017

[2] https://www.adl.org/education/references/amicus-briefs/equal-employment-opportunity-commission-v-harris-funeral-homes

The Equality Act represents an historic opportunity to ensure that, no matter where in this country they live, Americans are protected from discrimination based on sex, sexual orientation, and gender identity across virtually every area of daily life. The Equality Act is about ensuring LGBTQ Americans can live their lives with dignity and respect.

In her powerful remarks to the House Judiciary Committee earlier this month, Representative Pramila Jayapal spoke about why the Equality Act is so important to her personally. She spoke about her child, who would be directly impacted by this legislation, and how that child finally feels free to be who they are. "With that freedom," Rep. Jayapal said "comes a responsibility, for us as legislators, to legislate with love and not fear." We at ADL could not agree more.

ADL therefore welcomes the work of this Subcommittee on the Equality Act and urges its enactment as a priority for the 116th Congress.

Sincerely,

Eileen B. Hershenov

Eileen B. Hershenov
Senior Vice President, Policy

Erika Moritsugu
Vice President, Government Relations, Advocacy, and Community Engagement

Steven M. Freeman
Vice President, Civil Rights

April 8, 2019

The Honorable Rep. Bobby Scott
Chair, House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

Re: SUPPORT for H.R. 5, the "Equality Act"

Dear Chairperson Scott and Members of the House Education and Labor Committee:

American Atheists, on behalf of its constituents nationwide, thanks you for holding a hearing on H.R. 5, the Equality Act. This landmark legislation would ensure that individuals are federally protected against discrimination on the basis of sexual orientation and gender identity. We urge the committee to swiftly pass this vital measure to end historical and contemporary patterns of well-documented discrimination against lesbian, gay, bisexual, and transgender (LGBTQ) Americans.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. American Atheists believes that all Americans should be equally protected under the law, regardless of sexual orientation, gender identity, or religious beliefs or lack thereof. No individual should be subjected to discrimination and harassment that results from the religious beliefs of others.

Non-discrimination protections for LGBTQ people vary considerable from state to state, municipality to municipality. This patchwork of protections can make it challenging for individuals to determine whether they are protected, and it creates unnecessary complexity for employers, businesses, educational institutions, and others. Moreover, state and local non-discrimination protections frequently have religious exemptions of varying breadth and applicability, in some cases creating loopholes which permit invidious discrimination.[1]

[1] Gill AM. (2018). State of the Secular States 2018. Cranford, NJ: American Atheists. Available at https://www.atheists.org/states/.

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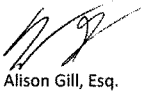
The Equality Act would create a foundation of basic non-discrimination protections across the nation, ensuring that LGBTQ people are protected in areas such as employment, housing, education, and public accommodations and will also apply uniform religious exemptions which have proved suitable for religious organizations for more than fifty years.

Moreover, H.R. 5 would address several issues frequently left unresolved by state laws, such as how non-discrimination laws apply to foster care and adoption agencies. Currently, 10 states have religious exemptions which allow foster care and adoption placement agencies to discriminate, potentially affecting approximately 18% of the LGBTQ population.[2] Sadly, these laws prevent children from finding loving, permanent homes by allowing agencies to turn away qualified prospective parents.

With 287 original co-sponsors, the Equality Act has overwhelming bipartisan support. Furthermore, research has shown that over 70% of Americans support non-discrimination measures for LGBTQ individuals, and 60% of Americans oppose religiously based service refusals.[3] In fact, most Americans already believe that there are explicit federal non-discrimination protections for LGBTQ people.[4] This commonsense legislation is long past due.

We strongly support the Equality Act, and we urge you to swiftly pass this important bill. If you should have any questions regarding American Atheists' support for H.R. 5, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,



Alison Gill, Esq.
Vice President, Legal and Policy
American Atheists

cc: All Members of the House Education and Labor Committee

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[2] Movement Advancement Project. (2019). Equality Maps: Foster and Adoption Laws. Available at http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.
[3] Jones RP, Cox D, Griffin R, Vandermaas-Peeler A, and Fisch-Friedman M. (2018). Emerging Consensus on LGBT Issues: Findings from the 2017 American Values Atlas. PRRI. Available at https://www.prri.org/wp-content/uploads/2018/05/AVA-2017-FINAL.pdf.
[4] Moore P. (2014). Poll Results: Discrimination. You Gov, June 18, 2014. Available at https://today.yougov.com/topics/legal/articles-reports/2014/06/18/poll-results-discrimination.

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Written Testimony of The Center for American Progress
To the Committee on Education and Labor
Hearing on the Equality Act of 2019
April 22, 2019

The Center for American Progress (CAP), the nation's foremost think tank dedicated to improving the lives of all Americans through bold, progressive ideas, is pleased to offer written testimony for the record in support of H.R. 5, The Equality Act of 2019. As a multi-issue think tank, CAP supports the bill's long overdue update of existing civil rights protections by adding protections against sex discrimination to Title II and Title VI of the Civil Rights Act of 1964, modernization of what constitutes a public accommodation for all classes protected by Title II, as well as its clarification that existing protections against sex discrimination include sexual orientation and gender identity.

For over a decade, CAP's research has documented both the extent of discrimination against LGBTQ people, racial and ethnic minorities, and women and the negative impact of this discrimination on people's lives, as well as our country as a whole. The Equality Act amends existing protections to expand civil rights without undermining any existing protections, a key priority for CAP. Nearly forty-five years after Congresswoman Bella Abzug introduced the first Equality Act in 1974, CAP joins business leaders, faith leaders, the civil rights community, and the majority of Americans in urging Congress to pass this important addition to our nation's civil rights laws and ensure all Americans are full and equal participants in our society, free from discrimination.

I. LGBTQ people experience discrimination across all areas of life covered under the Equality Act

Discrimination against LGBTQ people and their families is a pervasive problem urgently in need of solutions. Data from a nationally-representative survey of LGBTQ adults conducted by CAP and published in 2017 show that 1 in 4 respondents experienced some form of discrimination in the year prior to the survey.[1] Consistent with findings that discrimination has a significant, negative impact on LGBTQ communities, survey respondents reported that discrimination affected their psychological, physical, and spiritual wellbeing, as well as the environments they regularly found themselves in such as school and the workplace. Social science research clearly demonstrates a link between experiencing discrimination, or even the fear of experiencing discrimination, and negative psychological and physical health outcomes among LGBTQ

[1] Sejal Singh and Laura E. Durso "Widespread discrimination continues to shape LGBT people's lives in both subtle and significant ways," *Center for American Progress*, May 2, 2017, available at https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/.

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individuals, including depression and anxiety[2] and chronic pain.[3] CAP's research has shown that LGBTQ people sometimes take significant steps to avoid experiencing discrimination in their lives, such as avoiding certain public places including restaurants and shops, delaying necessary medical care, and hiding their sexual orientation and/or gender identity from employers.[4] Importantly, this research showed that LGBTQ people who had previously experienced discrimination were far more likely to report engaging in behaviors to avoid experiencing it again, demonstrating the long-term impact of discrimination on people's everyday lives. Previous CAP reports have documented the evidence of discrimination in specific areas of life covered by the Equality Act, including employment, housing, public accommodations, credit, and education.[5] For example, LGBTQ Americans frequently experience hiring discrimination, workplace harassment, and wrongful termination.[6] In educational settings, LGBTQ students from elementary school to college are more likely to experience verbal, physical, and sexual harassment than their non-LGBTQ peers, negatively impacting educational achievement and sometimes causing students to avoid school entirely. According to CAP's 2017 survey data, LGBTQ people who reported experiencing discrimination in the past year altered their lives to avoid discrimination, with nearly a quarter reporting that they made specific decisions about where to go to school to avoid discrimination, a third reporting they avoided public places to avoid discrimination, and nearly half reporting they chose where to live in order to avoid discrimination.[7] While greater acceptance of LGBTQ persons has led to safer social climates in some areas of the country, clear and explicit statutory protections against discrimination on the basis of sex, sexual orientation, and gender identity are necessary to ensure that all individuals receive the full measure of equality guaranteed to them under the Constitution.

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[2] IOM (Institute of Medicine), "The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding" (Washington: The National Academies Press, 2011), available at http://www.nationalacademies.org/hmd/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx; Ilan H. Meyer, "Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence," *Psychol Bull* 125 (5) (2003): 674-697, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/.

[3] D.J. Lick and others, "Minority stress and physical health among sexual minorities: Recent evidence and new directions," *Perspect Psychol Sci.* 8 (5) (2013): 521-48, available at https://www.ncbi.nlm.nih.gov/pubmed/26173210.

[4] Sejal Singh and Laura E. Durso "Widespread discrimination continues to shape LGBT people's lives in both subtle and significant ways."

[5] Sarah McBride and others, "We The People: Why Congress and U.S. States Must Pass Comprehensive Nondiscrimination Protections" (Washington: Center for American Progress, 2014), available at https://www.americanprogress.org/issues/lgbt/reports/2014/12/10/102804/we-the-people/.

[6] Center for American Progress, Movement Advancement Project, and the Human Rights Campaign, "A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers," (2013) available at http://www.lgbtmap.org/file/a-broken-bargain-full-report.pdf.

[7] Sarah McBride and others, "We The People: Why Congress and U.S. States Must Pass Comprehensive Nondiscrimination Protections."

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II. The Equality Act's expanded protections against discrimination in federal funding are necessary to prevent taxpayer dollars from funding discrimination

A. LGBTQ people face discrimination by taxpayer-funded child welfare agencies

Adoption discrimination runs counter to the principles held by the majority of Americans. Across the country, more than two-thirds (68 percent) of the public oppose allowing agencies that receive federal funding to refuse to place children with same-sex couples.[8] Opposition to this form of discrimination comes from all sides of the political spectrum, including 53 percent of Republicans, 67 percent of independents, and 81 percent of Democrats.[9] Allowing publicly-funded organizations to discriminate on the basis of religion would force taxpayers to foot the bill for a practice with which they disagree. Despite this, ten states and counting have passed legislation giving child placement agencies a license to discriminate based on their religious beliefs.[10] While often used to ban LGBTQ individuals and couples from providing loving foster or adoptive homes, these laws can also bar single people, people of other faiths, previously divorced people, or interracial couples from caring for these children. The overall legal landscape is disheartening, as a majority of states still lack protections in foster care and adoption for LGBTQ prospective parents.

Given the increasing number of states with religious exemptions for child placing agencies, the default assumption of some LGBTQ parents may be that an agency is not welcoming, especially if that agency is faith-based. Indeed, CAP research showed that faith-based child welfare agencies are less likely than secular agencies to have an inclusive nondiscrimination policy on their websites.[11] This does not necessarily mean that they are unwelcoming, but it likely sparks doubt for some prospective parents who might then avoid such agencies—an unfortunate possible result. A CAP review of child placing agency websites in Texas and Michigan, two states that have enacted licenses to discriminate in adoption, revealed that many more agencies either need to adopt nondiscrimination policies that are inclusive of sexual orientation and gender identity or need to post their existing policy on their website.[12] Overall, only 10 percent of Texas agency websites show their explicit willingness to work with LGBTQ prospective parents with a nondiscrimination policy inclusive of sexual orientation and/or gender identity or

[8] Daniel Cox and Robert P. Jones, "Most Americans Oppose Restricting Rights for LGBT People" (Washington: Public Religion Research Institute, 2017), available at https://www.prri.org/research/poll-wedding-vendors-refusing-service-same-sex-couples-transgender-military-ban/.
[9] Ibid.
[10] Frank J. Bewkes and others, "Welcoming All Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children" (Washington, DC: Center for American Progress, 2018), available at https://www.americanprogress.org/issues/lgbt/reports/2018/11/20/461199/welcoming-all-families/.
[11] Ibid.
[12] Ibid..

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positive mentions of sexual orientation and/or gender identity.[13] This also presents an issue of access, as a same-sex couple in El Paso might avoid the nearest agency one mile away for fear of being turned away, and instead have to drive 348 miles to find the nearest agency with an LGBTQ-inclusive nondiscrimination policy on their website.[14] There are 443,000 youth in care.[15] Same-sex couples raising children are seven times more likely to be raising a foster child and seven times more likely to be raising an adopted child than their different-sex counterparts.[16] Passage of the Equality Act would ensure qualified prospective parents are not turned away.

B. LGBTQ students face discrimination in schools

The Equality Act does not amend Title IX of the Education Amendments of 1972 (Title IX), but it does amend Title VI of the Civil Rights Act of 1964 to add sexual orientation and gender identity protections in federal funding, adding explicit protections for LGBTQ students. This is an important change because all youth deserve a learning environment free from harassment and discrimination, including LGBTQ youth. According to GLSEN's 2017 National School Climate Survey, about 70 percent of LGBTQ students experienced verbal harassment at school based on their sexual orientation, and over half reported harassment based on gender expression or gender.[17] In the same survey, over 40 percent of transgender and gender nonconforming students reported being required to use the bathroom facilities corresponding to their legal sex, and about 40 percent of LGBTQ students avoided gender-segregated spaces in school altogether due to safety concerns.[18] The survey also found that almost 30 percent of LGBTQ students were physically harassed for their sexual orientation and almost a quarter were physically harassed for their gender expression or gender identity.[19] Over 57 percent of LGBTQ students reported being sexually harassed.[20] Nearly three fifths of LGBTQ students reported feeling unsafe at school due to their sexual orientation, and almost half felt unsafe due to their gender identity.[21] Disturbingly, 60 percent of students who had reported incidents to staff said that the school had done nothing in response.[22] According to the Human Rights Campaign's (HRC) 2018 LGBTQ Youth Report, 73 percent of LGBTQ students have been verbally threatened due to their actual or perceived

[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Joseph G. Kosciw, Emily A. Greytak, Adrian D. Zongrone, Caitlin M. Clark, and Nhan L. Truong, "The 2017 National School Climate Survey" (New York, NY: GLSEN, 2017), available at https://www.glsen.org/sites/default/files/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.

identity, underscoring the importance of including protections for perceived membership in a protected class.[23]

This treatment has significant negative effects on LGBTQ students, such as causing the students to miss school and leading to lower GPAs and a decreased desire to pursue post-secondary education.[24] Worse still, analysis of National Violent Death Reporting System data found that as much as a quarter of 12 to 14 year-olds who died by suicide identified as LGBT.[25] According to the 2017 Youth Risk Behavior Survey, lesbian, gay, and bisexual youth are roughly four times more likely to consider or attempt suicide than their straight peers.[26] Despite the significant toll of bullying and discrimination in school, only 20 states, along with D.C., have passed legislation explicitly prohibiting bullying on the basis of sexual orientation and gender identity.[27] Additionally, only 14 states have explicitly banned discrimination on the basis of sexual orientation and gender identity in schools.[28] Thirty-three states lack any law explicitly protecting students from discrimination on the basis of sexual orientation or gender identity.[29]

LGBTQ students do have some federal legal protections. Title IX and its implementing regulations prohibit sex discrimination in educational programs, and an increasing number of courts have affirmed the logical conclusion that discrimination and harassment based on sexual orientation or gender identity are inherently included within federal definitions of discrimination based on sex.[30] In 2016 and 2017, the U.S. Courts of Appeals for the 6th and 7th Circuits respectively held that barring a student from using sex segregated facilities in accordance with

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[23] Human Rights Campaign, "2018 LGBTQ Youth Report" (Washington, DC: 2018), available at https://assets2.hrc.org/files/assets/resources/2018-YouthReport-NoVid.pdf?_ga=2.14787505.660137368.1555601322-2058663464.1548953793

[24] Joseph G. Kosciw and others, "The 2017 National School Climate Survey" (New York, NY: GLSEN, 2017), available at https://www.glsen.org/sites/default/files/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf.

[25] Geoffrey Ream, "What's Unique About Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth and Young Adult Suicides? Findings From the National Violent Death Reporting System," J Adolesc Health (2019) available at https://www.jahonline.org/article/S1054-139X(18)30791-2/fulltext.

[26] Centers for Disease Control and Prevention, "High School YRBS United States 2017 Results," available at https://nccd.cdc.gov/Youthonline/App/Results.aspx?LID=XX

[27] Movement Advancement Project, "Safe School Laws," available at http://www.lgbtmap.org/equality-maps/safe_school_laws (last accessed April 18, 2019).

[28] Ibid.

[29] Ibid.

[30] For cases that found that discrimination on the basis of sexual orientation is included in Title VII discrimination on the basis of sex, see, for example, Hively v. Ivy Tech Community College, 830 F.3d 698 (7th Cir. 2016); Brief of the Equal Employment Opportunity Commission As Amicus Curiae in Support of Hively's Petition for Rehearing and Suggestion for Rehearing En Banc, U.S. Court of Appeals for the Seventh Circuit (2016) (No. 15-1720), available at http://files.eqcf.org/wp-content/uploads/2016/11/42-Amicus-Brief-of-EEOC-iso-Rehearing.pdf; Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015). For cases that found that discrimination on the basis of gender identity is included in Title VII discrimination on the basis of sex, see, for example, Macy v. Dep't of Justice, EEOC 0120120821 (2012); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

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their gender identity violated Title IX.[31] Despite progress in the courts, the Trump Administration has rolled back enforcement of Title IX for LGBTQ students.[32]

Forthcoming CAP research on the lack of enforcement of Title IX protections for LGBTQ students under the Trump Administration highlights the importance of enacting explicit nondiscrimination protections for LGBTQ students. CAP reviewed complaints submitted to the Department of Education's Office of Civil Rights (OCR) alleging discrimination based on gender identity, sexual orientation, and sexual orientation-related sex-stereotyping under Title IX from October 2010 through May 2018. Under the Trump Administration, OCR was ten times more likely to determine that it had no jurisdiction over the allegation than under the Obama Administration.[33] The majority (83 percent) of the issues for which OCR determined it had no jurisdiction under the Trump Administration involved discrimination based on gender identity/transgender status.[34] Passage of the Equality Act would ensure that LGBTQ students in schools receiving federal funding are protected.

III. The Equality Act's clarification of Title VII's protections are needed to protect LGBTQ workers

A 2014 report from the Movement Advancement Project and CAP estimated that between 8 and 17 percent of lesbian, gay, and bisexual workers have been denied employment or unfairly fired on the basis of their sexual orientation.[35] This number rises to 13 to 47 percent for transgender workers. For LGBTQ people of color, workplace discrimination is an even more common experience, with nearly 1 in 3 reporting they experienced discrimination because of their LGBTQ identity when applying for a job.[36] Studies directly comparing LGBTQ job applicants with non-LGBTQ applicants have demonstrated that discrimination poses a significant threat to the job prospects of LGBTQ people. A 2014 resume-matching study found that men whose resumes indicated they were gay received lower starting salaries than identical resumes that

[31] Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir., 2017). Dodds v. United States Department of Education, 845 F.3d 217 (6th Cir., 2016).
[32] Memorandum to United States Attorneys and Heads of Department Components from the Attorney General of the United States, "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964"(Oct. 4, 2017) available at https://www.justice.gov/ag/page/file/1006981/download.
[33] Frank J. Bewkes and Shabab Ahmed Mirza. "Secretary DeVos is Failing to Protect the Civil Rights of LGBTQ Students" (Washington, DC: Center for American Progress, *forthcoming* 2019).
[34] Ibid.
[35] Movement Advancement Project, Center for American Progress, Human Rights Campaign, and Freedom to Wok, "Unchecked Discrimination Against LGBT Workers" (2014), available at http://www.lgbtmap.org/file/unchecked-discrimination-against-lgbt-workers.pdf.
[36] National Public Radio, Robert Wood Johnson Foundation, and Harvard T.H. Chan School of Public Health, "Discrimination in America: Experiences and Views of LGBTQ Americans," (2017) available at https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2017/11/NPR-RWJF-HSPH-Discrimination-LGBTQ-Final-Report.pdf.

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instead listed involvement in a general student council organization.[37] Likewise, a 2010 study conducted by Make the Road NY tested matched pairs of transgender and cisgender applicants with identical resumes and demographics, and not only found that the transgender applicant only received a job offer in one instance, in 11 out of 24 cases, the transgender applicant did not receive an offer of employment while the cisgender applicants did.[38]

Even for those who secure and retain jobs, discrimination can still take a toll. A 2017 survey from CAP found that of LGBT people who had experienced discrimination, 53 percent reported that discrimination had negatively impacted their work environment.[39] An additional 13 percent of all LGBT people – and 28 percent of LGBT people who had experienced discrimination – reported making specific decisions about where to work in order to avoid discrimination. Discrimination can also harm advancement within the workforce. One individual told CAP "I'm trying to minimize the bias against me by changing my presentation in the corporate world. I lower my voice in meetings to make it sound less feminine and avoid wearing anything but a black suit… When you're perceived as feminine—whether you're a woman or a gay man—you get excluded from relationships that improve your career."[40] Between 11 and 28 percent of lesbian, gay, and bisexual workers report being denied a promotion on the basis of their sexual orientation.[41] This can lead to other negative consequences for LGBTQ people.[42] For example, data from the Williams Institute reveal that gay men experience a "wage penalty" of 10 to 32 percent relative to their heterosexual counterparts.[43]

Altogether, these circumstances contribute to a lack of opportunity and heightened economic insecurity amongst members of the LGBTQ community. Nearly 60 percent of LGBTQ respondents to a survey conducted by NPR reported that where they live, LGBTQ people have fewer employment opportunities because of their sexual orientation or gender identity.[44] Half of LGBTQ respondents believed that where they live, LGBTQ people are paid less than non-

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[37] Movement Advancement Project, Center for American Progress, Human Rights Campaign, and Freedom to Wok, "Unchecked Discrimination Against LGBT Workers." "

[38] Make the Road NY, "Transgender Need Not Apply: A Report on Gender Identity Job Discrimination" (New York, NY: March 2010), available at http://www.maketheroadny.org/pix_reports/TransNeedNotApplyReport_05.10.pdf.

[39] Sejal Singh and Laura E. Durso "Widespread discrimination continues to shape LGBT people's lives in both subtle and significant ways."

[40] Ibid.

[41] Make the Road NY, "Transgender Need Not Apply: A Report on Gender Identity Job Discrimination" (New York, NY: March 2010), available at http://www.maketheroadny.org/pix_reports/TransNeedNotApplyReport_05.10.pdf.

[42] Ibid.

[43] M.V. Lee Badgett, Holning Lau, Brad Sears, and Deborah Ho, "Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination" (Los Angeles: The Williams Institute, 2007), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf

[44] National Public Radio, Robert Wood Johnson Foundation, and Harvard T.H. Chan School of Public Health, "Discrimination in America: Experiences and Views of LGBTQ Americans," (2017) available at https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2017/11/NPR-RWJF-HSPH-Discrimination-LGBTQ-Final-Report.pdf.

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LGBTQ people for equal work.[45] There are also disparities within the community. For example, bisexual women are less likely to be employed than their lesbian counterparts,[46] and a study of transgender people found they are nearly four times more likely to have a household income under $10,000 per year than the U.S. population as a whole (15 percent compared to 4 percent).[47] Meanwhile, children of same-sex couples are almost twice as likely to live in poverty compared to children raised by married different-sex couples. As many as 19 percent of children of female same-sex couples and 23 percent of children of male same-sex couples are poor, compared to 12 percent of children of married different-sex couples.[48]

The widespread discrimination faced by LGBTQ workers demonstrates how critical employment discrimination protections are. However, protections on the federal level have been inconsistent. The Equal Employment Opportunity Commission (EEOC) has interpreted Title VII's prohibition on discrimination against workers on the basis of sex to protect LGBTQ workers and investigates complaints of discrimination against LGBTQ workers. Since 2013, the Commission has obtained approximately $6.4 million in monetary relief for LGBTQ workers who have experienced discrimination.[49] President Obama signed Executive Order 13672, amending nondiscrimination protections for federal contractors to explicitly prohibit discrimination based on sexual orientation and gender identity.[50] While past administrations have taken important steps to protect LGBTQ workers, recent moves by the Trump administration's Department of Justice to ignore the growing consensus of federal courts and argue that Title VII does not protect LGBTQ workers put these protections in jeopardy.[51] The Equality Act's clarification of employment protections for LGBTQ workers would help ensure hiring, firing, and promotion decisions are based on a worker's skills, not based on who they are.

IV. The Equality Act preserves protections for freedom of religion

Freedom of religion is a fundamental value, which is why it is already protected by the First Amendment to the Constitution. The Equality Act does not impact existing protections for freedom of religion under the First Amendment to the Constitution, it simply reinforces the fact that religious exemptions cannot be used to harm people or otherwise discriminate against them.

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[45] Ibid.
[46] Shabab Ahmed Mirza, "Disaggregating the Data for Bisexual People," Center for American Progress, September 24, 2018, available at https://www.americanprogress.org/issues/lgbt/reports/2018/09/24/458472/disaggregating-data-bisexual-people/
[47] Center for American Progress and Movement Advancement Project, "Paying an Unfair Price: the Financial Penalty for Being LGBT in America."
[48] Ibid.
[49] U.S. Equal Employment Opportunity Commission, "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers," available at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.
[50] Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).
[51] See Brief for the Federal Respondent in Opposition, R.G. and G.R. Harris Funeral Homes v. EEOC, U.S. (2018) (No. 18-107); Brief for the United States as Amicus Curiae, Zarda v. Altitude Express, Inc., 883 F.3d (2d Cir. 2018)

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The Religious Freedom Restoration Act (RFRA) was created to protect freedom of religious practice where that practice wouldn't harm others, including ensuring Native Americans could engage in traditional religious ceremonies and that Jewish children could wear yarmulkes in public schools. Nothing in the Equality Act changes that. The Equality Act also does not alter existing religious exemptions contained in the Civil Rights Act of 1964, it simply ensures religious exemptions are not used to harm others, impose religious beliefs on others, or otherwise discriminate. Under the Equality Act, employees would continue to be able to seek religious accommodations in the workplace, such as seeking time off to attend religious services or wear a religious head covering. Religious organizations would still have the right to make personnel decisions about ministers or faith leaders free from government interference. People would still be able to select roommates or rent rooms in their home in a way that is consistent with their religious beliefs.

The Equality Act's expanded definition of public accommodations does not extend to churches, synagogues, mosques, or other houses of worship. Title II of the Civil Rights Act of 1964 limits the definition of public accommodations to those that affect commerce, defined for certain establishments as any that "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce."[52] Since this does not describe the activities of houses of worship, these would not fall under the definition of "other place of or establishment that provides exhibition, entertainment, recreation, exercise, amusement, gathering, or display" under the Equality Act's expanded definition of public accommodations.

V. Public opinion research demonstrates broad support for protecting LGBTQ people from discrimination

LGBTQ-inclusive nondiscrimination protections are strongly supported by a majority of Americans from multiple walks of life. According to the Public Religion Research Institute (PRRI), 69 percent of Americans overall support laws protecting LGBTQ people from discrimination in employment, housing, and public accommodations.[53] This strong level of support for fully inclusive laws has been consistently reported by PRRI since at least 2015. Support for these protections goes back decades, with Gallup polling data indicating that a majority of Americans have supported equal job opportunities for gay and lesbian workers since at least 1977.[54] Importantly, majorities of the nation's major political parties support LGBTQ-inclusive nondiscrimination laws, with 56 percent of Republicans, 70 percent of Independents,

[52] 42 U.S.C. §2000a(c).
[53] Daniel Greenberg, Maxine Najle, Oyindamola Bola, Robert P. Jones, "Fifty Years After Stonewall: Widespread Support for LGBT Issues – Findings from American Values Atlas 2018," (Washington: Public Religion Research Institute, 2018), available at https://www.prri.org/wp-content/uploads/2019/03/PRRI-Mar-2019-American-Values-Atlas.pdf.
[54] Gallup, "Gay and Lesbian Rights, available at https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx.

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and 79 percent of Democrats in support.[55] PRRI has also found that majorities of all major U.S. religious groups favor these types of laws, including groups not traditionally seen as supporting LGBTQ civil rights such as white evangelical Protestants (54 percent support), white Catholics (71 percent support), Hispanic Catholics (72 percent), and Mormons (70 percent support). There is also clear support for LGBTQ-inclusive nondiscrimination laws from businesses large and small. On April 2nd, IBM Vice President Tia Silas spoke before the Judiciary Committee in support of the Equality Act, emphasizing the role of nondiscrimination protections in creating "a culture – both inside and outside of work – where employees can bring their authentic selves to work every day."[56] Research has documented that LGBTQ-inclusive workplace policies are associated with positive business outcomes, including higher job satisfaction and lower turnover, which are in turn associated with increased productivity.[57] These positive outcomes are why 189 companies, with nearly 10 million total employees across all 50 states, support the Equality Act.[58]

Research conducted by CAP in partnership with the Small Business Majority and the American Unity Fund demonstrated strong support from small business owners for LGBTQ-inclusive protections.[59] In a 2015 survey, 8 in 10 small business owners supported laws protecting LGBTQ people from discrimination in the workplace and in places of public accommodation. Importantly, that survey also showed that 66 percent of small businesses say business owners shouldn't be able to deny goods or services to someone who is LGBT based on the owner's religious beliefs, including 55 percent of Republican small business owners and 62 percent of Christian small business owners. Given this support for nondiscrimination and opposition to denying LGBTQ persons jobs, goods, or services on the basis of religious beliefs, federal law that protects people on the basis of sexual orientation and gender identity should not include any exceptions for small businesses or enable business owners to circumvent civil rights law under the guise of religious liberty.

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[55] Daniel Greenberg, Maxine Najle, Oyindamola Bola, Robert P. Jones, "Fifty Years After Stonewall: Widespread Support for LGBT Issues – Findings from American Values Atlas 2018," (Washington: Public Religion Research Institute, 2018), available at https://www.prri.org/wp-content/uploads/2019/03/PRRI-Mar-2019-American-Values-Atlas.pdf.
[56] Tia Silas, "Testimony before the House Judiciary Committee Concerning HR-5, the Equality Act," April 2, 2019, available at https://docs.house.gov/meetings/JU/JU00/20190402/109200/HHRG-116-JU00-Wstate-SilasT-20190402.pdf.
[57] M.V. Lee Badgett, Laura E. Durso, Angeliki Kastanis, and Christy Mallory, "The business impact of LGBT-supportive workplace policies" (Los Angeles: The Williams Institute, 2013), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf.
[58] Human Rights Campaign, "Business Coalition for the Equality Act," *Human Rights Campaign*, available at https://www.hrc.org/resources/business-coalition-for-equality (Last accessed April 9, 2019).
[59] Small Business Majority, Center for American Progress, and American Unity Fund, "Opinion Poll: Small Business Owners Oppose Denying Services to LGBT Customers Based on Religious Beliefs (2015), available at https://cdn.americanprogress.org/wp-content/uploads/2015/07/071315-National-RFRA-and-ND-poll.pdf.

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VI. Discrimination against LGBTQ people by state actors is well-documented

Not only do LGBTQ people face high rates of discrimination in all aspects of their daily lives, but there has also been a widespread and persistent pattern of unconstitutional discrimination by local, state, and federal government actors on the basis of sexual orientation and gender identity. A report from CAP and AFSCME found that LGBT employees accounted for a significant portion of the public-sector workforce in 2009, comprising approximately 1 million people working in state and local government.[60] In addition to comprising a large part of the public sector workforce, the report also found LGBT people face high rates of workplace discrimination, including being denied government employment. Even those who are hired are subject to experiencing pay discrimination and being fired, verbally and physically harassed, and denied promotions because of their sexual orientation or gender identity. A 2009 report from the Williams Institute provides greater detail on the high rate of discrimination faced by LGBT public sector employees.[61] The report found that over half of LGBT K-12 teachers reported feeling unsafe at work because of their sexual orientation or gender identity and 27 percent reported being harassed within the prior year. Discrimination was not limited to K-12 teachers, with 19 percent of LGBT faculty and employees at state colleges and universities reporting experiencing discrimination and harassment in the workplace. The report also found that 13 percent of LGBT public-safety officers reported experiencing discrimination in hiring and 22 percent reported they were passed over for an otherwise deserved promotion due to their sexual orientation or gender identity.

VII. Conclusion

For all the reasons outlined above, we urge Congress to pass the Equality Act.

[60] Crosby Burns and others, "Gay and Transgender Discrimination in the Public Sector" (Center for American Progress and AFSCME 2012) available at https://m.afscme.org/news/publications/body/CAP-AFSCME-LGBT-Public-Sector-Report.pdf.
[61] Brad Sears and others, "Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment" (The Williams Institute 2009) available at - 11 - https://williamsinstitute.law.ucla.edu/research/discrimination/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/.

18-2574

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

SHARONELL FULTON; CECELIA PAUL; TONI LYNN SIMMS-BUSCH;
CATHOLIC SOCIAL SERVICES,

Appellants,

against

CITY OF PHILADELPHIA; DEPARTMENT OF HUMAN SERVICES FOR
THE CITY OF PHILADELPHIA; PHILADELPHIA COMMISSION ON HUMAN RELATIONS,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR *AMICI CURIAE* FAMILY EQUALITY COUNCIL AND COLAGE IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT; PARTIES' CONSENT TO FILE

Amici curiae have no parent corporation nor does any publicly held corporation own 10% of more of their stock.

No counsel for a party authored this brief, in whole or in part, and no person other than *amici curiae*, their members, and their counsel made any monetary contribution to fund the preparation or submission of this *amicus* brief.

All parties have consented to the filing of this *amicus* brief.

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INTEREST OF *AMICI CURIAE*

Amici curiae are not-for-profit organizations dedicated to promoting equality among our country's diverse families, in particular those comprised of lesbian, gay, bisexual, transgender, or queer (LGBTQ) parents, same-sex couples, and their children. This brief offers the stories of LGBTQ adults and same-sex couples with experience in seeking to foster as well as stories of former foster children to underscore the harm inflicted by sanctioning discrimination against same-sex couples seeking to become foster parents.

Family Equality Council ("Family Equality" or "FEC") is a national organization that connects, supports, and represents LGBTQ parents and their children. The organization is committed to changing attitudes and policies to ensure that all families are respected, loved, and celebrated. For nearly 40 years, Family Equality has been a community of parents, children, grandparents and grandchildren, reaching across the country and raising voices toward fairness for all families. Family Equality spearheads the Every Child Deserves a Family Campaign, a national effort to end anti-LGBTQ discrimination in the child welfare system and promote the best interests of all children in the foster care and adoption system by increasing their access to loving, stable, forever homes. Family Equality submits this brief on behalf of all of the LGBTQ parents and same-sex couples as well as the young people with whom it has worked.

COLAGE is the only national organization for and led by people with an LGBTQ parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. Based on its direct experience in working with thousands of youth over the past 28 years, COLAGE can attest to the critical importance of recognizing and respecting these families on every level – socially, institutionally, politically and legally.

SUMMARY OF ARGUMENT

Children need families, not facilities. At the heart of the foster care crisis in this country is the simple fact that there are not enough foster and adoptive homes. So, why would anyone think it is acceptable to turn away qualified, willing foster parents? At best, allowing child welfare agencies to discriminate based on their religious beliefs creates an atmosphere of confusion and discouragement for families who want to foster or adopt in a state that desperately needs more families to do so. At worst, it robs children of their livelihood by unduly denying LGBT, single, or non-Christian parents opportunities to save children from the cycle of abuse and neglect they will almost certainly encounter growing up in the foster care system. No child should have the childhood that I had – especially when there are people who are willing to provide a safe and loving home.

- Kristopher Sharpe, New York City (previously Texas)[1]

Shortly after I arrived at [Bethany Christian Services], I shared with the staff that we are a two-mom family.... Two staff members immediately left the room without addressing me. The third individual ... stated that refugee children have "already been through enough" and wouldn't be the best fit for placement in our family.... [W]e decided not to pursue any further inquiries fearing we would face the same humiliating and discriminatory treatment.

- Samantha Hutcherson Bannon, Philadelphia[2]

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1 Kristopher Sharpe Statement to FEC (Aug. 28 & 29, 2018). All statements cited in this brief are on file with *amicus* FEC and the undersigned counsel.

2 Samantha Hutcherson Bannon Statement to FEC (Aug. 28 & Sept. 4, 2018). The City also suspended BCS' contract to license foster parents, but BCS changed its policy to comply with the City's nondiscrimination policy and is partnering with the Mayor's Office of LGBT Affairs to train its staff on working with LGBTQ people and same-sex couples. The City has reinstated BCS' contract. *See* Julia Terroso, *City resumes foster-care work with Bethany Christian Services after it agrees to work with same-sex couples*, THE INQUIRER (June 28, 2018), available at http://www2.philly.com/philly/news/foster-care-lgbt-bethany-christian-

Despite the enormous need for foster care families, Catholic Social Services ("CSS") refuses to certify same-sex couples seeking to become foster parents, in violation of its contract with the City of Philadelphia (the "City"), which prohibits discrimination based on sexual orientation, among other characteristics. CSS argues that any harm from its admittedly discriminatory policy is hypothetical because same-sex couples may get certified to foster through other agencies. CSS is wrong: discrimination can discourage or delay a qualified same-sex parent family from fostering. That other agencies might behave differently does not cure the chilling effect of discrimination.

Amici offer the perspectives of the people directly affected by discriminatory policies like the one CSS seeks to justify: LGBTQ adults who have sought to foster and young people who were formerly in foster care. Through their experiences, these individuals are uniquely positioned to explain the harmful impact of discriminatory policies that ultimately result in fewer homes for children in foster care by preventing, deterring, and delaying would-be foster and adoptive parents from pursuing the care of children in need of families. Their stories make clear the need for nondiscrimination protections and the reality that, when they are in place, same-sex couples are more willing and able to foster and adopt. If this Court were

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services-same-sex-philly-lawsuit-catholic-social-services-20180628.html (last visited Sept. 29, 2018).

to accept CSS's position that government-contracted foster care agencies may discriminate against prospective families based on an agency's religious beliefs, children in the foster care system will be denied access to families who could provide them safe and loving homes.

ARGUMENT

POINT I

ALLOWING FOSTER CARE AGENCIES TO DISCRIMINATE AGAINST SAME-SEX COUPLES LIMITS THE NUMBER OF AVAILABLE HOMES

As the narratives below illustrate, discrimination prevents, deters, and delays same-sex couples from becoming foster parents. Historically, anti-LGBTQ discrimination has been pervasive in virtually all aspects of life, including in the child welfare system.[3] Until recently, some states had laws or policies expressly prohibiting LGBTQ individuals and/or same-sex couples from fostering or

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[3] *See* Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CENTER FOR AMERICAN PROGRESS (May 2, 2017), available at https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways (last visited Oct. 3, 2018); *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring) ("Discrimination against homosexuals has been pervasive in both the public and private sectors."); Peter Gallucci, *Thou Shall Not Adopt; Sexual Orientation Discrimination in the Adoption Process*, 23 CARDOZO J.L. & GENDER 465, 468-71 (2016) (summarizing historical and ongoing discrimination in adoption against the LGBTQ community).

adopting.[4] Other states enacted laws intended to have the same discriminatory impact.[5] Although these laws and policies have been overturned or repealed,[6] as discussed below, when same-sex couples face discrimination by foster or adoption agencies, the harm is exacerbated by this long history of discrimination.

Discrimination is harmful and, as the stories below demonstrate, it can have a chilling effect on same-sex couples' willingness and ability to move forward with plans to foster or adopt. As the United States Supreme Court has recognized, discrimination "generates a feeling of inferiority as to [individual's] status in the

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4 Fla. Stat. § 63.042; Miss. Code Ann. § 93-17-3(5); Joslin, Minter & Sakimura, *Statutes and administrative regulations banning or restricting the ability of lesbian and gay people from becoming adoptive or foster parents*, Lesbian, Gay, Bisexual & Transgender Family Law § 2:9 (August 2018) ("Family Law") (describing Missouri's "long-standing unwritten policy of not licensing homosexuals"); Nebraska Department of Social Services Administrative Memorandum (Memo 1-95); *see also Expanding Resources For Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, EVAN B. DONALDSON ADOPTION INSTITUTE at 17-20 (Sept. 2008) (the "Donaldson Report"), available at: https://www.adoptioninstitute.org/old/publications/2008_09_Expanding_Resources_Legal.pdf (last visited Oct. 3, 2018).

5 Ark. Code Ann. § 9-8-301 (preventing cohabiting couples from adopting pre-marriage equality); Utah Code Ann. § 78-30-1(3) (same).

6 *Campaign for S. Equal. v. Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691 (S.D. Miss. 2016); *Ark. Dep't of Human Servs. v. Cole*, 380 S.W.3d 429 (Ark. 2011); Family Law, *supra* n. 4 (describing how Missouri's policy was dropped); *Fla. Dep't of Children & Families v. X.X.G.*, 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010); 2015 Fla. HB 7013; *Stewart v. Heineman*, 296 Neb. 262 (Neb. S. Ct. 2017); *Utah Dep't of Health v. Stone*, Case No. 20140872-SC (Sup. Ct. Oct 23, 2014); *see also* Donaldson Report, *supra* n. 4 at 17.

community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). It "deprives persons of their individual dignity," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), and can have a harmful impact on one's family, *United States v. Windsor*, 570 U.S. 744, 772 (2013) (recognizing that discrimination against same-sex couples has a harmful impact on the couples and their children). Faced with discrimination, some same-sex couples seeking to be foster parents abandon their efforts. Even when couples ultimately persevere, they may delay moving forward for significant periods of time.

The harm of permitting discrimination against same-sex couples within the public child welfare system cannot be overstated.[7] There are over 400,000 children in foster care across the country,[8] and same-sex couples represent a large pool of

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[7] There is an increasing effort to undermine nondiscrimination protections by allowing taxpayer-funded faith-based agencies like CSS to discriminate. *See* Family Equality Council & Movement Advancement Project, *Ten States Have Passed Discriminatory Adoption and Foster Care Laws that Harm Children*, available at: https://everychilddeservesafamily.com/state-bills/ (listing ten states with laws permitting discrimination by faith-based agencies) (last visited Sept. 29, 2018).

[8] *See Number of Children in Foster Care Continues to Increase*, U.S. DEPT. OF HEALTH & HUMAN SERVICES: ADMINISTRATION FOR CHILDREN & FAMILIES (Oct. 3, 2017), available at: https://www.acf.hhs.gov/media/press/2017/number-of-children-in-foster-care-continues-to-increase (last visited Sept. 21, 2018); *The Adoption and Foster Care Analysis and Reporting System Report*, U.S. DEPT. OF HEALTH & HUMAN SERVICES: CHILDREN'S BUREAU (Nov. 30, 2017), available at:

interested and qualified foster families. In fact, same-sex couples are seven times more likely than different-sex couples to foster or adopt, making barriers to fostering by this community all the more harmful to children needing a family.[9] Further, gay men and lesbians historically have been "very willing to adopt children with special needs and, as a demographic group, may be more willing to do so than heterosexual adults."[10]

CSS argues that the City's suspension of referrals to CSS is "over a purely hypothetical disagreement" because it "is unaware of even a single person who has been prevented – or even discouraged – from fostering because of" CSS' discrimination against same-sex couples and asserts that if it is approached by a same-sex couple, it would simply refer them to another agency. CSS Br. at 1-2, 14. This argument ignores the chilling impact of discrimination.

Contrary to CSS's assertions, same-sex couples can be – and, as shown below, have been – deterred from fostering after facing initial discriminatory treatment. This reaction to discriminatory treatment is not surprising given the

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https://www.acf.hhs.gov/cb/resource/afcars-report-24 (last visited September 29, 2018).

9 Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?*, THE WILLIAMS INSTITUTE: UCLA SCHOOL OF LAW (July 2018) (finding that 2.9% of same-sex couples vs. 0.4% of different-sex couples raise foster children and that 21.4% of same-sex couples vs. 3.0% of different-sex couples have an adopted child).

10 Donaldson Report, *supra* n.4 at 5.

history of discrimination and the dignitary harm inflicted by such discrimination described above. Jamie and Bo Nabozny of Minnesota, who fostered-to-adopt four siblings, summarize the danger of allowing discriminatory policies like CSS':

> There are many LGBT couples like us who want to create their family through foster care and adoption. However, after facing discrimination in various forms through their lives, many may choose not to pursue adoption if they have doors slammed in their faces and obstacles put in their way.[11]

A) Discrimination Against Same-Sex Couples Deters and Prevents Them From Fostering

If this Court holds that CSS as a government-contracted foster care agency is allowed to refuse to accept same-sex couples, prospective families in Philadelphia and throughout the Third Circuit will be dissuaded or prevented from becoming foster parents.

For example, Samantha Hutcherson Bannon and her wife, an emergency medicine doctor, were "interested in fostering a refugee child" but abandoned their efforts in the face of discrimination. They attended an event held by Bethany Christian Services (BCS) near Philadelphia. However, when Samantha "shared with the staff that we are two-mom family . . . the 3 staff members present were clearly uncomfortable with the information." Two staff members "immediately left the room," and the third advised that BCS had "never worked with a same-sex family before" and offered "information about organizations in the area that

[11] Jamie and Bo Nabozny Statement to FEC (Aug. 29 & 30, 2018).

worked with families like ours to become foster parents." When Samantha explained that they were "specifically interested in fostering a refugee child and, as she knew, there were limited organizations that handled these placements," the staff member responded "that refugee children 'had already been through enough' and wouldn't be the best fit for placement in our family." The impact of this discrimination and dignitary harm led Samantha and her wife to relinquish their attempt to foster.

In Samantha's words:

> Being a parent is a responsibility that both my wife and I do not take lightly. We do not think our family structure causes either of our daughters any harm or difficulty. To have it insinuated that our family would be an additional burden to bear for a refugee child is inaccurate, insulting and embarrassing.... [W]e decided not to pursue any further inquiries fearing we would face the same humiliating and discriminatory treatment.[12]

April and Ginger Aaron-Brush of Alabama, a state without any non-discrimination protections for LGBTQ people seeking to foster or adopt, also wished to become foster parents but were met with discrimination that effectively prevented them from proceeding. April and Ginger contacted the only three agencies in their area. Two were private faith-based agencies that turned them away "almost immediately." The third – a local state agency – resulted in another "dead end with no path forward," despite their best efforts and persistence. They

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[12] Hutcherson Bannon, *supra* n.2.

"learned that many LGBT people who seek to foster or adopt have the same experience [with the state agency] and that there is only one person at the agency who will work with LGBT people and same-sex couples . . . . Apparently, we did not get that person." With no path forward, and the emotional impact of the discrimination, April and Ginger made the difficult decision to abandon their efforts:

> We felt scorned and deterred while attempting to work with our local [state] office and decided to give up on this process. We wanted to provide a safe and loving home to a child, and there was no foreseeable option for doing so in our area. So, we finally gave up. It is heartbreaking.[13]

Moreover, in the face of discrimination, some same-sex couples will choose other avenues to create their family, resulting in a loss of qualified, loving homes for youth in foster care. For example, when Thomas Starling and Jeff Littlefield, previously of South Carolina, encountered discrimination, they abandoned their hopes of adopting and instead turned to surrogacy. As Thomas relays, at the onset of exploring adoption options, including from the child welfare system, they scheduled meetings with "lawyers in South Carolina that specialize in family law" and "were met with resistance. The lawyers with which we spoke told us that there was no chance of a gay couple being able to adopt in South Carolina." This left

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[13] April and Ginger Aaron-Brush Statement to FEC (Sept. 7, 8 & 9, 2018).

Thomas and Jeff "very discouraged" and as a result they "gave up [their] dream of helping a child in need."[14]

The child welfare system similarly lost a potential family in the case of Rick Olson and Jay Timmons, a married couple from Virginia, who believed they could offer "a loving and nurturing environment for a child (or children) who need a permanent home." They explored foster care and adoption. However, after facing barriers to adopting as a same-sex couple they chose to create their family through surrogacy and now have three children.[15]

B) Discrimination Against Same-Sex Couples Delays Families From Fostering

Even if a same-sex couple is not permanently deterred from trying to foster because of discriminatory treatment, they may still defer their efforts for some time. Additionally, the discrimination can delay a successful placement. This too harms foster children as those parents are lost as potential families in the meantime.

For example, Drew Pierson of Texas was deterred from his dream of fostering and adopting when the first agency he went to told him that they would never place a child with him because he was gay.

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[14] Thomas Starling Statement to FEC (Aug. 30, 2018).

[15] Rick Olson and Jay Timmons Statement to FEC (Aug. 18, 2018).

Drew "had always wanted children" and considered adoption "because of the large number of children in the system who needed the kind of good, loving home that I knew I could provide." Having grown up in a Christian home and wanting "to instill those values to my children," he contacted a Christian agency in Texas. But after starting the training, he was told that, while "the agency would license me as a foster home. . . they would never place a child with me." This devastated Drew, "so [he] shelved the idea and went about [his] life." Drew tried again "[a] few years later" and was, ultimately, able to foster and has since adopted two children; in the meantime, the system lost Drew as a potential home for a child (or children) in need because of the discrimination he initially experienced.[16]

Lara Mayhew's and Jennifer Zilka's path to fostering was also delayed because of the discriminatory treatment they received. The state agency they first contacted was "over-taxed" so they contacted a faith-based state subcontracted agency but were ultimately "turned down because we were lesbians." As Lara and Jennifer share:

> The door was closed. Our journey continued with one hurdle after another, which contributed to a delay in our ability to provide a safe and loving home to a child in need. We sat for an adoption interview with a team comprised of caseworkers of another local agency . . . . We were specifically passed over for adoption and eliminated because we were not a "traditional family."

[16] Drew Pierson Statement to FEC (Aug. 30 & Sept. 4, 2018).

> Afterwards we learned from [interviewer] that we were, by far, the best couple interviewed.... We knew we were an excellent placement and it felt to be such a disservice to the children and to us as human beings.

Ultimately, Laura and Jennifer found a LGBTQ friendly agency to work with and were able to foster a child, whom they adopted. In the meantime, however, the disparate treatment they had received "caused delays in one more child being placed in a healthy, loving home."[17]

As these narratives demonstrate, the harm of allowing agencies to discriminate is tangible – families are deterred or delayed from fostering. When an agency turns away a same-sex couple, it causes a dignitary harm that is exacerbated by the history of discrimination against the LGBTQ community, leaving another child or children in care without a loving home, either permanently or longer than necessary. Applying nondiscrimination policies to all agencies that receive taxpayer dollars to find families for our Nation's most vulnerable children is essential for these needed families to pursue foster parenting.

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[17] Lara Mayhew and Jennifer Zilka Statement to FEC (Sept. 10 & 13, 2018).

POINT II

SAME-SEX COUPLES PROVIDE POSITIVE FOSTER HOMES AND NONDISCRIMINATION POLICIES CULTIVATE AN INCLUSIVE AND WELCOMING ENVIRONMENT FOR THEM TO FOSTER

There is no doubt that same-sex couples can – and currently do – provide loving nurturing homes to foster children in need. Decades of social science research shows that LGBTQ parents do just as well as heterosexual parents at raising happy, healthy and well-adjusted children. *See, e.g.*, Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 APPLIED DEV. SCI. 98, 104 (2012); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2600 (2015) ("[A]ll parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."). Indeed, acknowledging "[t]he research is clear that gay parents are good parents," dozens of Catholic Charity employees in Buffalo, N.Y. recently protested Catholic Charities' direction to senior management to "end foster care and adoption services [in Buffalo] because of the state requirement that those services be non-discriminatory."[18]

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[18] Stephen T. Watson & Harold McNeil, *95 Catholic Charities Workers Oppose Decision to End Adoption Program,* BUFFALO NEWS (Aug. 31, 2018), available at: https://buffalonews.com/2018/08/31/some-catholic-charities-workers-oppose-bishops-decision-to-end-adoption-program/ (last visited Sept. 29, 2018).

A nondiscriminatory and inclusive environment encourages same-sex couples to foster. For example, Rob, a former foster youth himself, and Reese Sheer have adopted four children from foster care in Washington D.C., a locality with nondiscrimination protections in place. The first two children, siblings, arrived at ages 4 and 2 in 2009; tibia trauma had stunted the growth of the two year old's legs – who is now a runner and gymnast, while his sister is an honor student. A couple of months later, they took in two brothers as well, one of whom had faced significant physical abuse. One of the brothers became "a star football player and a very kind young man" while the other, the youngest child, "is the apple of Rob's eye." After seeing the needs of children in foster care, which mirrored his own experience of being shuffled around with all of his belongings in a garbage bag, Rob founded a charity called Comfort Cases that has provided over 25,000 backpacks of comfort items to youth in care.[19]

Richard and Aaron Hooks Wayman, who fostered three children and fostered to adopt six more in Minnesota and Maine feel "very lucky to find welcoming, inclusive, and accommodating [child] welfare systems" in those states.

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[19] *See* Michael Lambert, *Rob Chasteen-Scheer: From Homeless Teen To Tireless Advocate For Foster Kids*, GAY WITH KIDS (Dec. 28, 2016), available at: https://www.gayswithkids.com/rob-chasteen-scheer-from-homeless-teen-to-tireless-advocate-for-foster-2465987441.html (republished by HUFFPOST on Mar. 30, 2017); *see also* COMFORTCASES, https://www.comfortcases.org/ (last visited Sept. 21, 2018).

They found the approach of each of the foster care licensure training courses "to welcome us into their community, offer us specific and relevant training … and encourage us in our journey to become foster parents was simply wonderful" and "went from hesitation and worry to being excited about our role as advocates and care takers for our children."[20]

Alex Lane Igoudin and Jonathan Clark of California, which has anti-discrimination laws in place, fostered to adopt biological sisters, raising them in a safe and loving home. They report that their daughters are "thriving today: healthy, social, and doing well in school: one is an athlete and the other wants to become a doctor."[21]

Likewise, Steve Ledoux and his husband, also from California, successfully "[grew their] family through the foster-adopt system." They fostered a 19-month-old toddler and were able, working with social workers, to reunite the toddler with his biological mother, who asked them "to remain a permanent part of [the child's] life" and the child still "spends one weekend a month at [their] home." They then fostered two brothers whom they later adopted. On top of that, they get together

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[20] Richard and Aaron Hooks Wayman Statement to FEC (Aug. 30 & 31, 2018).

[21] Alex Lane Igoudin and Jonathan Clark Statement to FEC (March 21 & Aug. 22, 2018).

with the boys' third brother – who was placed with a different couple due to his special needs – once a month. As they put it: "we've hit the jackpot."[22]

Scott Stumbo and Cliff Leonardi also found California's foster and adoption system "extremely inspiring." Their three children, who were placed in foster care with them at ages 2 and 3 but are now teenagers and adopted, have "thrived in [their] caring, attentive home."[23]

Similarly, Paul Rummell and Ben West of Oregon, also a state with affirming policies, have welcomed 13 foster children into their home over a three year period.[24]

If this Court requires Philadelphia to allow government-contracted agencies to discriminate against same-sex couples, the City risks losing qualified same-sex couples to jurisdictions prohibiting such discrimination. For example, Matthew Ramsey and his husband knew they wanted to be parents and that they "had a lot of love to provide to a child or children." This was a significant factor in their decision to move to a state with nondiscrimination protections. Matthew explains:

> We moved to Seattle in part so we could build a family without the then-existing legal barriers in Ohio. We wanted to live in a more progressive area and knew the laws in Washington state

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22 Steve Ledoux Statement to FEC (May 1 & Aug. 21, 2018).

23 *Stumbo-Leonardi Family*, 2011 Portrait Project, theme "*Families at the Forefront: Post-Adoption Services Support Forever Families*" at 44, Voice for Adoption (2011) (on file with Voice for Adoption).

24 Paul Rummell & Ben West Statement to FEC (May 15 & Aug. 21, 2018).

> were supportive of prospective LGBTQ parents and their efforts to form families.

Having now adopted two brothers from foster care, Matthew feels, "The more people who love my boys, the better. To all those agencies who would discriminate: There's no such thing as too much love. Stop getting in the way."[25]

POINT III

DISCRIMINATING AGAINST PROSPECTIVE FOSTER PARENTS BASED ON SEXUAL ORIENTATION DENIES FOSTER CHILDREN LOVING AND AFFIRMING HOMES

The harm caused by allowing barriers to same-sex couples fostering and adopting, like the one CSS' policy represents, is particularly egregious when viewed in light of the great need for foster homes and the lack of sufficient qualified families. Children languish in the system without placements with a family and, as the stories below illustrate, are too often being shuffled around between multiple families or being placed in group homes, often leaving them worse off than when they entered the system. Without enough homes for the over 400,000 children in foster care, far too many young people "age out" of the system without a forever family. In contrast, same-sex couples represent a large pool of potential, interested and qualified foster families.

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[25] Matthew Ramsey Statement to FEC (Aug. 20, 2018).

A) Children Who Cannot Remain with Their Families Need Supportive Family Foster Homes

Lacking sufficient foster homes, some children are placed in group homes or with families that are not well-matched to meet their needs

This was the experience of Joseph DeBiew, who grew up in New York, spent seven years "bouncing around between five different group homes[.]" "[T]he lack of available homes meant … seven years in a jail-like setting." Joseph explains:

> When there are not enough foster families available, people like me who didn't need a higher level of care may end up stuck in a juvenile detention facility. Not because I did anything to get there; I stayed there because there weren't any other housing options available. Allowing more families who are willing to be foster parents the opportunity to step up could've helped me avoid 7 years in a facility. No child or youth should have to grow up in a facility. Placing youth in congregate care facilities normalizes the super-structured, non-family life for young people.

Joseph believes a foster home would have been better:

> I didn't trust the adults around me because I knew they were there only because they were paid to be. I grew up feeling like there were no adults in my life who really cared about me. I think growing up in a foster home would have been a lot different. I would have had foster parents who chose to open their home to kids like me for a loving and supportive purpose. I could not have cared less about the sexual orientation or gender identity of

> foster parents, I just wanted a family and a supportive place to call home.[26]

Similarly, Kristopher Sharpe grew up in group homes. In the "more than eight years" Kristopher spent in Texas foster care, he "lived in upwards of 25 different placements, . . . For the most part, . . . in what is commonly referred to as 'congregate care settings' . . . ." Kristopher further explains:

> Some are the size of prisons. No matter their size, where they were located, or how many children are in care, abuse is pervasive in these facilities. I was molested for the first time at age 13 by one of my caregivers in a group home. By the time I turned 15, I had been beaten and raped more times than I care to remember – I was living in a state-sponsored hell, and there was nothing I could do about it.[27]

As the stories here illustrate, for many children, foster placements are a pathway to adoption.[28] The great need for qualified families interested in fostering and adopting is highlighted by the fact that over 20,000 children "age out" of foster care each year.[29] For these young people, the consequences of aging out without a

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26 Joseph DeBiew Statement to FEC (Aug. 23, 27 & Sep. 4, 2018).

27 Sharpe, *supra* n. 1.

28 *See 2016 Saw More Children in Foster Care and More Adopted*, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, available at https://www.nacac.org/2018/01/08/2016-saw-more-children-in-foster-care-and-more-adopted/ (last visited Oct. 2, 2018) (52% of kids adopted out of foster care are adopted by foster parents).

29 *See Extending Foster Care Beyond 18*, NAT'L CONFERENCE OF STATE LEGIS. (Jul. 28, 2017), available at: http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx (last visited Oct. 3, 2018);

"forever family" can be dire; such children are at "high risk for a host of negative outcomes, including poverty, homelessness, incarceration, and early parenthood."[30]

Kristopher describes his experience of aging out after eight years in Texas foster care:

> Like so many youth who age out of foster care, overnight, I was homeless, on the streets with no family, no support and nowhere to turn.... I spent the next six months on the streets, sleeping on the roof of a shopping strip in the north side of Houston at night and relying on the street economy to survive during the day. . . . Homelessness, unemployment, instability, and incarceration are the norm once foster children become adults. I have had to watch far too many of the young people I grew up with struggle, and in some cases even die an untimely death due to suicide, drug over dose, or other perils of life on the streets.[31]

In short, there is a great need for foster families and same-sex couples statistically offer a large pool of potentially qualified and willing families to help meet that need. Against this backdrop, the actual and potential risk of deterring and preventing same-sex couples from fostering is particularly serious. Discrimination by just one agency risks the loss of potential homes for children in

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51 Useful Aging Out of Foster Care Statistics Social Race Media, NAT'L FOSTER YOUTH INST. (May 26, 2017), available at: https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/ (last visited Oct. 2, 2018).

30 Donaldson Report, *supra* n.4, at 4 (citations omitted).

31 Sharpe, *supra* n.1.

need of placement in Philadelphia and beyond. *See supra* Point I. If the Court were to accept CSS's argument and hold that faith-based agencies have a constitutional right to violate non-discrimination requirements in providing public foster care services, it is unclear how many other agencies would also discriminate against same-sex couples.

B) Children Need a Diverse Pool of Foster Parents

In addition to the need for as many qualified families as possible, the City has an interest in ensuring that the "the pool of foster parents and caregivers is as diverse and broad as the children in need." *Fulton v. City of Philadelphia*, No. 18-2075, Mem. Op. at 30 (E.D. Pa. July 13, 2018). Allowing faith-based agencies to discriminate against families that do not meet their religious standards is antithetical to this goal. As the below stories from former LGBTQ foster children illustrate, some feel that placement with an LGBTQ family would have been best for them or is what led them to finally feel accepted and part of a family.

For example, after living in four homes in 10 years, Shane Read of Minnesota, an LGBTQ youth, "aged out" of foster care. Shane recounts, "I was not allowed to feel comfortable in my environment.... I was discriminated against and segregated from others.... I couldn't sleep in my own room because I had a roommate." Shane felt like "an animal at a shelter that was no longer wanted," and believes he would have thrived with "foster parents who were LGBTQ." Shane

explains, "I would have been in an environment where I knew I would be safe. I would have been able to explore who I was and maybe come to terms with myself sooner."[32]

Similarly, Tristan Torres of Nevada "had two sets of foster parents who had no idea what to do with me as a transgender foster kid." One foster parent "locked me in her room, berated me for being transgender, and forbade me from speaking to her biological children." He was placed in a new home, but, after revealing his gender identity to another family member, those foster parents "withheld food from me … and . . . I ended up literally thrown out of my house with my belongings in trash bags." After his experience, Tristan led a push for Nevada to require LGBTQ training for foster parents. As he explains, "There are a disproportionate number of LGBTQ+ youth in the system . . . . We need affirming placements with parents who can support our needs and who understand how to care for LGBTQ+ foster youth."[33]

Weston Charles-Gallo of Missouri says that his "social worker couldn't find a home that was supportive of me because I was gay. It was hard for me to find a space where others were comfortable." But "on the brink of living in the streets,"

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[32] Shane Read Statement to FEC (May 23, Aug. 22 & 28, 2018).

[33] Tristan Torres Statement to FEC (Aug. 21 & 22, 2018).

after being "bounced from home to home, many hospital visits, and living in a shelter," he found a "forever family with two dads and six siblings."

Weston explains:

> I can't imagine where I would be right now if I hadn't found them. It is because of them that I can be the person that I have always wanted to be. . . . I know my parents [will] always be there when I make mistakes. My family loves me for who I am – everything I've been through and the experiences I've overcome. I've been able to grow, now that I have security and stability.[34]

Courtney Sausville, who was in the Vermont's foster care system for four years, believes that "[n]ot limiting who is able to foster or adopt children by sexual orientation is important." She continues:

> There are tons of LGBT+ families who would love a child with open arms as much as the child would love to be part of something – a family.... Children should be able to feel safe and comfortable in a home. Comfortability can be different for each child.[35]

As a representative of the Children's and Youth Welcome Center in Los Angeles County explains:

> We understand that many foster youth who may self-identify as LGBT or questioning, feel that they aren't accepted in some foster families and foster homes. That's why we want to make sure we have a good representation from every community. Even if we have a good home for a foster youth, some of these teens are

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34 Weston Charles-Gallo Statement to FEC (Aug. 28 & Sept. 5, 2018).

35 Courtney Sausville Statement to FEC (Aug. 31 & Sept. 3, 2018).

> asking for a match with a parent or parents that mirrors their own demographic.[36]

Tim Dennis of Tennessee echoes this sentiment:

> When I was in care, I knew I couldn't reveal my identity to my foster parents; if I did, they would kick me out. Keeping my identity secret took a huge toll on me; I self-harmed and entertained thoughts of suicide. I moved several times because homophobic foster parents were unwilling to have me in their home. Having a family that supported me could have provided the stability I needed after entering care.

Now a case manager himself, Tim sees firsthand that when the LGBTQ youth he works with "find a foster parent who is willing to support and value their identity, whether that parent identifies as LGBTQ+ themselves or not, the young person can finally relax, grow, develop and heal."[37]

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36 James Michael Nichols, *This Incredible Place Helps LGBT Foster Kids When There's Nowhere Else To Turn*, HUFFPOST (Jan. 1, 2016), available at: https://www.huffingtonpost.com/entry/this-incredible-place-helps-lgbt-foster-kids-when-theres-nowhere-else-to-turn_us_56817433e4b0b958f659f7c5 (last visited Sept. 29, 2018); *LGBTQ Youth in the Foster System,* HUMAN RIGHTS CAMPAIGN, available at: https://www.hrc.org/resources/lgbt-youth-in-the-foster-care-system (last visited Oct. 3, 2018) ("Recognizing that LGBTQ adults are one potential group that could provide affirming foster homes for LGBTQ youth, agencies should engage LGBTQ adults who may be interested in becoming foster parents.").

37 Tim Dennis Statement to FEC (Aug. 22, 2018).

CONCLUSION

There is an enormous need for qualified families to foster children. Same-sex couples offer a large pool of potentially qualified families interested in meeting that need. Discriminatory policies like the one CSS seeks to defend can cause (and have caused) same-sex couples to abandon their hopes of fostering altogether. At a minimum, such policies can delay a same-sex couple's ability to foster a child. Children in need of loving families suffer because there are fewer available homes.

Dated: New York, NY
October 4, 2018

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: _____

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CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c)(i) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 6,303 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), the text of the brief filed with the Court by electronic filing is identical to the text in the hard paper copies of the brief.

4. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), a virus protection program was performed on this electronic brief using Trend Micro and no virus was detected.

Philip E. Karmel
Counsel of Record Amicus Curiae
Family Equality Council and COLAGE

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: October 4, 2018

Philip E. Karmel

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on October 4, 2018, a true and correct copy of the foregoing Brief of Amicus Curaei Family Equality Council and COLAGE using the Court's CM/ECF system, where it is available for printing and viewing.

s/ Philip E. Karmel
Attorney for Amicus Curaie
Family Equality Council and
COLAGE

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From: Victoria M. Rodríguez-Roldán, Senior Policy Counsel, National LGBTQ Task Force Action Fund

To: House Education and Labor Committee, Subcommittee on Civil Rights and Human Services

Re: HR 5 - the Equality Act

As the nation's oldest national organization dedicated to advocating for the rights of LGBTQ people, the National LGBTQ Task Force Action Fund has stood with our friends and colleagues in the social justice movement in the fight for access to nondiscrimination protections for all people since 1973.

In 1974, we worked with Congresswoman Bella Abzug to introduce the Equality Act of 1974, which would have amended the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex, marital status, or sexual orientation in public accommodations, education, federally funded programs, housing, and financial services.

Forty-five years later, we are still working to secure protection from discrimination for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. Today's Equality Act builds on Congresswoman Abzug's legacy to address a need for protections that is as acute for many LGBTQ people as it was forty-five years ago.

This testimony addresses the current state of nondiscrimination protections for LGBTQ people, and touches on why we must continue to work to ensure that all of our identities are protected by the law.

I. Employment discrimination

LGBTQ People and Title VII: current state of federal law

As of the writing of this document, 28 states and Puerto Rico do not have comprehensive non-discrimination protections for the LGBTQ community. This accounts for nearly 200 million Americans outside of the pale of non-discrimination laws that protect all of their identities all of the time, and underscores the need for Congress to act and pass federal protections nationwide.

At present, Title VII of the Civil Rights Act prohibits discrimination in employment on the basis of sex, race, color, national origin and religion. While it does not explicitly protect LGBTQ people by containing sexual orientation and gender identity, the Equal Employment Opportunity Commission (EEOC) has determined in both *Macy v. Holder*

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EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) and in *Baldwin v. Department of Transportation EEOC Appeal No. 0120133080 (July 15, 2015),* that gender identity and sexual orientation discrimination are illegal sex discrimination. This finding is binding on federal sector workplaces over which the EEOC has primary jurisdiction.

Subsequently, the EEOC also determined in *Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395, 2015 WL 1607756 (March 27, 2015)* that routine and intentional misgendering constituted a valid claim for sex discrimination under Title VII.

These decisions rely on the precedent established by *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989), in which the Supreme Court determined that sex discrimination included sex stereotyping, such as demanding that an employee adhere to specific stereotypes around femininity or masculinity, among other stereotypes.

However, the federal circuit courts have been split on the topic. While the 2nd Circuit Court of Appeals held in *Atitude Express, Inc. v. Zarda* that sexual orientation is covered by Title VII[1], the 11th Circuit Court of Appeals simultaneously has held in *Bostock v. Clayton County, Georgia* that sexual orientation is not protected by Title VII.[2]

As far as gender identity, the 6th Circuit, along with other courts have determined, such as in *EEOC v. Harris Funeral Homes* that transgender people are protected under Title VII's sex discrimination provisions.

However, to underscore how much we need explicit protections under the law, these three cases we use as examples today, have all been taken up by the Supreme Court to determine if Title VII indeed covers sex discrimination.[3] The Supreme Court could easily determine that Title VII does not cover sexual orientation and gender identity, and leave unprotected from discrimination all those LGBTQ people who live in states where it is legal to be fired or mistreated at work because of who they are.

Implications of Employment Discrimination on poverty, homelessness and criminalization of the LGBTQ community.

Anti-LGBTQ workplace discrimination is pervasive and carries serious long-term consequences for the community. In a 2015 survey, 27% of transgender respondents reported having been fired, denied a promotion, or not being hired for a job because of their being transgender.[4] More than three quarters (77%) of respondents said that they felt

[1] *Civil Rights Act Protects Gay Workers, Appeals Court Rules,* New York Times (Feb. 26, 2018) https://www.nytimes.com/2018/02/26/nyregion/gender-discrimination-civil-rights-lawsuit-zarda.html
[2] https://www.freedomforallamericans.org/gerald-lynn-bostock-v-clayton-county-georgia/
[3] https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/#more-285229
[4] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

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compelled to take preventive measures against discrimination such as hiding their gender identity in the workplace.[5] **To summarize, around 80% of respondents reported some form of negative employment experience because of their gender identity.[6]**

Pervasive employment discrimination has extensive consequences across the board for the LGBTQ community. Someone who cannot find gainful work, or is fired from their job is more likely to become homeless, or to have to resort to criminalized forms of making a living (such as drug selling or sex work), and by extension to have a criminal record that further prevents future work and housing opportunities. Employment discrimination is a pathway to poverty and homelessness for the LGBTQ community.

According to studies from the UCLA's Williams Institute, 25% of LGBTQ Americans had a household income under $24,000 a year, and 27% were food insecure, at rates higher than the general population.[7] This can be traced to a 9% rate of unemployment in the community.[8]

Among transgender people, 12% of respondents were living with incomes of less than $10,000 or less, a rate three times higher than the general population.[9] This couples with a rate of 29% of respondents living under the poverty line, compared to 12% of the general adult population.[10] This can also be traced to a 15% unemployment rate among transgender adults, more than three times higher than the rest of the population.[11]

The need for comprehensive non-discrimination protections

Because of these reasons, there is an urgent need for non-discrimination protections in the workplace at the federal level. As we discussed previously, in states that lack these protections, there are no explicit laws in place protecting the LGBTQ community from losing their jobs because of who they are. This is compounded as it can become an excuse for discrimination against LGBTQ people of color or from religious minorities, whose entire identities are not protected all of the time.

Likewise, as we demonstrated, the application of sex discrimination protections to LGBTQ people is not a sufficient means of protection because of the risks posed by current litigation challenging this interpretation of Title VII before the Supreme Court. There is a serious

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[5] Id.
[6] Id.
[7] https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density
[8] Id.
[9] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.
[10] Id.
[11] Id.

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risk that even these non-explicit protections will be overturned once the dust of litigation has settled.

II. Education

The state of federal law on non-discrimination protections in educational settings.

Title IX of the Educations Amendment Act of 1972 provides that no person shall be discriminated on the basis of sex in any educational program that receives federal funding. This includes the vast majority of schools and higher education institutions in the United States. It also gives the Department of Education's (ED) Office for Civil Rights (OCR) the authority to engage in enforcement actions around educational institutions that violate Title IX.

Due to the lack of explicit protections of the LGBTQ community in educational settings at the federal level, during the prior administration, ED issued guidance interpreting Title IX to cover transgender students and employees as part of its protections, including in settings like bathroom access and other accommodations.

Unfortunately, the current administration, the current Secretary of Education, in conjunction with the Attorney General rescinded this guidance.

Before the rescinding of this guidance, there was litigation challenging it in the form of the case *Gloucester School Board v. G.G.* (2017) featuring the then Virginia high schooler Gavin Grimm. The entire crux of the litigation was around the legality of the guidance under the Administrative Procedures Act (APA). Because the guidance had already been rescinded by the time it reached the Supreme Court, it was remanded to the 4th Circuit Court, which had initially upheld the guidance as legal.

Unfortunately, there has been no decision by the Supreme Court determining if Title IX's definition of sex is one that encompasses the LGBTQ community. While we believe it is, this could be overturned by the Roberts Court at any time.

Discrimination in educational settings is rampant. Nearly 77% of transgender survey respondents reported a negative experience such as being verbally harassed, prohibited from dressing according to their gender identity, or being physically or sexually assaulted.[12] 17% were harassed to such an extent that they left K-12 school because of it.[13]

[12] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.
[13] Id.

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This has real term consequences similar to what we've discussed before in this document. Being unable to complete your education can translate into inability or greater difficulty at obtaining gainful legal employment, or at finding housing, leading to the already discussed high rates of homelessness and unemployment in the community. Our youth deserve better from us and will do better if they have the protections guaranteed in the Equality Act – HR 5. We urge the committee and the US Congress to act swiftly by passing HR 5; known as the Equality Act.

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The Equality Act and Religion

What is the Equality Act?

The Equality Act would provide consistent and explicit non-discrimination protections for LGBTQ people across key areas of life, including **employment, housing, credit, education, public spaces and services, federally funded programs, and jury service.**

The Equality Act would amend existing civil rights law—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and several laws regarding employment with the federal government—to explicitly include sexual orientation and gender identity as protected characteristics. The legislation also amends the Civil Rights Act of 1964 to prohibit discrimination in public spaces and services and federally funded programs on the basis of sex, sexual orientation, and gender identity.

The Equality Act Maintains Existing Religious Exemptions

The Equality Act amends existing civil rights law, including the Civil Rights Act of 1964 and the Fair Housing Act, so the protections provided by the Equality Act would retain the exact same religious exemptions that already exist for every other protected characteristic. The Equality Act does not alter these exemptions. For the purposes of all civil rights statutes, religious organizations are never fully exempt from compliance with nondiscrimination protections. Rather, they are exempt from complying with certain aspects of the law. For example, religious organizations may limit employment to members of their faith, or refuse to perform ceremonies or host events that conflict with their religious beliefs if facility use is limited to their congregation.

Title VII

Title VII of the Civil Rights Act, which prohibits discrimination in employment, contains an exemption for religious entities with regard to expressing a religious preference in employment. Title VII's limited exemption allows religious corporations, associations, or societies to limit employment to members of their own faith, or co-religionists. This narrow exemption extends to schools, colleges, and universities that are supported, owned, controlled or managed by a religious organization.

While the Equality Act does not further define which religious entities may exercise the religious hiring exemption, decades of case law interpreting Title VII have made clear that this language includes a broad range of organizations. Federal courts have found many types of religious entities, well beyond houses of worship alone, may be considered exempt from compliance with these provisions, including:

- A tax-exempt, non-profit organization associated with the LDS Church
- A retirement home operated by Presbyterian Ministries
- A newspaper published by the First Church of Christ, Scientist
- Christian elementary schools and universities, and
- A non-profit medical center operated by the Seventh-Day Adventist Church.

In addition to Title VII's religious exemption, the Supreme Court has identified a "ministerial exception" under the First Amendment that religious organizations are entitled to use in their employment practices. The "ministerial exception" applies to employees serving in roles beyond the traditional ministerial role. Federal courts have found a variety of religious organization employees to not be covered under nondiscrimination laws including:

- a cemetery employee who organized religious services,
- a theology professor, and
- a music director.

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However, employees serving in "purely custodian or janitorial" roles have not been considered ministerial. Similarly, an organist who had no control over order of service and no contact with parishioners fell outside of the scope of the exception. This means that a religious organization cannot discriminate on the basis of religion against a custodian, janitor, or administrative staff unless they are utilizing the co-religionist exemption. In order to claim the co-religionist exemption a religious organization would have to always hire, or prefer to hire, members of their own faith. This would be unchanged by the Equality Act.

Neither Title VII nor the "ministerial exception," however, permits any secular employer, which is not a religious organization, to discriminate based on individuals' prejudices, morals, or religious-based beliefs. This is true of all civil rights laws, including those that protect Christians, Jews and other religious individuals from discrimination. A secular employer, organization, or company that markets its good and services to the general public cannot, and under the Equality Act could not, circumvent civil rights laws for a religious purpose. But nothing in the Equality Act, or in any civil rights law before it, affects the ability of a person to hold contrary beliefs, based on religion or otherwise. The Equality Act remains true to the purpose of civil rights laws historically—focusing on issues of fundamental fairness and ensuring that individuals are able to live and work in environments free of discrimination.

Fair Housing Act

Religious entities are exempt from the 1968 Fair Housing Act with regard to the sale, rental, or occupancy of a dwelling owned by the organization for non-commercial purposes. In addition, the law exempts single family homes sold or rented by the owner as well as rooms or units for rent where there are no more than four units and the owner lives on the premises. While the latter provision is not explicitly or only a religious exemption, it effectively allows people of faith to take into consideration the religious beliefs of individuals with whom they will be sharing close living quarters. The Equality Act would maintain these existing exemptions.

Public Spaces and Services

Businesses open to the public are expected to provide services on equal terms to all patrons. The Equality Act would ensure that businesses may not discriminate on the basis of race, religion, sex, sexual orientation, or gender identity just as they may not discriminate on the basis of disability. Current law provides an exemption for private clubs and other establishments that are not actually open to the general public. Churches and other places of worship providing spaces and services exclusively to their congregations, including meetings spaces or spaghetti dinners, would not be considered places of public accommodation. Operation of a day care, coffee shop, or food pantry that is exclusively open to congregants would also not be considered a place of public accommodation. Further, clergy operating in their ministerial capacity would never be compelled to perform a religious ceremony in conflict with their beliefs – including same-sex marriage.

The Equality Act and the Religious Freedom Restoration Act

In addition to maintaining existing religious exemptions in civil rights laws, the Equality Act includes a provision clarifying that the Religious Freedom Restoration Act (RFRA) cannot be misused to allow entities to violate federal civil rights laws.

When passed into law more than two decades ago, RFRA was designed to protect minority religious groups' constitutional right to freely exercise their religious beliefs. RFRA prohibits the federal government from "substantially burden[ing]" a person's religious exercise unless doing so is the least restrictive means of furthering a compelling governmental interest. RFRA was supported by a broad coalition of organizations including many in the civil rights community, who welcomed the law as an important shield from the tyranny of majority rule.

Despite this focused, straightforward intent, individuals and businesses have worked to distort RFRA into a blank check to discriminate or to impose their religious beliefs on others. In 2014, the U.S. Supreme Court issued a ruling in *Burwell v. Hobby Lobby Stores*, in which the Justices were asked to decide whether requiring a corporation to provide insurance coverage that includes contraception under the Affordable Care Act (ACA) is a "substantial burden" on the corporation

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with religious objections, and whether corporations are covered by RFRA. The Court ruled that closely held for-profit corporations are exempt from complying with the ACA contraception mandate based on the company's religious belief under RFRA.

In her dissent, Justice Ginsburg expressed her concern that *Hobby Lobby* could lead to RFRA being used to permit discrimination against minority groups. In August 2016, this concern materialized in a court decision by a federal judge in Michigan in the case *EEOC v. R.G. & G.R. Harris Funeral Homes*. In the decision, the judge ruled in favor of a Detroit-based funeral home who fired a transgender employee due to her gender identity, stating that RFRA could be used as a defense in a sex discrimination claim under Title VII—exempting the employer from Title VII's non-discrimination requirements. The Judge specifically relied upon *Hobby Lobby* in his decision. Although the 6th Circuit overturned the district court decision in favor of the transgender employee, the case has been appealed to the Supreme Court. Both *Harris Funeral Homes* and *Hobby Lobby* illustrate how individuals and businesses are attempting to use RFRA to refuse to comply with federal non-discrimination protections and other federal laws based on their religious beliefs.

While RFRA, if applied as originally intended, should not be able to be used as a defense to discriminate, the decision in *EEOC v. R.G. & G.R. Harris Funeral Homes* illustrates the importance of making this intention explicit. The Equality Act therefore includes a provision clarifying that RFRA cannot be misused to allow entities to violate federal civil rights laws. The federal government has a well-settled compelling interest in eradicating discrimination through robust enforcement of our non-discrimination laws. The Equality Act would prohibit the use of RFRA as a defense for, challenge to the application of, or enforcement of any of the civil rights laws amended by the Equality Act, restoring the intention of RFRA to protect religious freedom without allowing the infliction of harm on other people. It would not limit the use of RFRA in contexts outside of federal nondiscrimination laws.

The Equality Act Strengthens Protections for People of Faith

By ensuring RFRA cannot be misused as a defense for, challenge to the application of, or enforcement of any of the civil rights laws amended by the Equality Act, the Equality Act strengthens nondiscrimination protections for all protected communities, including people of faith.

Additionally, the Equality Act would update the public spaces and services covered in current law to include retail stores, services such as banks and legal services, and transportation services. These important updates would strengthen existing protections for everyone currently covered by these laws, including people of faith.

WHAT DOES THE EQUALITY ACT MEAN FOR WOMEN?

Protections from sex discrimination in public spaces and services

- In addition to the places of public accommodation like restaurants and hotels already included in the 1964 Civil Rights Act, the Equality Act updates the law to ensure that other important providers of goods and services like stores, accountants, hospitals, and salons do not discriminate on the basis of any protected characteristic. Transportation providers including trains, taxis, and airlines are also included within the Equality Act.
- In the absence of federal protections, women experience discrimination while accessing public accommodations across a wide range of contexts—including in restaurants, stores, theaters, and transportation. The Equality Act would ensure that breastfeeding women are not harassed or excluded from public spaces, for example, and would prohibit pharmacies from refusing to fill a woman's birth control prescription.
- Under current federal law, women can still be charged more for goods and services. For example, studies have shown that women are charged arbitrarily higher prices for everything from car repairs to dry cleaning. Under the Equality Act this would be illegal.
- Under current federal law, women who experience harassment on public transportation or at stores or restaurants do not have a remedy. Under the Equality Act, providers of these goods and services would have an obligation to prevent and address sexual harassment.

Explicit protection from discrimination on the basis of "actual or perceived" membership in a protected class

- The Equality Act makes explicit that individuals are protected from discrimination based on perceived membership in a protected class. An employer, landlord, or business owner's perception—rather than the individual's actual identity—can be just as relevant in assessing illegal discrimination.
- The explicit protection against discrimination based on "perceived" membership in a protected class will ensure, for example, that a woman is not discriminated against because someone misperceives her ethnicity or religion based on her married name, or mistakenly assumes she is a lesbian, or incorrectly identifies her as pregnant.
- Without this explicit protection, employers have sometimes successfully defended Title VII charges of discrimination because the individual was not actually a member of a protected class. This can leave individuals who experience discrimination with little recourse.

Protection from sex discrimination in federally funded programs and activities

- Federal funding touches the lives of people in every state and every county in America—from schools and community centers to homeless shelters and substance abuse rehabilitation facilities. Taxpayers fund critical social and community services including disaster relief, mortgage assistance, law enforcement, and health care.
- By adding sex to the list of protected characteristics under Title VI of the Civil Rights Act of 1964, the Equality Act would prohibit sex discrimination, including pregnancy discrimination and sexual harassment, in federally assisted programs or services. It would also make denying people access to federal benefits or excluding them from a federally assisted program on the basis of their sex or pregnancy unlawful.

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Letters

RESEARCH LETTER

Findings From the Behavioral Risk Factor Surveillance System on Health-Related Quality of Life Among US Transgender Adults, 2014-2017

The National Institutes of Health has prioritized research into disparities affecting the transgender population. An important domain in disparities research is health-related quality of life (HRQOL), which reflects the burden of chronic and acute physical and mental health conditions as well as unmet health care needs.[1] Historically, a lack of routine, standardized data collection has hindered explorations of transgender population health and HRQOL. In 2014, however, the Centers for Disease Control and Prevention (CDC) introduced an optional Sexual Orientation and Gender Identity module for the Behavioral Risk Factor Surveillance System (BRFSS). In 2014 through 2017, 36 states and territories representing almost 75% of the US population used the module at least once. This study compared HRQOL between transgender and cisgender adults in this rare probability sample of the transgender population.

Methods | The BRFSS is the largest continuously operating health survey in the world and is fielded annually by every state. The Sexual Orientation and Gender Identity module includes a question that asks, "Do you consider yourself to be transgender?" with the following primary answer options: (1) yes, transgender, male to female; (2) yes, transgender, female to male; (3) yes, transgender, gender nonconforming; and (4) no. Gender identity in the pooled 2014

Table 1. Characteristics of US Transgender and Cisgender Adults

Characteristic	No. (%)[a]		P Value[b]
	Transgender (n = 3075)	Cisgender (n = 719 567)	
Sociodemographic Characteristics			
Age, y			
18-24	314 (21.7)	36 636 (11.8)	<.001
25-34	349 (15.4)	65 595 (15.9)	
35-44	335 (14.2)	81 132 (16.1)	
45-54	508 (15.0)	118 056 (17.6)	
55-64	676 (16.5)	164 436 (17.5)	
≥65	893 (17.3)	253 712 (21.2)	
Race/ethnicity			
White, non-Hispanic	2066 (55.4)	557 261 (63.3)	<.001
Black, non-Hispanic	317 (16.1)	53 098 (11.5)	
Asian, Native Hawaiian, or Pacific Islander	144 (5.0)	24 258 (5.6)	
Other, non-Hispanic	188 (4.6)	27 745 (2.6)	
Hispanic	298 (18.9)	46 435 (16.9)	
Educational level			
Did not graduate high school	438 (20.6)	51 219 (14.0)	<.001
Graduated high school	1116 (32.9)	199 671 (28.0)	
Some college or technical school	833 (32.3)	195 514 (31.3)	
Graduated college or technical school	674 (14.2)	271 289 (26.7)	
Employment			
Employed[c]	1376 (50.3)	358 026 (56.6)	<.001
Unemployed	210 (8.4)	29 902 (5.6)	
Homemaker, student, or retired	1064 (29.2)	276 553 (30.9)	
Unable to work	397 (12.1)	50 995 (6.9)	
Annual income, $			
<15 000	471 (17.0)	59 455 (10.9)	<.001
15 000-24 999	606 (21.8)	99 481 (16.5)	
25 000-34 999	330 (13.3)	66 724 (10.5)	
35 000-49 999	355 (10.6)	88 833 (13.6)	
50 000-74 999	337 (12.6)	100 047 (14.9)	
≥75 000	535 (24.7)	202 610 (33.5)	

(continued)

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Table 1. Characteristics of US Transgender and Cisgender Adults (continued)

Characteristic	No. (%)[a]		P Value[b]
	Transgender (n = 3075)	Cisgender (n = 719 567)	
Home ownership			
Own	1797 (55.0)	521 886 (68.3)	
Rent	1054 (35.1)	162 721 (26.2)	<.001
Other arrangement	211 (9.9)	31 173 (5.5)	
Marital status			
Married or coupled	1425 (46.5)	398 808 (56.1)	
Divorced, separated, or widowed	885 (20.6)	205 943 (20.7)	<.001
Never married	747 (32.9)	111 145 (23.2)	
Child aged <18 y in household	740 (32.0)	185 860 (36.8)	.02
Veteran	446 (11.8)	93 017 (10.4)	.25
Sexual orientation			
Heterosexual	2241 (68.7)	681 569 (95.9)	
Lesbian or gay	203 (9.6)	10 137 (1.7)	<.001
Bisexual	365 (15.2)	10 808 (2.0)	
Other	130 (6.5)	2598 (0.4)	
Health Risk Factors			
Alcohol use			
None	1666 (58.4)	336 302 (47.6)	<.001
Light to moderate[d]	825 (24.8)	262 535 (34.6)	
≥1 Episode of binge drinking (≥4 drinks at 1 time) in past 30 d	475 (16.8)	101 469 (17.8)	
Cigarette use			
Never or past	2441 (80.9)	608 230 (83.7)	.04
Current	608 (19.2)	105 923 (16.3)	
No physical exercise in past 30 d	984 (35.0)	185 236 (25.6)	<.001
Health care access			
Insurance[e]	1818 (79.9)	411 946 (85.4)	.001
Regular provider	2502 (75.9)	616 442 (79.0)	.08
Checkup in past year	2270 (73.0)	540 135 (71.1)	.29
Financial barrier to care	448 (19.1)	69 396 (13.1)	<.001
Health conditions			
No chronic conditions[f]	1316 (54.6)	307 002 (52.4)	
1 Chronic condition	806 (23.1)	210 160 (26.5)	.11
≥2 Chronic conditions	953 (22.3)	202 303 (21.0)	
Ever diagnosed with depression	865 (29.4)	135 637 (18.1)	<.001

[a] Numbers are raw frequencies; percentages are calculated using design weights.

[b] *P* values reflect design-corrected *F* tests for differences between the weighted proportions of transgender and cisgender respondents.

[c] Employed indicates for wages or self-employed.

[d] Light to moderate alcohol use was defined as 1 to 3 drinks maximum at any time in the past 30 days.

[e] Insurance data are given only for individuals younger than 65 years.

[f] Chronic conditions were defined as having ever received a diagnosis of angina, arthritis, asthma, cancer, chronic obstructive pulmonary disease, coronary heart disease, diabetes, or chronic kidney disease or having a history of myocardial infarction or stroke.

through 2017 BRFSS data set was classified as transgender (response options 1-3; 3075 responses) and cisgender (response option 4; 719 484 responses). Respondents who answered "don't know/not sure" (response option 7; n = 3799) or refused to answer (n = 5800) were excluded. The need for study approval was waived by the Johns Hopkins School of Public Health Institutional Review Board. Informed consent was not applicable to this study because it is based on publicly available data from the CDC.

A core component of the BRFSS is a standard 4-item set of Healthy Days questions, which constitute the CDC HRQOL-4 measure. These items are (1) self-reported health and, of the past 30 days, the number of days that the respondent (2) felt physically unhealthy, (3) felt mentally unhealthy, and (4) limited usual activities. Following CDC recommendations,[2] results of the HRQOL-4 are reported in this analysis as (1) fair or poor health; (2) severe mental distress, defined as 14 or more mentally unhealthy days in the previous 30 days; (3) mean combined physically and mentally unhealthy days; and (4) mean activity-limited days.

Descriptive bivariate comparisons of transgender and cisgender adults were performed using design-corrected *F* tests. Logistic and zero-inflated negative binomial regression models were estimated for dichotomous and count outcomes, respectively. All models were adjusted for state and, following earlier literature,[3] sociodemographic factors and chronic health conditions. All analyses were performed in Stata, version 14 (StataCorp LP) and weighted to account for the BRFSS complex survey design. Variances were scaled to account for strata with single sampling units. Statistical significance was set at 2-sided $P = .05$.

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Table 2. Health-Related Quality of Life by Gender Identity[a]

Health-Related Quality of Life	Transgender (n = 3075)	Cisgender (n = 719 567)	Unadjusted OR (95% CI) or Unadjusted Mean Difference (SE)	P Value[b]	AOR (95% CI) or Adjusted Mean Difference (SE)	P Value[b]
Fair or poor health, No. (%)[c]	819 (24.5)	132 486 (18.2)	1.46 (1.21-1.75)	<.001	1.30 (1.03-1.62)	.02
Severe mental distress in last 30 d, No. (%)[c]	566 (20.3)	73 396 (11.6)	1.94 (1.61-2.34)	<.001	1.66 (1.36-2.01)	<.001
Total mentally and physically unhealthy days in past 30 d	9.40 (0.46)[d]	6.57 (0.03)[d]	2.83 (0.46)[e]	<.001	1.20 (0.04)[f]	<.001
Activity-limited days in past 30 d	4.53 (0.37)[d]	2.57 (0.02)[d]	1.96 (0.37)[e]	<.001	1.34 (0.09)[f]	<.001

Abbreviations: AOR, adjusted odds ratio; OR, odds ratio.

[a] Data are based on answers to the standard 4-item set of Healthy Days questions in the Behavioral Risk Factor Surveillance System. The questions are listed in the Methods section. All analyses were adjusted for number of multiple chronic conditions, race/ethnicity, age, marital status, educational level, and state.

[b] P values reflect weighted data analyses.

[c] Numbers are raw frequencies; percentages were calculated using design weights.

[d] Unadjusted mean (SE).

[e] Unadjusted mean difference (SE).

[f] Adjusted mean difference (SE) (weighted zero-inflated negative binomial regression coefficient).

Results | Transgender individuals comprised an estimated 0.55% (95% CI, 0.51%-0.59%) of the sample, which is equivalent to 1.27 million transgender adults in the general US population. Compared with cisgender adults, more transgender adults reported current cigarette use (19.2% vs 16.3%; $P = .04$) and physical inactivity (35.0% vs 25.6%; $P < .001$), and fewer reported having health insurance coverage (79.9% vs 85.4%; $P = .001$) (**Table 1**).

Transgender adults were more likely to report diminished HRQOL in the previous 30 days as measured by greater odds of fair or poor health (adjusted odds ratio [AOR], 1.30; 95% CI, 1.03-1.62; $P = .02$) or severe mental distress (AOR, 1.66; 95% CI, 1.36-2.01; $P < .001$) (**Table 2**). They also reported more days of combined poor physical and mental health (adjusted mean [SE] difference: 1.20 [0.04] days; $P < .001$) and of activity limitation (1.34 [0.09] days; $P < .001$).

Discussion | This analysis confirms the findings of previous studies that have identified severe health and HRQOL disparities affecting the transgender population.[4,5] These disparities require informed attention from clinicians and policy makers and further investigation by researchers. Until all states and territories field the BRFSS Sexual Orientation and Gender Module, however, the generalizability of the findings in this study remains limited. Given ongoing nationwide debates about public accommodations access, nondiscrimination protections, and other issues that influence transgender health,[6] all states and territories should field the module to facilitate research that draws on fully representative samples of the US transgender population. Furthermore, future analyses should investigate differences within the transgender population by factors such as gender, race/ethnicity, and sexual orientation.

Kellan E. Baker, MPH, MA

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Conflict of Interest Disclosures: None reported.

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Intersecting Injustice: A National Call To Action: https://www.govinfo.gov/content/pkg/CPRT-116HPRT38141/pdf/CPRT-116HPRT38141.pdf

UCLA School of Law Williams Institute: https://www.govinfo.gov/content/pkg/CPRT-116HPRT38142/pdf/CPRT-116HPRT38142.pdf

[Additional submission by Mr. Comer follows:]

April 23, 2019

The Honorable Suzanne Bonamici
Chair, Education and Labor Subcommittee
United States House of Representatives

2231 Rayburn House Office Building
Washington, D.C. 20515

The Honorable James Comer
Ranking Member, Education and Labor Subcommittee
United States House of Representatives
1037 Longworth House Office Building
Washington, D.C. 20515

Re: HR 5 "The Equality Act" and Adverse Implications for the American Market

Dear Chairwoman Bonamici and Ranking Member Comer:

I write on behalf of the C12 Group, which represents more than 1,500 businesses across the nation, and serves more than 2,300 CEO, business owners, and executive leaders who share a Christian faith. These businesses vary in size from $1M to more than $8B in annual revenues, collectively employing hundreds of thousands of Americans. Our brand statement is "Building Great Businesses for a Greater Purpose." As such, our members are dedicated to running their businesses consistent with their faith and ensuring their employees, customers, and clients are treated with dignity and respect.

We are deeply committed to the principle that all should be treated equally under the law, and that business owners should be free to operate their businesses consistent with their mission free from government punishment or coercion. After all, it's the freedom to run their businesses from government coercion and intervention that has allowed businesses to flourish for decades.

One example is a commercial cleaning company in Massachusetts. This company has been led by a dynamic CEO, who is herself a Brazilian immigrant, since 2009. Most companies in her industry face employee turnover in excess of 85%. For this CEO, her faith informs a commitment to treat every employee as a valuable and dignified person – not just "labor" – and as such, she has seen turnover decline to less than 15%! This is the Golden Rule from the Bible lived out with disciplined compassion, care and quality management that has yielded a flourishing, economically prosperous business. In fact, she's scaled this business from 10 employees to more than 150.

We are deeply concerned that H.R. 5, the "Equality Act," would negatively impact businesses, like this cleaning company in Massachusetts, if enacted. While the legislation raises multiple concerns, we are most troubled that this legislation, if enacted, would eliminate opportunities for women-run businesses, violate the privacy of female employees and customers, expose employers to significant financial and legal liability, and stifle economic freedom and a diverse marketplace.

First, H.R. 5 completely undermines the significant economic gains women have finally begun to achieve. Similar to women's sports, H.R. 5 would allow men (who self-identify as female) to apply for and take advantage of opportunities created exclusively for women.

C12 represents more than 340 women CEOs, business owners and executives including many who have achieved woman-owned business status. For years the Small Business Association (SBA) has certified Women Owned Small Businesses (WOSB) and Economically Disadvantaged Woman Owned Small Businesses (EDWOSB), awarding more than 267,000 contracts in 2014 alone. If H.R. 5 is enacted, these women and countless others would no longer enjoy a fair playing field to participate in such programs that empowers female entrepreneurs to compete in the marketplace and launch new businesses. It would also allow biologic men to take advantage of defense government contractor opportunities designed exclusively for women. This is a major setback for women in our country.

For example, we represent numerous women who run 8a, ANC, and other special designation government contract and defense contract businesses across the nation. This law would guarantee that many more women like would no longer be able to fairly or equitably take advantage of these opportunities exclusively created for women when men can simply profess a female identity and apply. How will such women be protected from the unintended harm caused by this law?

Second, this bill would force business owners to violate employees' and customers' privacy rights and dignity interests. When gender identity is added to non-discrimination laws, employers are prevented from maintaining sex-specific facilities, like restrooms, locker rooms, and changing areas. Instead, employers would be forced to allow men who identify as female share the same restroom or locker room with their female employees and customers, including young girls. As a result, female employees and customers would be forced to share restrooms, changing areas, and other similar facilities where they have an expectation of privacy with men who assert a female identity. And the employer would fear EEOC complaints and litigation if attempting to ensure all of employees have their privacy is protected, which leads to our third point.

Third, H.R. 5 would create significant legal and devastating financial liability for employers which greatly increases their cost of doing business. Employers have a duty to ensure that employees and customers are not harmed while on their premises. If business owners are no longer allowed to maintain female-only spaces for women to shower and undress in, they become vulnerable to costly lawsuits. But laws like this proposal puts employers between a rock and a hard place struggling to protect their employees and customers' privacy and avoid lawsuits claiming the business violated a woman's privacy, while simultaneously avoiding complaints or lawsuits alleging violation of this law.

Furthermore, businesses could face costly and unreasonable litigation because this law would implement standards that are impossible for employers and business owners to understand—let alone comply with - by placing into federal law the ambiguous legal concept of "gender identity." Organizations like Facebook recognize at least 58 different genders, which include designations like "Cis Man," "Cis Male," "Cisgender Male," "Bigender," "Agender," and "Androgynous." By definition, "gender identity" is also fluid and proponents state that one's gender identity can vary

for some people depending upon time and context. The misnamed "Equality Act" would create inequality for business owners by unfairly requiring them to discern, understand, and incorporate all of the many genders with which their employees and customers might identify. Yet few people know what the numerous gender-identity terms mean, and even fewer know how to identify or differentiate between them. Requiring employers and business owners to consider these amorphous, subjective, and fluid concepts, and subjecting them to liability for missteps, deleteriously impacts America's job and revenue creators.

Lastly, the Equality Act would harm economic liberty, growth, and prosperity, particularly of small businesses. While proponents of the Equality Act claim that it will "foster economic growth and prosperity," and result in a greater "diversity of talented individuals," the facts speak to the contrary. Numerous studies of the states that provide the most business-friendly environments suggest that states without laws like the "Equality Act" enjoy greater economic growth and are more attractive to new enterprises, while many states that have similar laws have weaker economies and lower job growth. For example, in a 2018 report from *Chief Executive* on the "Best States for Business," nine of the top ten states do not have laws like H.R. 5. To the contrary, the top ten states ranked worst for business by *Chief Executive* do have laws like H.R. 5. At a minimum, this data indicates that these types of laws are not essential to economic growth.

It also underscores a broader principle that is relevant here. Economic liberty withers under the heavy hand of government. Businesses and the economy flourish most when the government protects their freedom and does not micromanage how these businesses operate.

Whether a business wants to give their Jewish employees Saturday off, or close their business on Sunday, or whether they want to reference religious texts at work or have political conversations, they should be free to do so. If we fail to unite together, regardless of our beliefs, ideologies, or passions, the government could silence any of us at any time. Majority and minority beliefs come and go with the passing of time. If we want freedom for ourselves, we must advocate for freedom for those with whom we disagree. And the government's role is to be a neural arbiter—not to stifle, silence, or ostracize those with whom it currently disagrees. Tolerance is a two way street and disagreement of ideals or convictions does not equate to discrimination.

Diversity in the marketplace is good for the economy and it is good for all Americans. Choices and options for the rich, pluralistic nation we are benefits everyone. Congress should not pass laws that stigmatize and impose one set of values on everyone. Our laws should instead respect the freedom of all Americans—particularly our businesses—to peacefully work according to their convictions or beliefs.

In addition, H.R. 5 would impose a crushing and ambiguous business burden that harms economic effectiveness particularly of small and medium businesses. It would also likely require employers, many of whom are already struggling with the rising cost of healthcare, to cover pharmaceutical and surgical medical procedures for seemingly elective procurement that are quite costly and chronic in treatment. It seems ludicrous that while there is no requirement that employers cover diabetic testing supplies for diabetic employees and other medically necessary procedures, they could be required to cover procedures not medically necessary is deeply inconsistent and

burdensome. Elective surgical procedures and the costly pharmaceutical therapies necessitated by such interventions should not become an employer mandate at the expense of benefit resources for other employees or competitive capacities as a business in the global marketplace.

Furthermore,. HR 5 would create a pronounced peril of businesses being excluded from public contracts by procurement agencies if the agency determines the business owner's religious affiliation to be in violation of the law. We have seen this recently in how the cities of San Antonio, Las Vegas, and Buffalo excluded food vendors due to religious affiliation (not actual conduct or refusal to comply with ordinances). This law would only allow such government discrimination toward small businesses to escalate dramatically. It has been clearly demonstrated that municipal and state ordinances resembling H.R. 5 are often weaponized for discrimination against businesses owned by people of faith (whether Jewish, Muslim, Christian, etc). There are more than 500,000 privately owned businesses where the owner has a deeply held religious conviction in America, and each of these are threatened by H.R. 5, as well as all employers threatened with ambiguous and onerous compliance burdens that will stifle the economic and human flourishing of our nation.

In conclusion, passage of H.R. 5 would mark a step backwards from our nation's commitment to ensuring that freedom flourishes and that the beliefs, viewpoints, and convictions of all be respected. We can and must do better than silencing and stifling different ideas but must remain committed to the diversity and pluralism that makes our country unique and contributes to America having the best economy in the world.

Sincerely,

Mike Sharrow
President & CEO

[Additional submissions by Mr. Hedren follow:]

April 5, 2019

The Honorable Suzanne Bonamici
U.S. House of Representatives
Washington, DC 20515

The Honorable James Comer
U.S. House of Representatives
Washington, DC 20515

Dear Chair Bonamici and Ranking Member Comer:

Salesforce is pleased to submit a letter for the record in support of the Equality Act. This legislation is a top priority for Salesforce and our employees.

At Salesforce, Equality is a core value. Our company is committed to making our workplaces and communities free from discrimination **and where everyone feels seen, heard, valued, and empowered to succeed**. As we celebrate 20 years of business, we have clear evidence that social values create business value. **Equality is not only the right thing to do – advancing human dignity and opening opportunities for all – it is also the smart thing.** It drives employee pride, retention, and recruitment **while ensuring our products reflect and address the needs of the diverse communities we serve. It becomes especially important as we think about the ever-increasing needs for talent** – we want to attract and retain the best people and empower them to do the best work of their careers. Prospective employees want to know there is a welcoming community where we have corporate offices, where they and their families can feel safe and secure.

This is why Salesforce advocates strongly for comprehensive equality protections in the communities where we live and work. As a company, we have taken stances against discriminatory legislation that could impact our employees in Georgia, Indiana, North Carolina, and Texas. The existence of different laws in different states means that our employees can be at risk of different levels of protection in their communities because of where they live and who they are.

We support a consistent federal standard to protect Americans on the basis of sexual orientation and gender identity, both in their workplaces and also their communities. Salesforce is proud to join the business community in this effort. We encourage the U.S. Congress to pass the Equality Act.

Sincerely,

Tony Prophet
Chief Equality Officer

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Jacqueline Williams-Roll
Chief Human Resources Officer
General Mills, Inc.
Statement for the Record
Subcommittee on Civil Rights and Human Services
The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination
April 9, 2019

At General Mills, our purpose is to serve the world by making food people love. That means all people, regardless of their sexual orientation or gender identity. On average, U.S. consumers are placing one of our products in their grocery baskets every ten seconds. So it just makes good business sense to value all of our consumers. That is why General Mills strongly supports the Equality Act.

As one of the world's largest food companies our portfolio includes iconic brands such as Cheerios, Nature Valley, Annie's, Progresso, Yoplait, and Betty Crocker, to name a few. We have 38,000 employees worldwide, with about half working in the United States. We are headquartered in Golden Valley, Minnesota – where we trace our roots back over 150 years – and last fiscal year had annual sales of $15.6 billion.

Diversity and inclusion is not just the right thing to do, it's essential for the growth of our company. We want to recruit and retain the best talent. General Mills maintains an inclusive culture where we encourage employees to bring their whole selves to work. Walking the halls at General Mills you can see diversity prominently represented by *all* kinds of family pictures proudly displayed in peoples' offices. By enabling employees to be their true and authentic selves at work, they can focus their talents on bringing unique perspectives and new ideas to drive innovation in order to help the company grow.

Innovation is key to the success of the food industry. Consumer tastes are rapidly evolving, the way we market our products is becoming more dynamic, and manufacturing processes require skilled individuals to operate high-tech machines. In order to be successful for another 150 years and beyond, we need diverse thinkers with different backgrounds to make us a stronger company.

Our work environment is built on the foundation of our Equal Employment Opportunity policy, which prohibits discrimination based on age, race, color, religion, sex, national origin, marital status, disability, citizenship, sexual orientation, gender identity, military service, or other characteristic protected by law. Sexual orientation has been a part of our policy since the early 1990s and we added gender identity in 2004. In 1999, we introduced Domestic Partner benefits, another demonstration that we are committed to providing equality to our LGBTQ employees in all of our employment benefits. And in

2011 we provided equal health coverage for transgender individuals without exclusion for medically necessary care.

We've taken other steps to support diversity. In the mid-1990s we created our LGBTQ network, Betty's Family, named after one of our most familiar icons – Betty Crocker. The network's mission is to create a safe, open and productive environment for General Mills' LGBTQ employees and allies. We recently launched the Betty's Family Supply Chain network to help connect employees in our over 20 manufacturing facilities in 13 states. Our employees comment frequently on the powerful impact this network has on our ability to recruit and retain top talent. We know these networks, in addition to our many other affinity groups, is a tangible demonstration of our commitment to attracting, developing and advancing every unique employee.

General Mills is proud that efforts like the above have helped make us an employer of choice, and we are consistently recognized as such. For many years we have achieved a 100 percent score on the Human Rights Campaign's Corporate Equality Index, which recognizes the policies and practices we have that are supportive of our LGBTQ employees. We've also been recognized as one of the Best Companies for Inclusion by the National LGBT Chamber of Commerce, a top 50 Best Large Companies for Women and Diversity by Comparably and overall 50 Best Large Companies to Work For by Comparably. Recognitions like these contribute to our ability to recruit and retain talent.

In addition to promoting diversity because of its benefits to our business, we support the Equality Act because we believe it is a fundamental right of all American citizens to be treated fairly, with respect and dignity when it comes to employment; housing; credit; education; public spaces and services; federally funded programs and jury service, regardless of their sexual orientation or gender identity.

General Mills invests in the personal and professional development of our employees. With numerous brands and manufacturing facilities to learn about, employee's professional development often comes with relocating to different states. The patchwork of legal protections among the states leaves some of our employees vulnerable in their communities. One's sexual orientation or gender identity has nothing to do with their ability to be successful in their job at one of our plants and shouldn't be a barrier to professional growth. But some employees may be hesitant to take a new job in a state without protections. While we can support our employees within our walls, we want them to have happy and fulfilling lives outside of work. This legislation would protect all people, no matter what state they live in, from discrimination regardless of their sexual orientation or gender identity.

In conclusion, General Mills believes this legislation is good for our employees and thus for our business. The Equality Act will help us attract and retain top talent, create and support the diverse workforce necessary to spark creativity and innovation, and allow our employees to grow, progress and develop, wherever they may reside.

General Mills
Making Food People Love

Thank you for the opportunity to submit our comments for the committee record. Should you have any questions please refer to Mary Catherine Toker, Vice President of Government Relations, mary.toker@genmills.com.

[Questions submitted for the record and their responses follow:]

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April 26, 2019

Ms. Sarah Gallagher Warbelow, Esq.
Legal Director
Human Rights Campaign
1640 Rhode Island Avenue, NW
Washington, D.C. 20036

Dear Ms. Warbelow:

I would like to thank you for testifying at the April 9, 2019, Subcommittee on Civil Rights and Human Services hearing on "*The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination.*"

Please find the enclosed additional questions. Please provide a written response no later than close of business on Friday, May 3, 2019, for inclusion in the official hearing record. Your responses should be sent to Carolyn Ronis of the Committee staff. She can be contacted at the main number 202-225-3725 should you have any questions.

We appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Civil Rights and Human Services Subcommittee Hearing
"The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination."
Tuesday, April 9, 2019

CHAIRMAN ROBERT C. "BOBBY" SCOTT (VA)

1. Ms. Warbelow, Mr. Lorber testified that H.R. 5 may require or permit preferential treatment to individuals based upon sexual orientation or gender identity. How do you respond to that claim?

2. Ms. Warbelow, what are bona fide occupational requirements under title VII for religion that would permit discrimination?

3. Ms. Warbelow, can you please provide more detail about the intent behind RFRA when it was signed into law? Has RFRA been used in a manner beyond the intent of the law? If so, please provide examples and a brief narrative

4. Ms. Warbelow, Mr. Lorber testified that "Title IX has long been the source of precedential changes," and he raised a concern that the Equality Act amends Title VI without making any corresponding amendments to Title IX. Can you address how Title IX precedent will be applied to the Equality Act amendments to Title VI?

5. Ms. Warbelow, Title IX categorically excluded certain sex-based conduct from its general prohibition against sex discrimination, while Title VI contains no exceptions to its antidiscrimination provision. There are questions about whether the exemptions enumerated under Title IX will be applied under Title VI. Can you please address how the application for each of the Title IX exemptions listed below will be affected by the Equality Act?

(1) Institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(3) Educational institutions training individuals for military services or merchant marine;

(4) Public educational institutions with traditional and continuing admissions policy of admitting only students of one sex;

(5) Social fraternities or sororities when active membership consists primarily of students in attendance at an institution of higher education, or voluntary youth service organizations such as the YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls, membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(6) Boy or Girl conferences

(7) Father-son or mother-daughter activities same sex activities at educational institutions as long as reasonably comparable activities shall be provided for students of both sexes; and

(8) Institution of higher education scholarship awards in "beauty" pageants in which participation is limited to individuals of one sex only, so long as such pageant complies with other nondiscrimination provisions of Federal law.

Civil Rights and Human Services Subcommittee Hearing
"The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination."
Tuesday, April 9, 2019
CHAIRMAN ROBERT C. "BOBBY" SCOTT (VA)

Responses of Sarah Warbelow, Legal Director for the Human Rights Campaign

1.Ms. Warbelow, Mr. Lorber testified that H.R. 5 may require or permit preferential treatment to individuals based upon sexual orientation or gender identity. How do you respond to that claim?

The Equality Act would not require preferential treatment in employment for sexual orientation or gender identity, just as existing law does not require preferential treatment for affirmative programs for religion or national origin. Where preferential treatment in employment is permitted or required for sex, such as with respect to women owned businesses, then transgender people must be treated consistent with their gender identity. Transgender women are women.

2. Ms. Warbelow, what are bona fide occupational requirements under title VII for religion that would permit discrimination?

Under current law, bona fide occupational qualifications (or BFOQs) are very rarely recognized as permissible by courts. However, religious employers have strong Constitutional and other statutory protections. Title VII provides that religious organizations and institutions may prefer or limit hiring to co-religionists, while the First Amendment protects a religious organization's ability to hire for ministerial positions without regard to civil rights statutes. Ministerial positions have been interpreted by the courts to include variety of employees including some cemetery workers, music directors, and teachers with a responsibilities that include religious instruction even if it is only a portion of their work. In addition, Title VII's religious accommodation provisions require covered employers to accommodate their employees' religious beliefs, where those beliefs can be accommodated without undue burden on the employer. The Equality Act does not change the existing exemptions in Title VII.

3. Ms. Warbelow, can you please provide more detail about the intent behind RFRA when it was signed into law? Has RFRA been used in a manner beyond the intent of the law? If so, please provide examples and a brief narrative.

Too often, legislation and governmental policies are adopted without sufficient consideration for their potential impact on religious minorities. This is largely due to the fact that Congress and senior agency officials are rarely representative of the religious diversity within the United States. The Religious Freedom Restoration Act (RFRA) came to fruition in large part due to concern regarding the lack of protection for the rights of religious minorities. Contemporaneous with the passage of RFRA, the Senate issued an accompanying report highlighting that "[s]tate and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit

fundamental constitutional right." In recent years, federal courts and the federal government have misapplied RFRA by allowing the law to be used as a justification for harming others. A few key examples include:

- *In 2014, the Supreme Court determined in Burwell v. Hobby Lobby that under RFRA a closely held for-profit corporations had right to deny women employees insurance coverage for birth control.*
- *In 2016, a federal district court ruled in EEOC v. R.G. & G.R. Harris Funeral Homes that an employer had defense under RFRA for violating Title VII of the Civil Rights Act of 1964 by terminating a transgender employee.*
- *In 2019, the Department of Health and Human Services used RFRA as a justification to grant the State of South Carolina a waiver to permit a federally funded child welfare agency to discriminate against prospective parents and temporary caregivers, including Jewish and Catholic families, based upon religious belief.*

4. Ms. Warbelow, Mr. Lorber testified that "Title IX has long been the source of precedential changes," and he raised a concern that the Equality Act amends Title VI without making any corresponding amendments to Title IX. Can you address how Title IX precedent will be applied to the Equality Act amendments to Title VI?

Based upon Mr. Lorber's testimony it is unclear what "precedential changes" he was referencing with respect to Title IX. However, Title IX has played a critical role in advancing the rights of women and girls, including lesbian, bisexual, and transgender women and girls. The Equality Act would build upon these advancements by providing additional coverage for all women and girls in critical areas of life such as the vast array of federally funded programs. Please see the answer to question five regarding the interaction of the Equality Act and Title IX.

5. Ms. Warbelow, Title IX categorically excluded certain sex-based conduct from its general prohibition against sex discrimination, while Title VI contains no exceptions to its antidiscrimination provision. There are questions about whether the exemptions enumerated under Title IX will be applied under Title VI. Can you please address how the application for each of the Title IX exemptions listed below will be affected by the Equality Act?

(1) Institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
(2) Educational institutions controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;
(3) Educational institutions training individuals for military services or merchant marine;
(4) Public educational institutions with traditional and continuing admissions policy of admitting only students of one sex;
(5) Social fraternities or sororities when active membership consists primarily of students in attendance at an institution of higher education, or voluntary youth service organizations such as the YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls, membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(6) Boy or Girl conferences
(7) Father-son or mother-daughter activities same sex activities at educational institutions as long as reasonably comparable activities shall be provided for students of both sexes; and
(8) Institution of higher education scholarship awards in "beauty" pageants in which participation is limited to individuals of one sex only, so long as such pageant complies with other nondiscrimination provisions of Federal law.

Under the Equality Act, Title VI and Title IX would provide overlapping protections against sex discrimination that vary somewhat in their coverage, roughly analogous to the overlapping but distinct protections against discrimination provided today by Title IX and the Equal Protection Clause. Thus, these exceptions would not be incorporated directly into the Equality Act. However, reference to sex discrimination protections under the Constitution and other civil rights laws makes clear that the Equality Act's addition of a sex discrimination prohibition to Title VI would not flatly prohibit gender-specific programming and facilities. For example, under Title IX, regulations have long made clear that gender-specific programming is permissible to overcome the "effects of conditions which resulted in limited participation therein by persons of a particular sex." This provision does not rely on any statutory exemption from Title IX's sex discrimination prohibition. Given the close relationship between Title IX and Title VI, Title VI's prohibition of sex discrimination would incorporate this principle, permitting gender-specific federally funded programs and activities in such circumstances. The Equality Act is also explicit that the fact that it does not amend Title IX does not support any negative inference that Title IX's prohibition of sex discrimination does not include sexual orientation or gender identity discrimination, and that nothing in the Equality Act limits Title IX's protection against sex discrimination.

[Whereupon, at 4:25 p.m., the subcommittees was adjourned.]

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