

Testimony of Sunu P. Chandy - Legal Director, National Women's Law Center

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Thank you for the opportunity to submit testimony to the Committee on the Judiciary and the Subcommittee on the Constitution, Civil Rights and Civil Liberties on H.R. 5, the Equality Act. I currently serve as the legal director at the National Women's Law Center. The Center has worked for more than 45 years to advance and protect women's equality and opportunity, and to remove barriers for all who face sex discrimination including at work, in schools or in healthcare. Before joining the National Women's Law Center, I have served in civil rights senior leadership roles at the U.S. Health and Human Services and the D.C. Office of Human Rights and as a senior trial attorney with the U.S. Equal Employment Opportunity Commission. My 20 years of legal experience have included training lawyers and community groups on federal and local civil rights laws, providing guidance for hundreds of civil rights investigations and 15 years in federal civil rights litigation. I have also served on the boards of directors of many LGBTQ organizations including currently with the Transgender Law Center.

In addition to my work as a civil rights attorney I am a member of the LGBTQ community and have spent many years volunteering with South Asian and other Asian American LGBTQ community organizations and have experienced and provided deep support and solidarity to my peers, often in the context of seeking greater family acceptance. It is my dream that my daughter will grow up in a world where such acceptance is more forthcoming by our families and from within this nation's laws. When a few years ago, my daughter's first grade classmate said to her on the playground "but wait, you can't have two moms," I am proud that my daughter brought her principal from the side of the playground to help explain to the other student, that yes, in fact, she can have two moms. And we are urging Congress to pass the Equality Act so that all kids will grow up in a world where we all have fundamental legal protections, no matter our family structure.

The Equality Act would incorporate existing court rulings setting out the scope of sex discrimination protections into federal civil rights statutes by spelling out explicit protections against discrimination based on sexual orientation or gender identity, while also updating our civil rights laws to provide important new protections against discrimination. 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. Additionally, this Act would ensure that individuals gain new protections against sex discrimination in public spaces and by entities that take

federal dollars or run federal programs. The Act also ensures that protections against discrimination in public spaces, including discrimination on the basis of race and religion, extend to all relevant entities that provide goods and services in the public marketplace. As any bill that seeks to amend existing civil rights laws, this must be enacted in a way that expands – never retreats from – our commitment to civil rights.

My remarks are divided into the following areas. First, I will provide an introduction including the critical social change role of civil rights litigation. Second, I will detail why the Equality Act is a necessary addition to our nation’s civil rights laws. Third, I will outline the legal framework for current federal protections for LGBTQ individuals. Fourth, I will highlight how the Equality Act is a major gain for women’s rights. Fifth, I will focus on how nondiscrimination protections for sexual orientation and gender identity are already tested and successful, and, finally, I will lay out how the Equality Act protects freedom of religion in line with our existing civil rights laws.

I. Introduction

This nation’s federal civil rights laws have served a critical function since the passage of the Civil Rights Act of 1964 and analogous laws. Through the courage of individuals coming forward with claims of discrimination, often risking retaliation, we have expanded and deepened our understanding of the wrongs against which our civil rights laws protect. When the Civil Rights Act was passed, sexual harassment, pregnancy and same-sex harassment were not explicitly included and broadly recognized as part of sex discrimination but in time, the law has developed to address these kinds of harms in the workplace, schools and other settings. These cases have been brought by advocacy groups, public interest firms, federal civil rights agencies and pro bono attorneys, including for example, by the attorneys currently connected with workers through the TIME’S UP Legal Defense Fund administered by the National Women’s Law Center. Our federal civil rights laws also developed due to the tireless work of career employees within civil rights agencies. Government civil rights agencies have provided a legacy of gains through civil rights investigations, agency litigation and guidance documents that create civil rights policy as part of the work of building a more inclusive society. These efforts to address discrimination through civil rights laws are critical alongside organizing efforts, culture change through the media and other strategies for social change. These efforts to secure civil rights protections rely on our nation’s laws as one source of righting harms and seeking justice.

The federal government’s positions as to LGBTQ equality helps to create legal change and culture change, particularly for those of us with families who may be struggling to accept their LGBTQ family members. When someone is fired from a job because he is transgender, or a baby is turned away by a pediatrician because she has two moms, these are outrageous violations that cannot be acceptable under our federal civil rights. However, as of now, protections

against these harms are not explicitly included in our federal civil rights laws and that is why we must pass the Equality Act to ensure clear legal rights for LGBTQ individuals across the country.

As a woman, a person of color, a member of the LGBTQ community, and a parent in a two-mommy family I myself need these rights to be protected from discrimination. As the daughter of a minister and schoolteacher who were immigrants from a small village in Kerala, India, it has been a difficult journey towards family acceptance. Given this background, having explicit protections in the federal law would serve as a concrete measure of protection and provide an increased measure of dignity. And I know that for so many in the LGBTQ community who may not be accepted by our families, it is all the more important to have legal protections at school, at work and in other public spaces. Our nation must be one where dignity and equality based on who we are as people must be enshrined in federal law.

As the Supreme Court of India concluded in its compelling September 2018 opinion that not only struck down a discriminatory law but also called for greater LGBTQ rights, “Respect for individual choice is the essence of liberty,” Dipak Misra, India’s chief justice, told a packed courtroom. “This freedom can only be fulfilled when each of us realizes that the LGBT community possesses equal rights.”¹ Likewise, we are bringing a new urgency to calls for LGBTQ inclusion in this country and Congress must act. It is not enough for some states to act and for some employers to take voluntary steps to provide such protections. Everyone in this country—especially the LGBTQ people of color who experience multiple and intertwining forms of discrimination, and for LGBTQ folks living in poverty who are facing daily economic pressures² alongside civil rights violations—deserve explicit protections in our federal civil rights law. The Equality Act would provide these core protections.

II. The Equality Act Is a Necessary Addition to Our Nation’s Civil Rights Laws

A. The Equality Act Is Necessary to Strengthen Our Nation’s Civil Rights Laws

In its simplest form, the Equality Act is a bill that ensures people cannot be unfairly discriminated against because of their sex, including their sexual orientation or gender identity. It affirms the core value that everyone deserves to be treated fairly and equally under the law.

It does this by amending 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

¹ Joanna Slater and Vidhi Doshi, *India’s Supreme Court Decriminalizes Gay Sex in Historic Ruling*, WASHINGTON POST, Sept. 6, 2018, https://www.washingtonpost.com/world/asia_pacific/indias-supreme-court-decriminalizes-gay-sex-in-historic-ruling/2018/09/06/d15467b6-b111-11e8-8b53-50116768e499_story.html?utm_term=.67574abd1291.

² Brad Sears and Lee Badgett, *Beyond Stereotypes: Poverty in the LGBT Community*, TIDES, June 2012, <https://williamsinstitute.law.ucla.edu/williams-in-the-news/beyond-stereotypes-poverty-in-the-lgbt-community/>.

orientation and gender identity as protected characteristics. The legislation also amends the Civil Rights Act of 1964 to prohibit discrimination in public accommodations and federally funded programs on the basis of sex, sexual orientation, and gender identity.

In amending these existing laws, the Equality Act will accomplish what the current patchwork of inconsistent state legislation fails to do: provide clear and unambiguous protections for LGBTQ people against discrimination in significant areas of our lives. The Act will also equip businesses, educators, and service providers with clear guidance so that there is no confusion about their obligations toward protected classes. In short, this Act will expand and clarify the reach of existing civil rights statutes that have already been incorporated into much of our national legal and social fabric.

Having unequivocal and explicit prohibitions of discrimination based on sexual orientation and gender identity in areas including education, employment, housing, credit, and jury service are instrumental to realizing greater equality in this country. Providing LGBTQ Americans, who make up 4.5% of the total U.S. population,³ with equal opportunity and access means more workers, job-creators, homeowners, and consumers in states that once lacked basic civil rights protections.

The Equality Act would also provide greater security for LGBTQ people. Across state lines, LGBTQ individuals will feel more secure knowing that their livelihoods are protected no matter where they live or work. As a result, their families will also feel safer in the knowledge that their loved ones would have the explicit legal right to be treated with fairness and equality. The Equality Act would make it illegal to fire, refuse service to, or deny a loan to their loved one just because of who they are. Passing the Equality Act is essential to creating this safer reality.

For many Americans, that reality is long overdue. The Equality Act reflects the consensus of the American public, who support nondiscrimination legislation for LGBTQ citizens in overwhelmingly large numbers. According to recent polling, around 70% of Americans favor nondiscrimination laws protecting individuals on the basis of sexual orientation and gender identity. This includes a majority of Democrats, Republicans, and independents, members of all major religious groups, and residents of every state.⁴ Despite vast support in nearly all demographics and regions, only 20 states provide their citizens explicit protection against anti-LGBTQ discrimination.⁵ An individual working in the private sector in the District of Columbia who transfers just several miles away to Virginia may suddenly find themselves at risk should

³ *LGBT Demographic Data Interactive*, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW, Jan. 2019.

⁴ Daniel Greenberg et al., *Americans Show Broad Support for LGBT Nondiscrimination Protections*. PRRI. <https://www.prrri.org/research/americans-support-protections-lgbt-people/>.

⁵ *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, June 11, 2018, <https://www.hrc.org/state-maps/public-accomodations>.

they be terminated as a result of their sexual orientation or gender identity. LGBTQ individuals looking to rent will have a decidedly more difficult time making a home in the many states where same-sex couples and transgender individuals continue to have no state or local remedies or protections against housing discrimination.

The Equality Act also modernizes federal public accommodations law under Title II of the 1964 Civil Rights Act to provide important protections that are missing from current law. The 1964 Civil Rights Act only covers lodging, restaurants and other facilities serving food including gas stations, and entertainment spaces including movie theaters or sports arenas. The Equality Act includes additional important protections for all protected characteristics similar to state laws around the country and the protections provided under the Americans with Disabilities Act.

In addition to the places of public accommodation included in the original Civil Rights Act of 1964, the Equality Act includes providers of goods and services like stores, accountants, and hospitals as places of public accommodation. Transportation providers including trains, taxis, and airlines are also included within the Act as places of public accommodation. In addition, the Equality Act would prohibit sex discrimination under Title II for the first time. LGBTQ people and women, particularly ones who are pregnant and breastfeeding, experience discrimination while accessing public accommodations across a wide range of contexts – including restaurants, stores, theaters, and transportation. People of color continue to face persistent discrimination on a daily basis in stores, and when accessing transportation including car services and taxis. Whether denied service or experiencing unfair treatment or harassment, this discrimination impedes individuals from fully participating in social and public spaces and creates immense dignitary and other harms.

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 individuals 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 including in services such as car repairs when there aren’t fixed prices.⁶ Under the Equality Act this would be illegal.

The Equality Act would also protect individuals from discrimination on the basis of perceived membership in a protected class. An employer, landlord, or business owner’s perception—rather than the individual’s actual identity—will often drive discrimination. The explicit

⁶ Meghan R. Busse et al., *Repairing the Damage: The Effect of Price Expectations on Auto-Repair Price Quotes*, NATIONAL BUREAU OF ECONOMIC RESEARCH, 2013, <https://www.nber.org/papers/w19154>.

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.

Federal funding touches the lives of people in every state and 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 federally-funded benefits or excluding them from a federally assisted program on the basis of their sex or pregnancy unlawful.

The Equality Act also updates civil rights laws to clearly cover claims of associational discrimination— meaning protections for people who may face discrimination because of their relationships to others. This would provide civil rights protections, for example, to children who’ve been turned away from a pediatrician’s office because they have two parents of the same gender or a worker who is denied insurance benefits because they have a transgender child. A person should not lose opportunities or be mistreated because of their friendship, romantic relationship, or familial connection to a person of a different race, religion, gender identity, or sexual orientation.

III. Legal Framework for Existing Federal Protections for LGBTQ Individuals

A. Sex Stereotyping Is Unlawful Sex Discrimination

A range of federal laws—including Title VII of the 1964 Civil Rights Act, Title IX of the Educational Amendments of 1972, and the Fair Housing Act—prohibit discrimination on the basis of sex. Federal courts, including the Supreme Court, have long recognized that these protections are not limited to discrimination based on male or female physical characteristics. A decades-long body of case law affirms that sex discrimination includes a wide range of other forms of discrimination, including discrimination because a person does not conform to gender-related

stereotypes or traditional gender roles, because of pregnancy and related conditions, and because of a person’s sexual orientation or gender identity.⁷

Courts consistently have interpreted the plain meaning of Title VII’s prohibition against sex discrimination to cover a wide range of employer assumptions about women and men alike.⁸ The half-century of precedent interpreting “sex discrimination” has dismantled not just discrimination that drew distinctions *between* men and women, but also discrimination that draws distinctions *among* men and *among* women in such a way as to confine individuals to strict sex roles at work, and in society.

Specifically, in 1989, in the landmark case of *Price Waterhouse v. Hopkins*, the Supreme Court considered and rejected the argument that the term “sex” in Title VII refers only to differences between men and women.⁹ Ann Hopkins was a successful senior manager who was pivotal to securing a \$25 million government contract, and yet she was denied a partnership in an accounting firm in part because her demeanor, appearance, and personality was deemed insufficiently “feminine.” Colleagues described her as “macho” and advised that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” and take “a course at charm school” if she wanted to become a partner. Ms. Hopkins was not rejected from partnership because she happened to be a woman; she was rejected from partnership because she was not the kind of woman that the firm’s partners felt she ought to be. The Supreme Court held that when an employer relies on sex stereotypes to deny employment opportunities, it unquestionably acts “because of sex.”

That case was not the only instance in which an employer’s stereotype-based decision-making was found to violate Title VII. In fact, some of the earliest Title VII cases addressed and disapproved of the exclusion of women from employment opportunities because of the assumptions that women were not suited physically, emotionally, and temperamentally for some jobs due to “protective laws” restricting women from male-dominated fields and cultural attitudes about what jobs were appropriate for women.¹⁰ A few years following these decisions, the Supreme Court ruled that the use of physical criteria that disproportionately exclude women applicants violates Title VII if they are premised on the flawed assumption that “bigger is better” when it comes to dangerous jobs.¹¹

⁷ See e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985) (Title IX); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (Title VII).

⁸ See *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

⁹ *Price Waterhouse*, 490 U.S. 228.

¹⁰ See e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (women-only rule for flight attendants); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (policy against women working as switchmen on grounds that job required heavy lifting).

¹¹ See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

Title VII additionally prohibits discrimination against men¹² and against subsets of employees of a particular gender—for example, an employer violates Title VII when it discriminates against women with children, even if it is happy to employ childless women.¹³

B. Discrimination on the Basis of Gender Identity Is Unlawful Sex Discrimination

Over the last two decades, an overwhelming majority of federal courts addressing the issue have held that discrimination because a person is transgender constitutes unlawful sex discrimination under a variety of federal laws. Applying the logic of Supreme Court precedents in *Price Waterhouse* and *Oncale*, five circuit courts of appeals and dozens of district courts have held that anti-transgender bias violates federal sex nondiscrimination laws, including Title VII of the 1964 Civil Rights Act, Title IX of the Educational Amendments of 1972, Section 1557 of the Affordable Care Act, the Fair Housing Act, and the Equal Credit Opportunity Act. For example, in *Schwenk v. Hartford*, the Ninth Circuit relied on *Price Waterhouse* and *Oncale* in concluding that transgender people must be protected under the federal Gender Motivated Violence Act.¹⁴ The plaintiff in the case, Crystal Schwenk, a transgender prisoner, alleged that a guard targeted her for a physical assault because she was transgender. On appeal, the guard argued that sex nondiscrimination laws do not protect transgender people, relying on the Ninth Circuit’s 1977 decision in *Holloway v. Arthur Anderson*, where the court rejected a claim by a transgender plaintiff.¹⁵ The *Schwenk* court, however, stated that:

The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In *Price Waterhouse*..., the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed “to act like a woman”—that is, to conform to socially-constructed gender expectations. Thus, under *Price Waterhouse*, “sex” under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. ... Indeed, for purposes of [Title VII and similar laws], the terms “sex” and “gender” have become interchangeable.¹⁶

Similarly, in a series of cases beginning in 2004, the Sixth Circuit held that a firefighter, police officer, and funeral home employee each stated Title VII claims by alleging they were terminated because of being transgender.¹⁷ As in *Schwenk*, the Sixth Circuit in *Smith v. City of*

¹² See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983).

¹³ See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*) (mothers of preschool-aged children); *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 693 F.2d 589 (5th Cir. 1982) (Black women); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (unmarried female flight attendants).

¹⁴ 204 F.3d 1187 (9th Cir. 2000).

¹⁵ See 566 F.2d 659 (9th Cir. 1977).

¹⁶ *Id.* at 1201–02.

¹⁷ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *EEOC v. Harris Funeral Homes*, 884 F.3d 560, 566 (6th Cir. 2018). See also *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (denying stay pending appeal and pointing to “settled law” that anti-transgender discrimination is prohibited under sex discrimination law).

Salem held that “[t]he Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”¹⁸ The court explained:

By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to “sex” 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. ...

As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender [as assigned at birth]—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.¹⁹

The Sixth Circuit affirmed this holding a year later in *Barnes v. City of Cincinnati*,²⁰ and again a decade later in *Dodds v. Department of Education*.²¹

In its most recent ruling on the subject this year, the Sixth Circuit explained further:

First, it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex.... Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping.... An employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.... Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.²²

The Eleventh Circuit likewise recognized *Price Waterhouse* as holding that “Title VII barred not just discrimination because of biological sex, but also gender stereotyping — failing to act and appear according to expectations defined by gender.”²³ Further, it held in that discrimination based on failure to conform to sex stereotypes is sex-based discrimination, and that this necessarily meant that anti-transgender discrimination is inherently sex discrimination, since “a

¹⁸ *Smith*, 378 F.3d at 572.

¹⁹ *Id.* at 573, 575.

²⁰ 401 F.3d at 737.

²¹ 845 F.3d at 221.

²² *Harris Funeral Homes*, 884 F.3d at 575–77. See also *Parker v. Strawser Construction, Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018) (holding that termination of employee based on transgender status violates Title VII); *Mickens v. Gen. Elec. Co.*, No. 16-603 (W.D. Ky. Nov. 28, 2016) (same).

²³ *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”²⁴

The Seventh Circuit concurred when ruling in favor of a student who faced discrimination because of being transgender, holding that school policies that require a student to be treated in a manner “that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”²⁵ Likewise, the First Circuit followed the logic of *Price Waterhouse* in reaching the conclusion that discriminating against a person because they are transgender or do not conform to gender stereotypes is unlawful under sex discrimination laws.²⁶ Dozens of federal courts across the country have followed these precedents in affirming that federal sex discrimination laws—including Title VII of the Civil Rights Act, Title IX of the Educational Amendments of 1972, Section 1557 of the Affordable Care Act, and the Equal Protection Clause of the Constitution—prohibit anti-transgender discrimination.²⁷

C. Sexual Orientation Discrimination Is Unlawful Sex Discrimination

Applying a similar analysis to sexual orientation claims, federal and state courts and administrative agencies have affirmed that discrimination on the basis of sexual orientation is a form of sex discrimination. While the majority of cases to date involve employment claims under Title VII, a legal understanding that prohibitions on sex discrimination also prohibit discrimination on the basis of sexual orientation is transferable to all civil rights laws that prohibit sex discrimination, including the Fair Housing Act, the Jury Selection and Service Act, Title IX of the Education Amendments of 1972, and the Equal Credit Opportunity Act.

i. The EEOC Has Concluded That Sexual Orientation Discrimination Is Unlawful Sex Discrimination Under Title VII

In its 2015 decision in *Baldwin v. Foxx*, the EEOC ruled that a claim of sexual orientation discrimination is “necessarily” a claim of sex discrimination for the purposes of Title VII.²⁸ In *Baldwin*, the Commission found that an employer had unlawfully relied on “sex-based-

²⁴ *Id.*

²⁵ *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).

²⁶ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

²⁷ See e.g., *Smith v. City of Salem, Ohio*, 378 F.3d 566, 568 (6th Cir. 2004) (holding that a transgender fire department lieutenant who was fired for “expressing a more feminine appearance” could sue for sex discrimination under Title VII); *Whitaker*, 858 F.3d at 1049 (holding that discrimination against transgender student constitutes sex discrimination under Title IX and violates the Equal Protection Clause of the Constitution); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. Sept. 18, 2018) (holding that state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause of the Constitution).

²⁸ *Baldwin v. Foxx*, E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015).

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.”²⁹ Because of the inextricable way in which sexual orientation and sex are tied, they must be looked at through the same legal lens. In its holding, the EEOC outlined three theories through which sexual orientation discrimination can be seen as sex discrimination: the comparative, associational, and gender stereotyping theories.

The comparative method of evaluating a Title VII sexual-orientation-as-sex discrimination claim requires courts to consider whether the treatment of a person “but for that person's sex would be different.”³⁰ For example, if an employer treats a female employee who dates women differently than a male employee who dates women, the employer is engaging in disparate treatment because of the sex of the employee. This analysis considers whether an employee would receive different, better treatment “but for” his or her sex. If the answer is yes, under Title VII, this gives rise to a claim of unlawful sex discrimination.

Through the associational theory of sexual-orientation-as-sex discrimination, the Commission ruled that plaintiffs could be unlawfully discriminated against based on the sex of their intimate partner. The associational argument was originally used successfully to pursue claims of racial discrimination under Title VII for persons in interracial relationships.³¹ Employers were found to be in violation of Title VII prohibition on racial discrimination where they discriminated against an employee not just on the basis of the employee’s own race, but on the basis of the race of the employee’s intimate partner. Similarly, the EEOC found that “treating female employees with male partners more favorably than male employees with male partners” is done “because of sex” and therefore is sex discrimination prohibited by Title VII.³²

Finally, the EEOC adopted the gender stereotype theory of sexual-orientation-as-sex discrimination, building off a body of cases following the Supreme Court’s ruling in *Price Waterhouse v. Hopkins*.³³ Specifically, the Commission found 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.³⁴

²⁹ *Id.*

³⁰ *Id.* (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

³¹ See, e.g., *Parr v. Woodmen of World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986).

³² *Baldwin* at *6.

³³ 490 U.S. 228 (1989).

³⁴ *Baldwin* at *8.

ii. Federal Case Law Supports the EEOC's Interpretation of Title VII

A few federal district courts had begun to acknowledge that sexual orientation discrimination could give rise to a sex discrimination claim under Title VII prior to *Baldwin*,³⁵ and since that decision many more have concluded that Title VII provides protections against sexual orientation discrimination.³⁶ In addition, both the Second³⁷ and Seventh³⁸ 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 because of her sexual orientation. Hively brought a claim of sex discrimination against her employer under Title VII, 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. 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 all three theories affirmed in *Baldwin* to validate Hively's claim: the comparative method, the gender stereotype method, and the associational method. 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."³⁹ 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."⁴⁰ The court then concluded that "the line between a gender nonconformity claim and one based on sexual orientation ... does not exist at all."⁴¹ Finally, under the associational theory, the court found that "to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff

³⁵ See, e.g., *Koren v. Ohio Bell Telephone Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (holding that an employer's discrimination against man because he took his husband's last name upon marriage could be considered sex discrimination in violation of Title VII); see also *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (holding that pleading a claim of termination because of "nonconformity with male sex stereotypes" such as heterosexuality was enough to survive a Motion to Dismiss under Title VII).

³⁶ 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).

³⁷ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

³⁸ *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

³⁹ 853 F.3d at 345.

⁴⁰ *Id.* at 346.

⁴¹ *Id.*

associates, it also prohibits discrimination on the basis of ... the sex of the associate.”⁴² 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.”⁴³ 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.⁴⁴

iii. Statutory Codification of These Protections Is Essential

Although our federal courts have repeatedly affirmed that discrimination based on sexual orientation and gender identity are forms of sex discrimination, it is essential that Congress codify these in our nation’s civil rights statutes. Clear, explicit protections incorporated into the U.S. Code would ensure that the public is aware that discrimination against LGBTQ people is prohibited and empower individuals experiencing discrimination by providing them with stronger legal recourse. It would also serve as notice for entities covered under the Act so they can take proactive steps to avoid engaging in unlawful discrimination. This concrete clarification is also necessitated by confusion about the state of the law that has led to a narrow interpretation of sex discrimination across the federal government. Actions taken as a result of this narrow interpretation have undermined the health and well-being of our nation’s most vulnerable members and run counter to legal analysis and existing Supreme Court precedent regarding the interpretation of the scope of prohibited sex discrimination. The Equality Act is a critical tool to countering this dangerous and misguided narrative once and for all.

IV. The Equality Act Represents a Major Step Forward for Women’s Rights

Support of the Equality Act is key to the National Women’s Law Center’s mission as a women’s rights organization. First, the protections the Equality Act would provide are vital for LGBTQ women. For example, over one third of transgender women report losing a job because of their gender identity or expression, and studies have found that lesbian, bisexual, and queer women

⁴² *Id.* at 349.

⁴³ *Zarda*, 883 F.3d at 113.

⁴⁴ *Id.* at 114.

are 30 percent less likely to receive invitations to interview for jobs than their straight counterparts.⁴⁵ Lesbian and bisexual women are more likely to live in poverty than heterosexual women, and female same-sex couples typically have lower incomes than married different-sex couples.⁴⁶ Transgender women of color also face discrimination in many contexts including experience pervasive housing discrimination--with 31 percent of Black transgender women and 27% of Native transgender women reporting being denied a home or apartment in the past year because they were transgender.⁴⁷ Making clear that protections against sex discrimination on the job, in housing, and elsewhere include protections against sexual orientation or gender identity discrimination will be transformative for LGBTQ women specifically. These protections also help ensure that women who depart from gender stereotypes and gendered expectations will not face discrimination or harassment based on, for example, a perception that they are part of the LGBTQ community, regardless of their gender orientation or sexual orientation. It can be difficult or impossible to definitively parse whether harassment or other discrimination is motivated by gender stereotypes or by perceived sexual orientation or gender identity; the Equality Act will provide broad protections against such discrimination without the need for such determinations.

Moreover, the Equality Act would provide groundbreaking new civil rights protections for all women, regardless of sexual orientation or transgender status, by closing longstanding gaps in federal law and amending Titles II and VI of the Civil Rights Act of 1964 to for the first time prohibit discrimination on the basis of sex (including pregnancy) in public spaces and services and in all federally-funded programs and activities. These protections against sex discrimination are long overdue.

A. Prohibition of Sex Discrimination in Public Accommodations

By amending Title II to add a prohibition of discrimination on the basis of sex, the Equality Act would ensure that for the first time federal law reaches discrimination against women in hotels, restaurants, theaters and sports arenas, stores, hair salons, taxi services, airline services, to name only a few examples. For example, under the Equality Act, women would have new legal protections against sex-based harassment in hotels or restaurants, or on trains, airplanes, and subways, and purveyors of these establishments and services would be on notice that they must institute policies and systems in place to address sex-based harassment of customers. These protections are sorely needed. For example, a 2017 survey of flight attendants found

⁴⁵ See *Paying an Unfair Price: The Financial Penalty for LGBT Women in America*, MOVEMENT ADVANCEMENT PROJECT AND CENTER FOR AMERICAN PROGRESS, March 2015, <http://www.lgbtmap.org/policy-and-issue-analysis/unfair-price-lgbt-women>.

⁴⁶ *Id.* at 5, 14.

⁴⁷ S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, 2016.

that 20 percent had received a report of passenger-on-passenger sexual assault while working on a flight, but that flight attendants typically have no training on how to respond in such situations.⁴⁸ In addition, female solo travelers, of all sexual orientations and gender identities, frequently confront harassment, but do not consistently have access to security measures or experience responsiveness from tourism industry employees.⁴⁹ The Equality Act would help change this by prohibiting discrimination on the basis of sex in these spaces.

By prohibiting sex discrimination in public places and services, the Equality Act would also prohibit sex-based price discrimination. For example, studies have shown that car dealers typically quote lower prices to male customers than female customers for the same cars,⁵⁰ as do auto mechanics when customers do not indicate an expected price.⁵¹ Under the Equality Act, service providers and retailers such as contractors, mechanics, and car dealerships would not be permitted to charge women more for the same work or the same product simply because of their sex.

The Equality Act's prohibition of sex discrimination in Title II would also provide new protection against breastfeeding parents being excluded from public spaces, which remains a persistent problem.⁵² Harassment and discrimination based on lactation constitutes sex discrimination and would not be permissible in covered public places.⁵³ The Act would also provide additional protections for women who confront a pharmacy's refusal to fill prescriptions for contraception. When pharmacies provide other medications but refuse to provide prescription

⁴⁸ Karl Paul, *After man is arrested for groping passenger, women speak about #MeToo at 35,000 Feet*, MARKETWATCH, Oct. 25, 2018, <https://www.marketwatch.com/story/the-metoo-movement-has-now-reached-35000-feet-2018-05-23>.

⁴⁹ See generally Lucy Vlahakis, *Fly? #MeToo? Two out of Five Women Report Sexual Harassment When Traveling Solo*, MOWER, Feb. 8, 2018, <https://www.mower.com/insights/fly-metoo-two-out-of-five-women-report-sexual-harassment-when-traveling-solo/>; Alex Temblador, *Travel Safety Expert Shares Her Best Safety Tips for Women Travelers*, TRAVEL PULSE, March 5, 2019, <https://www.travelpulse.com/news/features/travel-safety-expert-shares-her-best-safety-tips-for-women-travelers.html>.

⁵⁰ Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, FACULTY SCHOLARSHIP SERIES, 1995, https://digitalcommons.law.yale.edu/fss_papers/1523/.

⁵¹ Meghan R. Busse et al., *Repairing the Damage: The Effect of Price Expectations on Auto-Repair Price Quotes*, NATIONAL BUREAU OF ECONOMIC RESEARCH, 2013, <https://www.nber.org/papers/w19154>.

⁵² See e.g., Trishna Doroski, *Nursing Mother Asked to Leave a Hospital Waiting Room for Breastfeeding*, BABYGAGA, March 29, 2019, <https://www.babygaga.com/mom-kicked-out-hospital-waiting-room-breastfeeding/>; *Breastfeeding Mother Asked To Leave Chick-Fil-A Restaurant*, WNEM, Jan. 15, 2018, https://www.wnem.com/news/breastfeeding-mother-asked-to-leave-chick-fil-a-restaurant/article_dc4e9ba4-709f-5a03-921d-7195c6be1363.html; Amber Jayanth, *Water Park Staff Told Breastfeeding Mom to Cover Up or Leave, Woman Says*, FOX 19, Jul. 6, 2018, <http://www.fox19.com/story/38586977/silverlake-water-park-in-erlanger-tells-breastfeeding-mom-to-cover-up-or-leave/>.

⁵³ See generally, e.g., *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (lactation is a related medical condition of pregnancy for purposes of Title VII, and an adverse employment action motivated by the fact that a woman is lactating constitutes sex discrimination).

birth control or emergency contraception, that is sex discrimination.⁵⁴ There have been instances in at least 26 states of women being refused birth control at the pharmacy, with some pharmacists even refusing to transfer a prescription to another pharmacist or to refer her to another pharmacy.⁵⁵

B. Prohibition of Sex Discrimination in Federally Funded Programs and Activities

While current federal law prohibits sex discrimination in particular types of federally funded programs--most significantly, education programs and activities⁵⁶ and health care programs and activities⁵⁷--no comprehensive protection exists against sex discrimination in federally funded programs. The Equality Act would change this, recognizing that federal dollars should never support sex discrimination.

For example, under the Equality Act, recipients of federal funding would be prohibited from discriminating against women or women-owned businesses in making contracting decisions.⁵⁸ Expanding Title VI's protections to reach discrimination on the basis of sex would also ensure new protections against sex discrimination and sex-based harassment are available for individuals who perform work in federally funded programs or activities as independent contractors rather than as employees. While Title VII prohibits sex-based harassment and other forms of sex discrimination against employees, workers who are not properly classified as employees frequently lack any such protections under current law. The Equality Act would change this in federally funded programs and activities, ensuring that, for example, a consultant

⁵⁴ See generally, e.g., Commission Decision on Coverage of Contraception (Dec. 14, 2000) (because prescription contraceptives are available only for women, employer's refusal to offer insurance coverage for them is a sex-based exclusion), available at <https://www.eeoc.gov/policy/docs/decision-contraception.html>; *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) ("[A]s only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion."); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (exclusion of prescription contraceptives from employer's generally comprehensive prescription drug plan violated PDA).

⁵⁵ *Pharmacy Refusals 101*, NWLC, Dec. 28, 2017, <https://nwlc.org/resources/pharmacy-refusals-101/>.

⁵⁶ 20 U.S.C. § 1681 et seq.

⁵⁷ 42 U.S.C. § 18116.

⁵⁸ See, e.g., *Carnell Const. Corp. v. Danville Redev. and Hous. Auth.*, 745 F.3d 703, 715 (4th Cir. 2014) (contractor has Title VI standing because its president and sole shareholder is African-American, it was eligible for consideration as a contractor on a federally funded public project, and it alleged that defendants discriminated against it based on race); *Jacobson v. Delta Airlines*, 742 F.2d 1202, 1209 (9th Cir. 1984) (holding a contractor, corporate or individual, may be deemed a "person" and covered by Title VI); U.S. Department of Justice, Title VI Legal Manual, at <https://www.justice.gov/crt/fcs/T6manual5> ("Once an entity receives federal financial assistance, jurisdiction under Title VI attaches and if the recipient's program includes selection of contractors to carry out its various functions, then Title VI covers that selection process.").

on a federally funded project who was sexually harassed by the director of that project would have a meaningful legal remedy.⁵⁹

Broadly prohibiting sex discrimination in federally funded programs would also provide new tools to address systematically inadequate responses to sexual assault or intimate partner violence by federally funded law enforcement agencies. For example, the Equality Act would provide new protection against a federally funded police department's systematic failure to test rape kits.⁶⁰

In protecting against sex discrimination, including discrimination on the basis of pregnancy, childbirth, and related medical conditions, the Equality Act would also ensure that federally funded entities making other forms of healthcare and health information available could not discriminate by refusing to provide individuals with reproductive health care or information.⁶¹ For example, the Equality Act would prohibit an organization that received federal funding to provide services to trafficking victims, including health care services, from refusing to provide trafficking victims access to reproductive health care. This would help eliminate barriers to comprehensive health care for those in the care of or seeking assistance from a federally-funded program.

C. The Equality Act Promotes Safety and Opportunity for Women and Girls

For all the reasons set out above, the Equality Act represents a major step forward for safety, equity, and dignity for all women and girls. Its requirement that transgender women and girls be included in gender-specific spaces and programs forwards these values, and the National Women's Law Center rejects any suggestion that cisgender women and girls are served by the exclusion of transgender women and girls, whether from bathrooms and locker rooms, from women's sports programs, or otherwise from our public and civic life. Our country has a long and unfortunate history of justifying sex discrimination and curtailment of women's liberty to make their own decisions about their lives through assertions that such actions are necessary to protect women and girls.⁶² Just as this stereotype-driven rationale falls short as a legal or moral

⁵⁹ See *United States v. Harris Methodist Ft. Worth*, 970 F.2d 94, 97 (5th Cir. 1992) (holding that physicians who were neither beneficiaries nor employees of a federally funded hospital were protected by Title VI from race discrimination in admitting privileges by the hospital).

⁶⁰ See generally Meaghan Ybos, *No Backlog: Why The Epidemic of Untested Rape Kits is not a Symbol of Insufficient Police Budgets But Instead a Failure to Investigate Rape*, THE APPEAL, Oct. 11, 2017, <https://theappeal.org/no-backlog-why-the-epidemic-of-untested-rape-kits-is-not-a-symbol-of-insufficient-police-budgets-but-instead-a-failure-to-investigate-rape/>.

⁶¹ Thus, for example, Title VII's protection against sex discrimination requires employers to make maternity care coverage available on the same terms as they make other health coverage available. 29 C.F.R. § 1604.10(b).

⁶² See generally *Muller v. Oregon*, 208 U.S. 412 (1908) (justifying law limiting women's ability to work overtime by holding that State had a valid and overriding interest in women-protective laws); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding law prohibiting women from working in bars based on conclusion that such laws were

justification for excluding women from opportunities or restricting their autonomy, it also fails as a rationale for justifying exclusion of and discrimination against transgender women and girls in sports⁶³ or any other context.

Allowing discrimination and exclusion based on a determination that an individual is insufficiently feminine threatens harm to any woman or girl who departs from traditional gender stereotypes.⁶⁴ By rejecting such gender policing, the Equality Act protects the rights of all women and girls.

Moreover, nondiscrimination laws and policies protecting transgender people have existed for years in many states and localities around the country, and experience has shown they have protected transgender people from discrimination without harming anyone else.⁶⁵

While some people have more recently become aware of transgender people and the issues they face, there is nothing “novel” or “untested” about the protections the Equality Act creates for this vulnerable population. Over the past two decades, states and municipalities have successfully implemented prohibitions on gender identity discrimination and trans inclusive protections, ensuring that all residents are treated equally under the law.

Twenty-one states, the District of Columbia, and nearly 200 local governments, large and small, already prohibit employment and housing discrimination based on gender identity. Twenty states prohibit discrimination in public accommodations on the basis of gender identity.⁶⁶ Many of these laws have been around for years, or even decades – Minnesota adopted its

protective), *disapproved of by Craig v. Boren*, 429 U.S. 190 (1976). In *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), the Court addressed these protective pretexts: “Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” *Id.* at 684; *see also Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (“[T]he argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.”); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (holding that abortion laws pretextually justified as protections for women’s health and safety violated women’s liberty).

⁶³ Notably, the National Women’s Law Center, the Women’s Sports Foundation and other women’s rights organizations have indicated their strong and public support for the full inclusion of transgender people in athletics and have rejected the suggestion that cisgender women and girls benefit from the exclusion of women and girls who happen to be transgender.

⁶⁴ *See generally Price Waterhouse*, 490 U.S. 228.

⁶⁵ For example, in 2016, after North Carolina passed HB2 barring transgender people from single-sex spaces like restrooms, over 250 domestic violence and sexual assault organizations signed onto a statement rejecting the premise that transgender people’s presence in restrooms threatens the safety of others. The organizations explained of non-discrimination laws, “These laws have protected people from discrimination without creating harm.” *See* https://www.lambdalegal.org/blog/20160421_sadv.

⁶⁶ *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, June 11, 2018, <https://www.hrc.org/state-maps/public-accomodations>.

protections for transgender people more than 25 years ago.⁶⁷ The Equality Act's definition of gender identity closely tracks these many state and local laws.

V. Freedom of Religion Is Protected Under the Equality Act

A. Protections Within Existing Civil Rights Laws

Freedom of religion is already protected by the Constitution and through existing federal civil rights statutes. Currently religious organizations and people of faith benefit from a set of thoughtful exemptions from federal civil rights law that amply protect religious actors from government intrusion. 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, as described further below.

i. Title II

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 for example, spaghetti dinners, would not be considered places 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 any marriage ceremony.

ii. Title VII

Title VII of the Civil Rights Act 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 exemption extends to schools, colleges, and universities that are supported, owned, controlled or managed by a religious organization.⁶⁸

Title VII also requires businesses to provide accommodations to employees provided it does not present an undue hardship. Employees will continue to be able to seek religious

⁶⁷ Emma Margolin, *How Minneapolis became the first city in the country to pass trans protections*, MSNBC, June 3, 2016, <http://www.msnbc.com/msnbc/how-minneapolis-became-the-first-city-the-country-pass-trans-protections>.

⁶⁸ 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 2000e-2(e)(2).

accommodations in the workplace, such as seeking time off to attend religious service, receive breaks for daily prayers, or wear a religious head covering.⁶⁹ Religious employees may also be reassigned to different tasks when an assigned task conflicts with religious principles such as production of weapons of war.⁷⁰ The Equality Act would maintain these protections.

iii. 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.⁷¹ 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.⁷² 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.

B. 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. This does not eliminate RFRA, but rather limits its reach to ensure that it cannot be used as a defense to civil rights law violations.

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.⁷³ RFRA was supported by a broad coalition of organizations including many in the civil rights community, who welcomed the law as an important shield for people of faith from majority rule.

Despite this intent, individuals and businesses have worked to distort RFRA into a blank check to discriminate or as a way to impose their religious beliefs on others. In the 2014 case *Burwell v. Hobby Lobby Stores*, a narrow majority of the U.S. Supreme Court allowed RFRA to be used to

⁶⁹ See e.g., *EEOC v Alamo Rent -A-Car, LLC; ANC Rental Corporation*, CIV 02 1908 PHX ROS available at <https://www.eeoc.gov/eeoc/newsroom/release/5-30-06.cfm>; See generally *What You Should Know About Workplace Religious Accommodation*, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/workplace_religious_accommodation.cfm.

⁷⁰ See e.g., *EEOC v. Dresser Rand Co.*, 04-CV-6300, W.D.N.Y. available at <https://www.eeoc.gov/eeoc/newsroom/release/11-8-11b.cfm>; See generally *What You Should Know About Workplace Religious Accommodation*, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/workplace_religious_accommodation.cfm.

⁷¹ 42 U.S.C. § 3607 (a).

⁷² 42 U.S.C. § 3603 (b).

⁷³ 42 U.S.C. § 2000bb-1 (b).

discriminate against others and take insurance coverage of contraceptives away from women.⁷⁴ In dissent, Justice Ginsburg expressed her concern that decision could be taken still further, and lead to RFRA being used to permit discrimination. 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.⁷⁵

Although the Sixth Circuit overturned the district court decision in *Harris Funeral Homes* in favor of the transgender employee, the case has been appealed to the Supreme Court. While RFRA, if applied as originally intended, should not be able to be used as a defense to discriminate, the district court decision in *EEOC v. R.G. & G.R. Harris Funeral Homes* illustrates the importance of making this intention explicit. 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 the civil rights laws amended by the Equality Act, restoring the intention of RFRA to protect religious freedom without allowing harm to others. This would not limit the use of RFRA in contexts outside of federal nondiscrimination laws.

C. 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.

VI. Conclusion

For all the reasons outlined above, we urge Congress to pass the Equality Act.

⁷⁴ 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 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. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁷⁵ *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018).