Written Testimony of the Becket Fund for Religious Liberty

United States Senate—Committee on the Judiciary

Hearing on H.R. 5, March 17, 2021

Overview

The Equality Act would have serious negative consequences for religious freedom. The Supreme Court in *Bostock* expressly relied on the Religious Freedom Restoration Act to balance the interests of religious believers and the LGBTQ community. Congress has never before exempted a bill from RFRA. But the Equality Act would do just that, removing bipartisan-supported protections while at the same time exposing religious people to new legal threats. The Equality Act would subject synagogues and mosques to lawsuits for having single-sex prayer rooms. It would remove the ability of religious groups of all sorts to have single-sex bathrooms. 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.

The Equality Act would entrench inequities by making it more difficult for those who receive federal financial assistance for school lunches, college tuition, healthcare, or security enhancements to use that assistance. Under the Bill, girls facing food insecurity may not be able to use their federal food assistance at religious K-12 girls' schools, since it would expose those schools to lawsuits. Students struggling to afford college might not be able to use Pell grants and other aid at the religious college of their choice, a decision that would disproportionately impact students of color. Parents fostering or adopting special needs children might not be able to partner with a faith-affirming agency like Catholic Charities due to its beliefs about marriage. And it would put churches, mosques, and synagogues to a difficult choice—if they accept grants to help protect themselves against hate crimes, they risk private lawsuits over women-only prayer areas, ministries, or even bathrooms.

That is not the only way the Bill threatens houses of worship. It expands the definition of public accommodations in a way that would be used by plaintiffs' lawyers to file harassing lawsuits against houses of worship and religious charities serving those in need, for actions as simple as maintaining single-sex bathrooms or changing facilities. The Bill pressures religious groups to close their doors and serve only the faithful, since they increase their risk of lawsuits if they open their doors to host food pantries, shelters, or vaccine clinics that serve the surrounding community.

The Bill also sneaks in a mandate that healthcare professionals must assist with gender transitions and abortions, even if they cannot do so consistent with their religious beliefs or best medical judgment. And the Bill creates a blueprint for further agency action to restrict religious freedom. This comes at the worst possible time, when frontline healthcare workers need to be able to serve the public without additional fear of lawsuits or government penalties.

It is the groups most open to serving those in need, regardless of faith, race, or sex, whose religious freedom is most at risk from the Bill. The Bill would mar the proud history of the Civil Rights Act, chasing out religious service providers that contribute billions of dollars in social services to their communities and stripping choices and opportunities away from religious minorities and people in need.

Background

The Becket Fund is a non-profit law firm and legal institute that has defended Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, Zoroastrians, and others in lawsuits around the country. These cases often involve federal constitutional claims under the Free Exercise and Establishment Clauses as well as federal statutory claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Religious Freedom Restoration Act (RFRA). In the last decade, we have successfully litigated multiple cases before the United States Supreme Court, including *Agudath Israel of America v. Cuomo, Little Sisters of the Poor v. Pennsylvania*, *Our Lady of Guadalupe School v. Morrissey-Berru*, *Zubik v. Burwell*, *Holt v. Hobbs*, *Burwell v. Hobby Lobby*, *McCullen v. Coakley*, and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[1]

The Becket Fund 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, the Becket Fund does not take a position on debates expanding nondiscrimination laws as such, but focuses instead on these debates only as they relate to religious liberty.

The legal analysis we offer below touches on only the most important aspects of the Bill as they relate to religious liberty. We do not attempt to provide a comprehensive analysis of the Bill's effects on religious liberty. Moreover, we do not address all aspects of the Bill as they affect other constitutional or civil rights.

Legal Analysis

I. The Bill strips longstanding, bipartisan-supported religious protections from federal civil rights laws.

A. The Bill dismembers RFRA, eliminating crucial protections for religious freedom.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, is bipartisan-supported legislation, signed into law by President Clinton, which protects the religious freedom of Americans of every faith. Indeed, RFRA simply enforced the

[1] *See Agudath Israel of America v. Cuomo*, No. 20A90, 2020 WL 6954120 (Nov. 25, 2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *McCullen v. Coakley*, 573 U.S. 464 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

same First Amendment protections that had been recognized by the Supreme Court since the 1960s. It has been used to protect Native Americans conducting religious ceremonies, Sikhs wearing articles of faith, Catholics serving the poor, and Muslims wearing beards.[2] The Supreme Court explicitly relied upon RFRA in its *Bostock* decision, with the six-Justice majority stating that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands" where complying with its requirements might otherwise "require some employers to violate their religious convictions."[3] The majority also emphasized the importance of "preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[4] In other words, the Court relied on RFRA as a key part of crafting a balance between nondiscrimination claims and religious liberty interests.

The Bill would upset that longstanding and carefully crafted legal balance by exempting the Equality Act, and all claims brought under it, from RFRA. *See* H.R. 5, Sec. 1107. **Congress has never exempted a bill from RFRA.** This unprecedented exemption is particularly pernicious because the Equality Act is so sweeping, threatening endless litigation for religious charities, hospitals, shelters, colleges, churches, synagogues, and mosques. 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.

The exemption is also entirely unnecessary. As the ACLU has explained, RFRA is about "striking sensible balances."[5] It merely sets the standard the government must meet if it chooses to burden religious exercise.[6] It does not say that religious people always win, just that they have a fighting chance in court before government is allowed to punish their sincere beliefs. By stripping RFRA protections for all claims and defenses under the Bill, the Bill attempts to deprive religious believers, including religious minorities, of a court hearing for their basic civil rights.

Even worse, the harm of this unprecedented rollback will fall most heavily on members of minority faith groups. Empirical studies have shown that religious minorities benefit most from RFRA's protection for religious beliefs against

---

[2] *See McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014); *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Potter v. District of Columbia*, 558 F.3d 542 (D.C. Cir. 2009).

[3] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753-54 (2020).

[4] *See id.* at 1754.

[5] *See Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 198 (1992) (statement of Nadine Strossen, President, American Civil Liberties Union), https://perma.cc/Y9KD-BTFZ.

[6] *See id.* at 2 (statement of Sen. Edward M. Kennedy, S. Comm. on the Judiciary).

government punishment.[7] This comes as no surprise, since government officials are often unfamiliar with minority beliefs, and less responsive to minority groups.[8] For religious minorities, RFRA is often the best line of defense, yet the Bill strips it away from major portions of federal law.

B. The Bill threatens longstanding bipartisan-supported Title IX protections, creating backdoor liabilities for religious schools and colleges.

Federal law has long banned race discrimination in education through Title VI of the Civil Rights Act, and sex discrimination in private education through Title IX of the Education Amendments of 1972.[9] Recognizing the unique issues that come with sex, Title IX includes longstanding and carefully negotiated protections for women's colleges, single-sex dormitories, sororities and fraternities, boys and girls' clubs, and religious colleges.[10] Since Title VI was limited to race, color, and national origin, it contains no such language. But the Bill adds "sex" to Title VI, while saying nothing about the longstanding protections in Title IX.[11]

In practice, this means that religious schools and colleges that would ordinarily be protected under Title IX would likely be sued under Title VI instead. While we take no position here on whether such claims would be meritorious, private colleges and girls' schools don't have the luxury of waiting to see what the courts decide. If the Bill passes, such religious and single-sex schools will immediately be forced into hard choices. Because Title VI and its litigation risks are tied to federal funding, the schools will have to make the difficult choice to stop serving students receiving Pell grants or free lunches, or open themselves up to potential lawsuits under Title VI.

II. The 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 service providers from the arena and making it harder for Americans to use government aid.

---

[7] *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) (available at https://perma.cc/WFP3-8ABK).

[8] *See, e.g.,* Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 163 (2009) ("The only way for legislators to protect these unpopular religions is to include them in a broad statement of principle, such as a Religious Freedom Restoration Act.")

[9] *See* Department of Justice, *Types of Educational Opportunities Discrimination*, (Nov. 19, 2020), https://perma.cc/X7W3-4EEV.

[10] *See* 20 U.S.C § 1681(a).

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

A. The Bill threatens the choices of disadvantaged students receiving free lunches and college grants.

As noted, the Bill would amend Title VI to prohibit discrimination based on sex, with no exceptions.[12] Title VI is triggered by accepting certain federal funds, such as Pell grants and National School Lunch Program aid that alleviates food insecurity.[13] This means that students who want to escape failing schools and still receive food assistance, or first-generation college students who want to use their Pell grants, might be unable to use them at the school of their choice. A K-12 girls' school or a religious college will have to choose between serving those students and risking potential lawsuits under Title VI. This is especially concerning for the hundreds of thousands of religious college students who are people of color,[14] especially when students of color are more likely to rely on Pell Grants.[15] Thus the Bill would make it harder for poor, minority, and immigrant students to achieve their college dreams.

Attacks on government-backed student aid funding have been attempted before. In 2016, California's legislature considered SB 1146, a discriminatory bill that sought to deny state educational grants known as Cal Grants to students choosing to attend schools with religious codes of conduct.[16] Three-fourths of affected students were students of color from lower-income families. Following public outcry, the bill was amended to remove the discriminatory provisions. And for good reason: Religious identity is important to 72% of college students nationwide.[17] Many of these students want to attend religious schools. They choose these communities not just for friendship and inspiration, but also to have a safe environment where they can focus on their intellectual pursuits. At many religious institutions, the average family income of a student's household is less than $64,000 a year, and as many as one-third of these students are first-generation college students.[18] After graduation, these students dedicate their career to social service at a rate of three times the national average. They are also nearly 10% more likely to volunteer time for community

---

[12] *See* H.R. 5, Sec. 6.

[13] *See* 42 U.S.C. §§ 2000d, 2000d-4a (Title VI); H.R. 5, Sec. 6 (amending Title VI).

[14] *See, e.g.,* Association of Catholic Colleges and Universities, *Frequently Asked Questions*, https://perma.cc/2GGM-QS92 (more than 30% of the 850,000 students enrolled at Catholic colleges are people of color); Council for Christian Colleges and Universities, *Diversity Matters*, Advance Magazine at 19 (Spring 2020), https://perma.cc/DW86-GGKA (26.2% of the 444,618 students enrolled at Council for Christian Colleges and Universities schools are people of color).

[15] *See* National Center for Education Statistics, Status and Trends in the Education of Racial and Ethnic Groups (Feb. 2019), https://perma.cc/H8F8-XXB8.

[16] *See* S.B. 1146, 2016 Leg. Sess. (Cal. 2016) (as introduced, Feb. 18, 2016).

[17] *See* Pew Research Center, Religious Landscape Study, Religious composition of college graduates (2014), https://perma.cc/G53N-HLKD.

[18] *See* Council for Christian Colleges and Universities, *Building the Economy and the Common Good: the National Impact of Christian Higher Education in the United States* (2018) at 34, https://perma.cc/N6ZF-C9Q9.

service. The Equality Act could deny students who rely on federal aid—in a moment where fewer low-income and minority students than ever are making the choice to go to college[19]—the freedom to make that choice.

B. The Bill threatens the choices of foster and adoptive families.

Many religious Americans choose to become foster parents or to welcome special needs children into their hearts and homes. In fact, the support of a faith group has proven effective in helping parents to avoid burnout and foster longer.[20] But the Bill limits their choices. Foster and adoptive parents qualify for federal aid to help them care for children and afford treatment for special needs.[21] Under the Bill, foster and adoption agencies who work with those parents—particularly faith-affirming agencies—will be exposed to litigation. This takes choices away from parents by making it more difficult for them to receive the support of agencies that affirm their faith. Many have testified they would not be able to continue fostering without the support of their faith-based agency.[22] The net result is more attrition of foster parents and higher barriers for foster and special-needs children.

C. The Bill threatens houses of worship that need security against hate crimes.

Federal programs offer aid to houses of worship to "prevent targeted violence against faith-based communities."[23] Under the Bill, a house of worship that accepts those funds might be subject to private lawsuits under Title VI. The same argument might be made about houses of worship who receive rebuilding funds after a natural disaster. This is particularly problematic for Muslim and Orthodox Jewish groups, which maintain separate worship and prayer spaces for women and men. The federal programs designed to protect those houses of worship might instead lay the groundwork for harassing lawsuits, or force minority faith groups to eschew much-needed security funds.

---

[19] *See* Scott Jaschik, *Minority, Low-Income Freshmen Not Filling Out FAFSA*, Inside Higher Ed (July 27, 2020), https://perma.cc/6T7L-KAR3.

[20] For example, one study found that people who hear about fostering through a church or religious organization fostered for 2.6 years longer than other foster parents. *See* Mary Ellen Cox, Cheryl Buehler, & John G. Orme, *Recruitment and Foster Family Service*, 29 J. Soc. & Soc. Welfare, no. 3, 2002, at 166-68, https://perma.cc/P4SV-MTP4.

[21] *See* North American Council on Adoptable Children, *Eligibility and Benefits for Federal (Title IV-E) Adoption Assistance* (Feb. 9, 2017), https://perma.cc/X6SA-9UUY.

[22] *See generally*, Free to Foster, https://perma.cc/2QTJ-V44E.

[23] *See* Department of Homeland Security, *DHS Announces Grant Allocations for Fiscal Year 2020 Preparedness Grants* (June 30, 2020), https://perma.cc/395Y-PGPJ.

III. The Bill exposes religious groups to litigation while simultaneously stripping them of legal defenses.

Minority faith communities too often face discrimination, harassment, or opposition because of their beliefs.[24] Becket regularly defends mosques, churches, and synagogues that face community opposition when they seek to build houses of worship or when they open their doors to minister to the poor.[25] The Bill would give activists that oppose these religious communities a new tool.

A. Activists could sue houses of worship as public accommodations.

The Bill redefines Title II, the federal public accommodations law, to include a "place of or establishment that provides . . . **public gathering**." H.R. 5, Sec. 3(a)(2)(A) (emphasis added). It also includes "any establishment that provides a good, service, or program, including a . . . shelter." H.R. 5, Sec. 3(a)(4). Previously, Title II focused primarily on commercial venues. Congress has considered the question of houses of worship as public accommodations before, when enacting the Americans with Disabilities Act. There, it specifically exempted "religious organizations or entities controlled by religious organizations, including places of worship" from the public accommodation provisions. 42 U.S.C. § 12187. But the Bill contains no such language.

This expansive language could be used to bring lawsuits against houses of worship and religious charities, and will place a chill on religious groups nationwide. If houses of worship were deemed by a court to be public accommodations, they could be sued not only for sexual orientation or gender identity discrimination, but also for having single-sex facilities at all, since the Bill would ban all "segregation" on the basis of sex. *See* 42 U.S.C. § 2000a(a); H.R. 5, Sec. 3(a)(1). This could open up a synagogue or mosque that has separate worship areas—or even restrooms—for men and women to legal threats and costly litigation. Because Title II also prohibits discrimination on the basis of religion, the expanded definition of a "public accommodation" could even expose houses of worship to harassing litigation for religious discrimination brought

---

[24] At times, this kind of bias can turn into violence. According to the FBI, hate crimes motivated by religious bias accounted for 1,650 offences in 2019. 60.3% were anti-Jewish, 13.3% were anti-Islamic, 7.6% were anti-Catholic or other Christian, and 3% were anti-Sikh. 48.4% of hate crimes based on race were directed at Black Americans, and the tragic history of Black churches becoming targets of violence is well known. *See* U.S. Dep't of Justice, Federal Bureau of Investigation, *2019 Hate Crime Statistics: Incidents and Offenses*, https://perma.cc/CQA4-4KWK.

[25] See, e.g., *United States v. Rutherford County*, No. 3:12-0737, 2012 WL 13082000 (M.D. Tenn. Aug. 3, 2012) (neighbors attempted to exclude mosque); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (City attempted to stop church from helping homeless); *Gagliardi v. City of Boca Raton*, No. 16-cv-80195, 2017 WL 5239570 (S.D. Fla. Mar. 28, 2017), *aff'd sub nom. Gagliardi v. TJCV Land Tr.*, 889 F.3d 728 (11th Cir. 2018) (neighbors attempted to exclude synagogue).

by disgruntled neighbors. All these risks are further heightened because, as noted above, the Bill strips the mosques and synagogues of any RFRA defense from such lawsuits.[26]

B. Activists could sue religious charities that open their doors to serve their communities.

Similarly, religious homeless shelters might be sued if they serve people of all faiths, sexual orientations, and genders, but maintain single-sex sleeping or changing rooms. *See* H.R. 5, Sec. 3(a)(4). The Bill's proponents have pointed to the private club exception as a protection for religious exercise—but that exception is narrow, and would have the perverse incentive of penalizing those who choose to move beyond serving coreligionists and instead open their doors to their neighbors. Given that the vast majority of religious groups provide social services and benefits without restriction to their surrounding communities[27]—benefits that one study valued at over $1 trillion per year[28]—the narrow exemption places houses of worship at risk nationwide.

The same could be true of healthcare providers. The Bill would add any "establishment that provides health care" to the list of public accommodations. H.R. 5, Sec. 3(a)(4); 208(1). This broad language even extends to individual doctors and nurses with conscientious objections to personally performing certain procedures or services, like abortion. Similar language in federal regulations has been used to try and require doctors to perform gender transition procedures which go against their medical judgment.[29]

---

[26] Of course, the First Amendment protects houses of worship. But lawsuits to vindicate First Amendment rights can be long and costly, and Congress—just as it has in the past—should avoid subjecting houses of worship to years-long litigation just to assert basic Constitutional rights. As courts have long recognized, the investigation and litigation process alone can infringe First Amendment values protecting a healthy separation of church and state. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 499, 502 (1979); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996).

[27] 80% of congregations in America provide social services to their community. *See* Mark Chaves, Joseph Roso, Anna Holleman, & Mary Hawkins, *National Congregations Study: Waves I-IV Summary Tables*, Duke University Department of Sociology (Jan. 11, 2021), https://perma.cc/2UZX-6XQG.

[28] *See* Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, Interdisciplinary Journal of Research on Religion at 1, 2 (2016), https://perma.cc/CP3X-CX55.

[29] Regulations promulgated under Section 1557 of the ACA were enjoined by federal courts for this very reason. *See Religious Sisters of Mercy v. Azar*, No. 3:16-cv-00386, 2021 WL 191009, at *22 (D.N.D. Jan. 19, 2021) ("Under the prevailing interpretations of Section 1557 and Title VII, refusal to perform or cover gender-transition procedures would result in the

The risk of litigation is highest for the organizations that do the best work serving their communities. If a predominantly Black church hosts COVID vaccine clinics,[30] it could face litigation by activists for maintaining single-sex bathrooms. The Bill would incentivize houses of worship to curtail public service in order to avoid being deemed a public accommodation and the legal risks that come with it.

IV. The Bill sneaks in an abortion mandate.

Congress has long protected those who cannot, in good conscience, participate in abortions. H.R. 5 threatens penalties for doctors who cannot participate in abortion and for religious schools that do not pay for them.

A. "Sex discrimination" is defined in a way that is often construed to include abortion.

The Bill defines "sex discrimination" to include discrimination based on pregnancy and "related medical conditions"—a phrase that the EEOC and at least three federal courts say includes abortion.[31] When Congress added the same language to Title VII, it added a statement that the term did not include abortion: "The terms 'because of sex' . . . include…because of or on the basis of pregnancy, childbirth, or related medical conditions . . . "[T]his subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion[.]") 42 U.S.C. § 2000e(k) (added by the Pregnancy Discrimination Act). It did the same thing when similar language appeared in Title IX.[32] The Bill adopts this language ***without*** adding any abortion disclaimer. The fact

---

Catholic Plaintiffs losing millions of dollars in federal healthcare funding and incurring civil and criminal liability.").

[30] For example, New Jersey has partnered with churches in Black and other underserved communities to improve COVID-19 vaccine access. *See* CBS News, *New Jersey churches team up with state to vaccinate underserved communities* (March 2, 2021), https://perma.cc/Z6UD-UP6D

[31] *See* U.S. EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues, Notice 915.003 (June 25, 2015), https://perma.cc/2CLW-R5R6 (noting that the PDA includes protections for abortion). *See also Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (reading this language in PDA to cover female employee who had an abortion); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (same); *Ducharme v. Crescent City Deja Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (holding that "Title VII as amended by the Pregnancy Discrimination Act extends to abortions.").

We disagree with this interpretation of "related medical conditions" in the Bill. But given the history of interpretation of identical language in Title VII, Congress should affirmatively state that declining to participate in or pay for an abortion is not "sex discrimination."

[32] *See* 20 U.S.C. § 1688 ("Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.") (added by the Civil Rights Restoration Act of 1987).

that Congress added a disclaimer elsewhere, but not here, might be construed by courts to mean that Congress specifically intended to include abortion here.

B. The Bill's sex discrimination language could be used against frontline healthcare workers.

Because both Title II (public accommodations) and Title VI (federally-assisted programs) already include a private right of action, if no abortion disclaimer is added, individuals could sue their healthcare providers directly, claiming that failure to provide abortions constitutes sex discrimination. And under Title VI, a student receiving federal financial aid could sue a religious college that does not pay for student abortions. Moreover, as explained above, the Bill strips RFRA defenses from religious doctors, ministries, and schools that are sued under these provisions. H.R. 5, Sec. 1107 (eliminating RFRA defense).

Stripping RFRA protections would have significant consequences. In 2016, HHS adopted a rule redefining "sex discrimination" to include gender transitions and abortion, with no religious exemption.[33] A religious hospital and an association representing 20,000 religious doctors challenged the regulation, asking to be protected from penalties for their conscientious objection to participating in gender transitions or performing abortions. These plaintiffs won a nationwide injunction, based on RFRA.[34] But under the Bill, government regulators or private individuals could argue that the same mandate has been imposed nationwide, and without RFRA to shield against it. Indeed, the same healthcare providers who won in court might be subject to renewed attacks if the Bill is enacted in its current form.

At a minimum, the Bill exposes healthcare providers to the risk of lengthy and expensive litigation to protect their fundamental rights. The nation's healthcare providers have been serving heroically during the pandemic; when they ask whether their conscience rights will be protected, they deserve more from Congress than "maybe."

Forcing medical professionals to choose between faith and conscience will drastically discourage religious people from entering the healthcare field, and will pressure existing religious doctors and nurses to exit the field, both of which will harm patients and society.[35]

C. Providers may not receive protection from the federal government.

Existing federal conscience laws primarily rely on federal officials like the Secretary of HHS to protect healthcare conscience rights, including the right not to

---

[33] *See Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

[34] *See id.* at 695. *See also Religious Sisters of Mercy*, 2021 WL 191009, at *22.

[35] *See* Christian Medical Association/Freedom2Care, Key Findings - 2019 National Survey of Faith-based Health Professionals, https://perma.cc/3VVW-28LJ.

be coerced into participating in abortion. But HHS Secretary nominee Xavier Becerra previously defended California's rule that all insurance plans—including those offered by churches, religious schools, and religious colleges that object—must cover elective abortions.[36] He has also aggressively sued to take away federal conscience protections for religious healthcare professionals, which would protect them from having to personally perform abortions.[37]

V. The Bill creates a blueprint for narrowing First Amendment protections.

In addition to risks of private litigation, the Bill also provides a roadmap for government agencies to restrict religious freedom.

As noted, the Bill takes the unprecedented step of stripping RFRA protections from religious people. *See* H.R. 5, Sec. 1107. But it doesn't stop there. The Bill also contains findings that the Equality Act is the least restrictive means of accomplishing a compelling interest. *See* H.R. 5, Sec. 2(22)-(23). This is not accidental phrasing—it is the language of the strict scrutiny test, the legal test used to determine when the government may restrict some First Amendment and Equal Protection rights. In other words, the Bill announces intent to restrict religious liberty and other constitutional freedoms that would normally be protected.

This brazen assertion will certainly be used by litigants to claim that even the First Amendment is no shield. But it does not stop there: this rights-stripping is the same tactic that has been used by federal agencies to try to restrict First Amendment rights. For example, when HHS created the HHS mandate, forcing the Little Sisters of the Poor to provide contraception and abortifacients, the government attempted to shield its actions by making regulatory findings that its actions satisfied strict scrutiny. *See, e.g.,* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) (asserting that the HHS Contraceptive Mandate regulations were narrowly tailored to advance a compelling government interest). HHS ultimately lost at the Supreme Court, but only after six years of "protracted" litigation. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020).

The federal government did the same thing when it attempted to require doctors to perform gender transitions against their conscientious beliefs. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,380 (May 18, 2016) (asserting "compelling interest" in regulations, strong enough to overcome RFRA in some cases). Federal agencies will surely read the compelling interest language in the Equality Act as a congressional blessing to take actions that

---

[36] *See* Letter from Xavier Becerra, Attorney General of California, to Roger T. Severino, Director, Office of Civil Rights (Feb. 21, 2020), https://perma.cc/A7C6-YZUS.

[37] *See* Complaint, *California v. Azar*, No. 3:19-cv-02769 (N.D. Cal. May 21, 2019) (pending appeal, No. 20-16045 (9th Cir. 2020)).

go beyond even the already-extreme language of the Equality Act itself, and claim that those actions are shielded from constitutional limitations.

* * * * *

The Equality Act claims to protect civil rights, but in fact stands to impose serious harms on Americans of faith, including those who have long depended on the Civil Rights Act for protection. The Bill undermines the purposes and carefully crafted protections of the Civil Rights Act and creates entirely unnecessary conflicts, undermining national unity at a time of crisis. The question that the Committee considers today is an important one, but Americans of all faiths and the people from all walks of life that they serve every day deserve better than a law that trivializes their concerns, strips their legal protections, and will exclude many of them from helping those who need help the most.