

Religious Freedom and the Equality Act: An Unequal Proposal

Background

The Equality Act (H.R. 5) proposes a significant expansion of federal law by broadening the definition of public accommodations and adding sexual orientation and gender identity to nondiscrimination provisions across federal law. Rather than propose carefully crafted changes, the bill takes a bludgeon to decades of painstakingly developed statutes and applicable case law. It dramatically expands litigation risk for religious organizations while simultaneously stripping them of a key legal defense, the Religious Freedom Restoration Act (RFRA). The resulting impact of passing the bill would be widespread—and these consequences have been inadequately explored by Congress. This bill:

- ***Restricts freedom of choice for some of our nation's most at-risk populations.*** The bill has been promoted as simply preventing discrimination with federal funds. Instead, it may entrench inequities by chasing religious social service providers from the public square and making it harder for Americans to use government aid. It threatens the choices of disadvantaged students receiving aid like free lunches at religious schools, college grants to choose the school that best supports them, and even jeopardizes security grant funding for houses of worship that need protection against hate crimes.
- ***Threatens longstanding, bipartisan protections in Title IX for religious schools and colleges.*** Title IX has narrow, carefully drawn exceptions for religious institutions; all-women's schools; sex-segregated sports programs; Greek groups; single-sex facilities; and student clubs that focus on empowering women. By expanding Title VI, the bill bypasses Title IX's carefully crafted protections.¹ Religious schools and other institutions with sex-based programming or facilities that ordinarily would be protected under Title IX could be sued instead under Title VI, which has no such protections.
- ***Imposes a disguised abortion mandate on medical professionals.*** Congress has historically protected healthcare providers that cannot in good conscience participate in abortion. The bill threatens penalties for medical professionals and religious institutions by adopting novel language banning discrimination on the basis of pregnancy and "related medical conditions" without an abortion disclaimer. In the past, Congress has added a disclaimer to such language.
- ***Imperils faith-based foster care services in violation of a unanimous Supreme Court decision.*** Many Americans who foster, including by welcoming special needs children, are religious. Often, the support of a faith-based agency is critical in helping them to avoid burnout and foster longer.² But the bill limits their choices by penalizing faith-based agencies—the very type of religious discrimination that a unanimous Supreme Court rejected in *Fulton v. Philadelphia*.
- ***Penalizes houses of worship for having same-sex spaces.*** The bill would subject synagogues and mosques to harassing lawsuits for having single-sex prayer rooms. It would remove the ability of religious groups of all sorts to have single-sex bathrooms and private spaces. It would allow litigants to bypass the carefully crafted protections in Title IX and sue religious schools, including K-12 girls' schools, for having women-only spaces..
- ***Strips longstanding, bipartisan religious protections from federal civil rights laws.*** The bill exposes religious individuals and organizations to a vast array of litigation risks while stripping them of their most important legal defense in court—RFRA. This unprecedented exemption is particularly pernicious because H.R. 5 is so sweeping, threatening endless litigation for religious charities, hospitals, shelters, colleges, churches, synagogues, and mosques. RFRA provides critical religious liberty protections for people of all faiths—and particularly minority communities.³ It does not predetermine winners and losers, but simply gives religious claimants a day in court where their religious liberty claims can be balanced with compelling government interests.

1 See 42 U.S.C. § 2000d (Title VI, which does not contain the Title IX exceptions); H.R. 5, Sec. 6 (amending Title VI).

2 More information on the impact of faith-based foster care agencies is available here: <https://bit.ly/38bkRK9>.

3 See Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 356, 368-70 (2018), <https://bit.ly/2WkyuUK>.

Impact

Religious communities make a profound impact on their local communities through the provision of aid and critical social services. Most religious congregations don't just serve the needs of their own members, but of the community at large. For example, the federal government has courted religious communities for partnership in responding to the COVID crisis, including aggressively recruiting them to serve as vaccination sites.

Congress should not force religious institutions to choose between their religious beliefs and serving disadvantaged populations. Over the last ten years, the Supreme Court has been clear that it does not view legal conflicts between religious freedom and the LGBTQ community as a zero-sum game. Even as the Court ruled in favor of same-sex marriage in *Obergefell v. Hodges*, the Justices reminded the American people that many are led to believe in traditional marriage by "decent and honorable religious or philosophical premises."

In 2017, the Court held in *Masterpiece Cakeshop v. Colorado* that singling out a religious belief for hostile treatment is "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." Three years later in *Bostock v. Clayton County*, the Court praised RFRA while simultaneously expanding LGBTQ rights. And in June 2021 in *Fulton v. City of Philadelphia*, the Court ruled unanimously that excluding a religious organization from partnering with the government because of its religious beliefs was unconstitutional.

"As a Christian physician, I practice medicine as a calling; in other words, the practice of medicine is an extension of my very self. I cannot sever my calling and practice as a physician from the calling and practice of my Christian faith. Any attempt to do so would cut off my calling as a healer from the source of its life."

– **Dr. Joy Draper**,⁴ OB-GYN

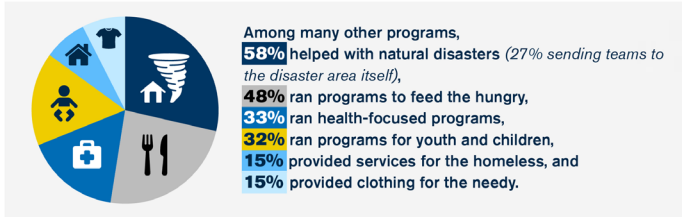
"The Equality Act puts at risk the life-transforming work of heroic foster care and adoption workers and takes choices away from adoptive families like mine."

– **Melissa Buck**,⁵ adoptive mother of five special needs children

The Becket Fund is a non-profit law firm that has defended Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, Zoroastrians, and others in lawsuits around the country. Becket has also represented religious people and institutions with a wide variety of views about marriage and sexuality, including both non-LGBTQ and LGBTQ clients. As a religious liberty law firm, Becket does not take a position on debates expanding nondiscrimination laws, but focuses instead on these debates only as they relate to religious liberty. You can read Becket's full testimony submitted to the Senate Judiciary Committee here: <https://bit.ly/3sFUCoA>.

American congregations serve communities beyond their members.

80% of congregations in America provide social services to their community.



These services benefit people beyond their members.

In a study done of congregations in Philadelphia,

62% of people served were not members of the congregation.

Chaves, Mark, Joseph Roso, Anna Holleman, and Mary Hawkins. 2020. *National Congregations Study: Waves IV Summary Tables*. Duke University Department of Sociology, Durham, NC. Available at https://sites.duke.edu/nscsweb/files/2020/11/NCS-IV_Summary-Tables_ForPosting.pdf.

Cnaan, R. A., Sinha, J. W., & McGrew, C. C. (2004). *Congregations as Social Service Providers: Services, Capacity, Culture, and Organizational Behavior*. Retrieved from http://repository.upenn.edu/spp_papers/9

4 Dr. Joy Draper, *Written Testimony to the S. Judiciary Comm. on H.R. 5*, (March 15, 2021), <https://bit.ly/3jzbzofa>.

5 Melissa Buck, *Written Testimony to the S. Judiciary Comm. on H.R. 5*, (March 15, 2021), <https://bit.ly/2WkuDHG>.