

April 24, 2019

Memorandum for Chairman Jerrold Nadler

From: Doriane Lambelet Coleman, Professor of Law, Duke Law School

Re: Questions for the Record of the April 2, 2019 Hearing on H.R. 5, the " Equality Act"

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Following are my responses to the three questions you posed to me following my testimony at the hearing.

*1. Apart from the discussion points you raised at the April 2, 2019 hearing about issues of access to sex-segregated athletic programs, do you otherwise believe that people should not be subject to discrimination based on their sexual orientation or gender identity in employment, housing, public accommodations, credit, jury service, or programs that receive federal funds?*

This is generally correct, subject to the following two caveats:

The first is that, to the extent we continue to find them useful, programs designed specifically to remedy discrimination against females based in facts or stereotypes about their sex-specific biology should be permitted to continue to discriminate on the basis of that biology. (We might otherwise describe these as affirmative action programs for females.) As Justice Ginsberg wrote in *United States v. Virginia*, 518 U.S. 515, 533 (1996), "[i]nherent differences' between men and women . . . remain a cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." Thus, "[s]ex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people." *Id.* at 532.

The second caveat is detailed in my response to question 2 on the next page.

2. *Testimony given by your fellow witness, Julia Beck, implied that if the federal government guaranteed equal access to federally-funded facilities and programs under the Equality Act, transgender people would be a threat to the safety of others. Do you believe that transgender people are a threat to public safety? Do you believe that ensuring equal access to programs serving people experiencing homelessness or intimate partner violence on the basis of gender identity threatens the personal safety of women and their families?*

I do not believe that transgender people are a threat to public safety. And I believe that transgender people should have equal access to programs serving people experiencing homelessness or intimate partner violence. But I also believe that we should not be forced by anti-discrimination law to ignore that in highly sensitive situations, it will sometimes be necessary to distinguish among people based on their presentation as male- or female-bodied.

For example, someone who has just been violently raped by a male may well be traumatized to the point where -- at least in the moment -- they may not be able to overcome their fear of another obviously male-bodied person. The law should not require those who run domestic violence shelters and rape crisis centers to ignore these facts when they arise, or the commonsense solutions which may include sex- rather than identity-based segregation.

3. *You have publicly stated that North Carolina's HB 2 law "is bad law because it allows the government to discriminate against vulnerable populations in ways that are morally wrong, constitutionally incurable, and contrary to our collective self-interest." Do you support ensuring equal access to public facilities like restrooms on the basis of gender identity?*

I do.