

QUESTIONS AND ANSWERS ABOUT THE EQUALITY ACT OF 2019
Sexual Orientation, Gender Identity, and Religious Liberty Issues

1. What is the Equality Act?

The Equality Act is a comprehensive bill in Congress that would add “sexual orientation” and “gender identity” to a range of federal nondiscrimination laws. It has been introduced in multiple prior terms and, in the 116th Congress, was introduced as H.R. 5 by Rep. Cicilline (D-RI) and as S. 788 by Sen. Jeff Merkley (D-OR).

2. What does the Equality Act do?

The Equality Act would add the categories of “sexual orientation” and “gender identity” to the definition of “sex” (§ 9), and add “sex” where it is not already present, in the Civil Rights Act of 1964 (§§ 3-8); government employment statutes (§ 7); the Fair Housing Act (§ 10); the Equal Credit Opportunity Act (§ 11); and jury selection rules (§ 12).

The Civil Rights Act requires nondiscrimination on the basis of select classes of persons in public accommodations (Title II), employment (VII), federal funding and recipients’ use thereof (VI), public facilities (III), and public education (IV). In addition to effectively adding new classes to these titles, the Equality Act expands the definition of “public accommodations” from restaurants, hotels, and theaters to nearly every consumer service or place of commerce, gathering, or charity, notably including health care (§ 3). It also expressly makes available restrooms, locker rooms, and dressing rooms to persons according to their “gender identity” rather than natural sex (§ 9).

In addition to “sexual orientation or gender identity,” the Equality Act adds elements to the definition of “sex” to include “sex stereotypes” and “pregnancy, childbirth, or a related medical condition.” It also defines “sexual orientation” (“homosexuality, heterosexuality, or bisexuality”) and “gender identity” (“the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth”) themselves.

The Equality Act explicitly exempts itself from the requirements and protections of the Religious Freedom Restoration Act of 1993 (§ 9). This would be unprecedented, as no federal law has ever done so before, and it demonstrates the Equality Act’s radical denial of tolerance to people of faith who do not agree to the government’s view of sexuality as established by the Act.

3. Who are the people that the Equality Act is designed to help?

Supporters assert that the Equality Act is needed to protect people who identify as “LGBT” from discrimination in a range of public and professional settings, including employment and the provision of consumer, government, or charitable services. They claim that this is necessary to prevent economic, legal, and emotionally-experienced “dignitary” harms.

Catholics oppose unjust discrimination or harassment that baselessly deprive any person of basic needs, goods, or dignity. Each and every human person is made in the image and likeness of God and, as such, bears inviolable dignity. The Church teaches that persons with same-sex attractions

in particular must be “accepted with respect, compassion, and sensitivity...”¹ and that society is to avoid “unjust discrimination in their regard.”² Similar principles can also apply to those experiencing gender dysphoria or feelings of gender incongruence. This means that Catholics support appropriate nondiscrimination policies, for example, those that support the right of every individual to decent employment regardless of their sexual inclinations.³

However, “LGBT” people are not subject to systemic discrimination on the scale that has historically warranted the creation of a new federal policy, such as was necessary when the Civil Rights Act was passed. Widespread patterns of segregation or denial of basic goods, services, or opportunities to people who identify as “LGBT” are not evident. On the contrary, “LGBT” people today are often held in high regard in the market, as well as the academy, local governments, and media.⁴ Some studies suggest that people who identify as homosexual earn higher incomes than the national average.⁵

The Equality Act’s sponsor in the U.S. House has said that the bill “is one where the American people are way ahead of us overwhelmingly. I think part of our challenge is to catch up to where the American people are,” and that “this is about kind of Congress basically catching up to where the rest of the country is.”⁶ In other words, the country does not need a federal law about this.

4. Whom would the Equality Act hurt? Are there examples?

The Equality Act would legally and socially injure many Americans. These effects have been demonstrated in states and localities where similar laws already exist.

a. First and foremost, the Equality Act hurts women and girls. The Equality Act would fortify regressive, sexist stereotypes by enshrining the notion that subjective feelings and preferences (such as hobbies, attire, emotional patterns, or style of interaction) are what define a woman or a man.

By redefining “sex” without physical meaning, the Equality Act would also remove legal recognition of women and girls, such as in Title IX, and risk eviscerating their hard-won consideration in areas including student scholarships and athletics.⁷ College sports positions, and the scholarship opportunities attached to them, could be taken by men who self-identify as

¹ CATECHISM OF THE CATHOLIC CHURCH (2d ed. 1997), ¶ 2358.

² *Id.*, ¶ 2357.

³ Benedict XVI, Encyclical *Caritas in veritate*, ¶ 63 (2009); *see also* Congregation for the Doctrine of the Faith, “Some Considerations Concerning the Response to Legislative Proposals on the Non-discrimination of Homosexual Persons,” ¶ 12 (1992).

⁴ *See, e.g.*, Brittney McNamara, *Pride Celebrations in 25 Major US Cities*, Teen Vogue, 2 June 2017; “2018 International Gay Pride Calendar,” International Gay and Lesbian Travel Ass’n, <https://www.igta.org/gay-pride-event-calendar/>; Karen Loew, *When Pride Comes to Town*, City Lab, The Atlantic Monthly Group, 22 June 2018; Kastalia Medrano, *6 Cities Throwing Their First-Ever Pride Celebrations in 2018*, Thrillist, 31 May 2018.

⁴ Erica O’Malley, “Businesses leading the way to LGBT inclusion,” Grant Thornton LLP, 4 June 2018, <https://www.granthornton.com/library/articles/advisory/2018/businesses-leading-LGBT-inclusion.aspx>.

⁵ Christopher Carpenter and Samuel Eppink, *Does it Get Better? Recent Estimates of Sexual Orientation and Earnings in the United States*, Southern Economic Journal, Vol. 84 Iss. 2, 2017, pp. 426-441.

⁶ Chris Johnson, “Cicilline touts Equality Act as House’s new senior gay member,” Washington Blade, 3 Jan. 2019.

⁷ *See, e.g.*, Pat Eaton-Robb “Connecticut runners part of debate over transgender athletes,” Washington Post, 24 Feb. 2019.

women under the Equality Act's terms. Many sex-specific environments that have cultivated support, growth, and success among women in other arenas, such as in business and entrepreneurship, could be ended.

Some proponents of the Equality Act argue that courts can sort through what claims to a gender identity are valid or not, and that unfairness would only occur in isolated incidents not warranting legislative consideration. There are no grounds for this assertion. When opportunities for taking unfair advantage of a system exist, there will unfortunately be people who do so. Laws should function to curtail such behavior, not ignore it. Further, a consistent approach of dismissing individual instances and focusing on systemic problems supports the contention that the Equality Act is unnecessary (*see* #3). As to courts, they have little historical guidance on the claims that would arise, and they will largely have to rely on the terms of the Act, which do not explain how to determine a person's "gender identity" except by their unilateral assertion.

The legislation also diminishes safety in intimate spaces with its restroom and locker room mandate to provide access based on "gender identity." While most people who identify as "transgender" do not seek to harm others (in fact, many seek to avoid harm themselves), these laws open the doors of very personal facilities to others who would do harm.

Even without direct, malicious harm, however, sharing of intimate facilities between the sexes offends privacy and betrays modesty. People have a responsibility, and therefore a right, to practice modesty, to refuse "to unveil what should remain hidden."⁸ This not only involves the right to not be seen by the opposite sex when in a state of undress or tending to bodily functions, but to not be forced to see others of the opposite sex when they are in such a state.

Vulnerable, often traumatized, women in homeless shelters or other charitable transitional housing are put at great risk of emotional distress or physical harm by the Equality Act's forcing such facilities to house males with them – including in shared bedrooms and bathrooms. Such policies have already led to a lawsuit after women were being harassed in a California shelter,⁹ a shelter in Anchorage being investigated by the city for refusing admittance to (but buying a cab to a hospital for) a drunken male,¹⁰ and to a sexual assault survivor being forced out of rehab in Ontario because her trauma was triggered by having a male roommate.¹¹ Faith-based shelters that refuse to endanger women in this way may be forced by the government to shut down if the Equality Act becomes law. In addition, incarcerated women are also put at risk by the Equality Act; in the UK, a convicted male rapist claiming a "gender identity" as a "woman," sexually assaulted women in prison multiple times.¹²

⁸ See CATECHISM OF THE CATHOLIC CHURCH, ¶¶ 2521-2523.

⁹ Rory Appleton, "Women accuse Poverello House of allowing transgender resident to sexually harass them," The Fresno Bee, 12 Oct. 2018, <https://www.fresnobee.com/news/local/article219560720.html>.

¹⁰ Lauren Maxwell, "Judge hears motions in Anchorage shelter's transgender case," KTVA, 11 Jan. 2019, <https://www.ktva.com/story/39777310/judge-hears-motions-in-anchorage-shelters-transgender-case>.

¹¹ Joseph Brean, "Forced to share a room with transgender woman in Toronto shelter, sex abuse victim files human rights complaint," National Post, 2 Aug. 2018, <https://nationalpost.com/news/canada/kristi-hanna-human-rights-complaint-transgender-woman-toronto-shelter>.

¹² Nazia Parveen, "Transgender prisoner who sexually assaulted inmates jailed for life," The Guardian, 11 Oct. 2018, <https://www.theguardian.com/uk-news/2018/oct/11/transgender-prisoner-who-sexually-assaulted-inmates-jailed-for-life>.

b. “Transgender”-identifying people themselves may be hurt by the Equality Act. Its nondiscrimination mandate for health care as a “public accommodation” effectively promotes “gender affirmative” hormone therapy and surgical procedures, with irreparable consequences. To be sure, health care providers should welcome with compassion, and provide healing care to, every individual in need. The Equality Act, however, would depart from ensuring service to people and would federally prescribe specific procedures or treatments. “Gender reassignment surgery” has not been substantially associated with improved long-term health outcomes, which the Centers for Medicare and Medicaid Services under the Obama Administration effectively described in 2016 in its declining to issue a nationwide coverage requirement.¹³ Tragically, “sex reassignment” surgeries appear to do little to ameliorate the already-high long-term rate of suicide among those identifying as “transgender.”¹⁴

c. Health care providers, both individual professionals and institutions as well as insurers, would lose the ability to exercise their best medical judgment under the “public accommodation” nondiscrimination mandate and be forced to perform or cover “gender affirming” procedures, even if they find them to be detrimental to patients’ health, and even in the case of minors. Catholic health care providers compassionately serve everyone who comes to them, regardless of characteristics or background. Nondiscrimination thus centered on *who* is served, and oriented toward every patient as an individual, is a positive goal, but when it mandates *what* procedures are performed for what conditions, that is another matter. The medical community, rather than being subjected to legislative mandates with uncertain long-term outcomes, should be free to develop ways of treating gender dysphoria that consider the health and integrity of the whole person.

d. Parents could be at risk of losing custody of their children for declining “gender affirming” medical procedures that have irreparable consequences. The Equality Act’s health care nondiscrimination provision takes for granted that puberty-blocking, hormonal treatment, and surgical procedures are both necessary and standard, even though this has not been proven and in many cases is still an off-label use of medication. Under the Equality Act, refusing this type of treatment could be used by states to take children away from their parents, as has already occurred in certain places such as Cincinnati in 2018.¹⁵ In addition, the Equality Act’s provision mandating nondiscrimination in programs and services receiving federal funding may affect parental rights decisions by states’ judges and child protection agencies if they receive federal funds.

It should be noted that, while proponents tout that “puberty blockers” can be “undone,” this is questionable, as such procedures fundamentally alter age-appropriate physical and associated social development, inevitably affecting later choices and outcomes.¹⁶

¹³ “Decision Memo for Gender Dysphoria and Gender Reassignment Surgery.” CAG-00446N. 30 Aug. 2016.

¹⁴ Many studies in support of “gender affirmation” procedures are short-term or do not account for the number of people who were unable to be reached for follow-up in the longer-term. A thorough longitudinal study of post-surgical transgender-identifying persons, however, found a completed suicide rate of over 19 times that of the general population. Cecilia Dhejne, et al., *Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS One (2011).

¹⁵ Jen Christensen, “Judge gives grandparents custody of Ohio transgender teen,” CNN, 16 Feb. 2018, <https://www.cnn.com/2018/02/16/health/ohio-transgender-teen-hearing-judge-decision/index.html>.

¹⁶ See Paul W. Hruz, Lawrence S. Mayer, and Paul R. McHugh, *Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria*, The New Atlantis, No. 52, Spring 2017, pp. 3-36.

e. Children in the foster care and adoption system would be displaced, as the Equality Act would shut down Catholic adoption and foster care work nationwide (and ultimately put other faith-based ministries at risk of losing all federal funds, *see* paragraph g). This has already occurred in multiple jurisdictions.¹⁷ Children “have a right to grow up in a family with a father and a mother.”¹⁸ The Equality Act would close faith-based agencies that seek to accordingly place children with a married mother and father, even though same-sex couples are able to foster and adopt in every state and have multiple other agencies with which to work. Narrowing the pathways to caring families at a time when drug crises are pushing more and more children into the system (currently with over 400,000 in foster care)¹⁹ is wrong. Shutting down these agencies serves no one.

f. Faith-based charitable services would be expected to either surrender their sincerely-held beliefs or be shut down by the Equality Act. As indicated above, this would notably apply to women’s shelters, foster care and adoption agencies, and health care facilities. Counseling centers with a faith-based approach or affiliation, often serving at below-market cost, would also be limited in the ability to hire and operate in accord with their principles. Other charities with sex-designated spaces would also be at risk. The impact of the Equality Act could further spread to a broader range of ministries, effectively stripping federal funding from everything from food aid to immigration assistance. This does not simply hurt the organizations but, more importantly, the countless people that they serve.

g. Schools, private and public, K-12 and higher education, would all be affected by the Equality Act. This would occur through the Act’s nondiscrimination requirements for any program or activity touched by federal funding, which would likely to apply to school lunch assistance or student financial aid. Single-sex girls’ and boys’ schools could be eliminated, since they would be unable to maintain their identity.

Private schools could also be required to hire or retain people whose speech or conduct violates tenets of the school’s faith. This limits the ability of a religious group to enculturate its religious beliefs.²⁰ Further, if implementation of the Equality Act were to follow the course of the Civil Rights Act which it amends, curricula at both public and private schools could be required to incorporate “LGBT” lessons.

h. Religiously-affiliated facilities and properties that serve parts of the public in any capacity, potentially even houses of worship themselves, would be subjected to the Equality Act’s “public

¹⁷ Catholic adoption services have been shuttered in Massachusetts (2006), San Francisco (2008), Washington, D.C. (2010), Illinois (2011), and Buffalo (2018); and similar situations are unfolding in Michigan and Pennsylvania. In Illinois, about 2,000 children were displaced when Catholic Charities’ operations shut down. Christine Rousselle, “House committee moves to protect religious adoption agencies,” Catholic News Agency, 12 Jul. 2018, <https://www.catholicnewsagency.com/news/house-committee-moves-to-protect-religious-adoption-agencies-94105>.

¹⁸ Pope Francis, colloquium on “The Complementarity of Man and Woman”, Rome, 17 Nov. 2014; *see also* Pope Francis, audience with International Catholic Child Bureau, 11 Apr. 2014.

¹⁹ “The Adoption and Foster Care Analysis and Reporting System (AFCARS) Report: Preliminary FY 2016 Estimates as of Oct 20, 2017”, Children’s Bureau, Administration for Children and Families, U.S. Dept. of Health and Human Services, Nov. 24, 2017.

²⁰ While the constitutional “ministerial exception” would apply to some private education personnel, it is not a complete protection, and its contours continue to evolve in the judiciary.

accommodations” requirements. Thus a church group that owns a banquet hall, for example, may be compelled to rent the space for same-sex ceremonies.

i. Small businesspersons and employers would have their livelihoods and consciences burdened by the Equality Act. Instead of guaranteeing people’s rights to receive basic goods and services and earn a living, which should be upheld, the Act can inhibit the ability of people of faith to earn a living in certain professions. Wedding and event vendors, for example, would be required to apply their craft to celebrate same-sex relationships or “gender transitions” regardless of their sincerely-held beliefs about what marriage is. Employers who provide health coverage to their employees would have to pay to cover “gender reassignment” procedures according to the provisions of the Equality Act.

j. Individual workers could be expected to express or conform to views with which they disagree to keep their jobs. For example, whether in correspondence among fellow employees or in interactions with the general public, working Americans would be expected to regard others in accordance with their preferred “gender identity” under threat of law. This impacts the freedoms of speech and conscience. Already, some working people may lose their jobs for “misgendering” others, even if they agree to call someone by a preferred name.²¹

5. Why is protecting persons based on their “sexual orientation” and “gender identity” different from other federal nondiscrimination protection?

The goal of the Civil Rights Act and other anti-discriminatory legislation was to promote effective responses to a serious problem – e.g., racism, sexism, discrimination against those with disabilities, etc. As noted above (*see* #3), there is currently no such systemic discrimination against people who identify as LGBT.

The definition of “sexual orientation” in the Equality Act is unclear, seeming to refer to sexual behavior not simply attractions, and it is inserted into the definition of “sex,” as if it were a part of a person’s sex itself. Contrary to this, Catholic teaching asserts that there is a distinction among a person’s sexual inclinations or attractions, identity, and behavior. One may have an attraction and not act on it.

The definition of “gender identity” in the Equality Act (“gender-related identity”)²² is circular, and therefore unsound. The logical inconsistencies required to maintain gender ideology are abundant: one must believe gender is fluid yet immutable; that “gender affirming” surgeries are medically necessary yet cannot be required before changing a birth certificate; that biological sex is meaningless but traits that are stereotypically anchored to “sex” must be used to define “gender identity”; and more.

²¹ *E.g.*, Karma Allen, “Virginia teacher fired for referring to transgender student as female,” ABC News, 7 Dec. 2018, <https://abcnews.go.com/US/virginia-teacher-fired-referring-transgender-student-female/story?id=59669818>.

²² The full definition is “the gender-related identity, appearance, mannerism, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.” H.R. 5, § 9.

While the intent of legislators may be one of inclusion, all of the above makes for unsustainable legislation – legislation that even undefines the basis of “sex” in the Civil Rights Act that once protected it – and causes great social confusion.²³

6. Isn't religious freedom already protected by the Constitution and Law?

The U.S. Constitution's guarantee of free exercise of religion was severely constricted when, in the case of *Employment Division v. Smith* (1990), the U.S. Supreme Court decided that a person's religious practice must yield to laws that are generally applicable and not targeted against religion, with no right to an exemption.²⁴

Largely in response to that decision, the Religious Freedom Restoration Act of 1993 (RFRA) was passed with near-universal support. It was introduced by then Representative Chuck Schumer, passed by a voice vote without objection in the U.S. House of Representatives, passed in the Senate by a 97 to 3 vote, and signed into law by President Bill Clinton. RFRA revived the standard previously applied by the Court, limiting the federal government by requiring that any substantial burden to religion, however unintended, can only stand if the government had used the least restrictive means to achieve a compelling interest.

The Equality Act takes the unprecedented step of exempting itself from RFRA, thereby explicitly shrinking Americans' federal right of free exercise of religion. This would greatly diminish individuals' and faith-based organizations' ability to prevail in the court system.

In practice today, RFRA is key to ensuring that the freedom of religion stands a chance of being fully lived out and vindicated in court (or with an administrative agency) when an American's faith bumps up against a federal law. With RFRA carved-out in the Equality Act, individuals and organizations will have little recourse and will likely be subject to the broad, one-size-fits-all federal imposition of the law and the full weight of its harms.

Some proponents of the Equality Act allege that the bill has a religious exemption. This is only marginally true. The bill leaves in place the exemption (present in the Civil Rights Act) allowing religious employers to prefer hiring members of the same religion. This is unlikely to provide a defense against discrimination claims based on the Equality Act. Currently, Catholic institutions can hire people with diverse backgrounds – including people of different religious – yet require adherence to religiously-informed employee conduct standards and the religious mission of the organization. This bill would change that.

For all these reasons, the Equality Act would gravely undermine the freedom of individuals and of religious organizations, impeding or preventing their good work, to the detriment of those organizations and the people whom they serve.

²³ As Pope Francis wrote in his encyclical on the environment, “It is not a healthy attitude which would seek to cancel out sexual difference because it no longer knows how to confront it.” Pope Francis, *Laudato Si*, ¶ 155 (2015).

²⁴ In *Smith*, two members of the Native American Church had been denied unemployment benefits for using peyote, an illegal substance in Oregon, which they averred was for a religious ritual. The Court found that the Constitution did not require an exemption for them.