

**TESTIMONY OF KENJI YOSHINO
CHIEF JUSTICE EARL WARREN PROFESSOR OF CONSTITUTIONAL LAW**

NEW YORK UNIVERSITY SCHOOL OF LAW

**BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

**HEARING ON THE EQUALITY ACT OF 2019
APRIL 2, 2019**

Introduction

Thank you for the opportunity to appear before you in these hearings on the Equality Act, House Bill 5. My name is Kenji Yoshino. I am the Chief Justice Earl Warren Professor of Constitutional Law at New York University School of Law and serve as Director of the Center for Diversity, Inclusion, and Belonging. Prior to my appointment at New York University, I was the inaugural Guido Calabresi Professor of Law at Yale Law School, where I taught for ten years and served as Deputy Dean.

In this testimony in support of the Act, I seek to make six points. First, I underscore the grim reality that discrimination against LGBT individuals is a continuing national challenge. Second, I demonstrate that Congress has ample authority to promulgate the Act. Third, I maintain that the Act—building on legislation in the several states—is an exemplar of American principles of federalism. Fourth, I show that the Act codifies the view of the majority of the federal appellate courts that the prohibition against sex discrimination includes protections against discrimination on the basis of sexual orientation and gender identity. Fifth, I note that the Act carefully maintains many protections for freedom of religion in the context of advancing civil equality for LGBT individuals. Sixth and finally, I contend that the Act is not overbroad in protecting conduct alongside status.

I. Discrimination against LGBT individuals is a continuing national challenge.

Since the Stonewall Riots inaugurated the modern LGBT-rights movement fifty years ago, our society has seen significant gains in recognizing the dignity and humanity of the LGBT community—including the 2015 Supreme Court decision allowing same-sex couples the constitutional right to marry.¹ Nevertheless, the LGBT community continues to face serious discrimination in many areas of life, including in employment, in housing, by businesses, in credit lending, in the criminal justice system, and in education. In some twenty-nine states, no state laws explicitly prohibit discrimination in employment and housing on the basis of sexual orientation and/or gender identity.²

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

² *What Is the Equality Act?*, HUMAN RIGHTS CAMPAIGN, March 12, 2019, https://assets2.hrc.org/files/assets/resources/EqualityAct_TwoPager_Coalition.pdf.

Among high-profile employers, conditions have improved over the last few decades,³ but this does not tell the whole story. According to a 2013 Pew Research Center survey, 21% of LGBT Americans reported being treated unfairly by an employer in hiring, pay, or promotions.⁴ The 2008 General Social Survey, conducted by the National Opinion Research Center at the University of Chicago, posted much higher numbers, finding that 42% of lesbian, gay, and bisexual individuals had experienced employment discrimination on the basis of sexual orientation during their lifetimes, and 27% had experienced it in the prior five years.⁵ Of those who were open in the workplace about their sexual orientation, the numbers were yet higher: 56% and 38%, respectively.⁶ Some 35% reported having experienced harassment at work.⁷

These problems affect the transgender community even more acutely. The 2015 National Center for Transgender Equality survey of over 27,000 transgender people reported some sobering findings.⁸ In the year prior to completing the survey, 30% of respondents who had a job reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace due to their gender identity.⁹ The unemployment rate for transgender people was three times the national average.¹⁰ The rate of homeownership was only 16% compared to 63% in the overall national population, and nearly 30% of respondents reported having experienced homelessness at some point in their lifetime.¹¹ The impact of discrimination in employment, housing, and other areas was significant: some 39% reported experiencing serious psychological distress in the month before the survey—eight times the proportion of the overall population—and 40% had attempted suicide in their lifetime—nearly *nine* times the attempted suicide rate in the overall population.¹²

Moreover, the burden of discrimination does not just fall on the victims of the most egregious rights violations. Researchers have found that prejudice and discrimination in these areas of life create “minority stress” for all members of the group.¹³ Minority stress from discrimination can lead to physical and mental health outcome disparities for all sexual minorities, not just for those who report discrimination.¹⁴

³ Currently, 93% of the Fortune 500 include sexual orientation in their policies and 85% include gender identity. *See* HUMAN RIGHTS CAMPAIGN FOUNDATION, CORPORATE EQUALITY INDEX 2019, at 6, <https://assets2.hrc.org/files/assets/resources/CEI-2019-FullReport.pdf>.

⁴ PEW RESEARCH CENTER, A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 1 (June 13, 2013), http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf.

⁵ *See* BRAD SEARS & CHRISTY MALLORY, DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 4 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf>.

⁶ *Id.*

⁷ *Id.*

⁸ SANDY E. JAMES ET. AL, NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 4 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.*

¹³ *See* Michael P. Dentato, *The Minority Stress Perspective*, Psychology & AIDS Exchange Newsletter, April 2012, <https://www.apa.org/pi/aids/resources/exchange/2012/04/minority-stress> (canvassing the literature).

¹⁴ *Id.*; *see also* Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674 (2009); INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 211-22 (2011).

Last term, the Supreme Court held: “Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.”¹⁵ By passing the Equality Act, Congress will bring the nation closer to realizing this promise.

II. Congress has the power to promulgate the Equality Act.

The Commerce Clause of the U.S. Constitution empowers Congress “to regulate Commerce with foreign Nations, and among the several States.”¹⁶ This Clause has long been a significant source of Congressional power. Congress’s commerce power “is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.”¹⁷

Because discrimination against LGBT people substantially affects interstate commerce, the Commerce Clause authorizes Congress to pass the Equality Act. Indeed, the Supreme Court twice upheld the Civil Rights Act of 1964—one of the statutes the Equality Act amends—on these grounds.

In *Heart of Atlanta Motel v. United States*, the Court held that the Commerce Clause empowered Congress to ban racial discrimination even by private actors such as a small hotel business.¹⁸ The Court noted that “the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”¹⁹ Here, discrimination in hotel accommodations substantially affected—and impeded—interstate travel. In *Heart of Atlanta*, the fact that the Civil Rights Act addressed a *moral* wrong “[did] not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.”²⁰

Similarly, in *Katzenbach v. McClung*, the Court held that the commerce power allowed Congress to regulate the behavior of a small, family-owned barbeque restaurant.²¹ Again, the Court noted that racial discrimination in restaurants had a “direct and adverse effect on the free flow of interstate commerce.”²²

In neither case was it relevant that the hotel or the restaurant’s interstate activity was modest. As the Court explained in *Katzenbach*, such activity, when “taken together with that of many others similarly situated, . . . is far from trivial.”²³

¹⁵ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

¹⁶ U.S. CONST. art. I, § 8, cl. 3.

¹⁷ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (citing *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).

¹⁸ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

¹⁹ *Id.* at 258.

²⁰ *Id.* at 257.

²¹ *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

²² *Id.* at 304. The Court noted that the restaurant bought \$150,000 of food, half of which was from local supplier who originally procured it out of state. *Id.* at 296.

²³ *Id.* at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)).

Under *Heart of Atlanta* and *Katzenbach*, the Equality Act is within Congress’s commerce power. Just as racial discrimination has a significant effect on interstate commerce, so too does discrimination against LGBT people.

Later cases in which the Supreme Court struck down Congressional laws as beyond the scope of the commerce power are not to the contrary. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act because the possession of guns near schools was in “no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”²⁴ Given that it deemed the activity not to be economic in nature, the Court did not permit its aggregate effects on interstate commerce to be considered.²⁵ It then determined that the activity, taken alone, had too attenuated a link to interstate commerce to be regulated under the commerce power. It characterized the link as follows: the possession of guns would lead to a degraded educational environment, which would in turn lead graduates to become less productive members of the workforce, which would in turn affect interstate commerce.²⁶ In *United States v. Morrison*, the Court invalidated part of the Violence Against Women Act on similar grounds, holding that the link between gender-motivated violence and interstate commerce required a “but-for causal chain” of very “attenuated effect[s].”²⁷ In both *Lopez* and *Morrison*, the Court also observed that no jurisdictional element restricted the sweep of the statute to the reach of the commerce power.²⁸

In contrast, as *Heart of Atlanta* and *Katzenbach* explained, private businesses are (by definition) engaged in economic activity. Even under *Lopez*, regulated activity can be aggregated if it is economic in nature.²⁹ For this reason, discrimination in the operation of those businesses substantially affects interstate commerce. Moreover, the Equality Act contains a jurisdictional element specifying that the term “establishment . . . shall be construed to include an individual whose operations affect commerce and who is a provider of a good, service, or program.”³⁰ By its terms, the ambit of the Equality Act is limited to entities that affect commerce.

The Court also held in *National Federation of Independent Business v. Sebelius* that the Commerce Clause did not afford the power to enact the individual mandate of the Affordable Care Act.³¹ If *Lopez* and *Morrison* focused on the distinction between economic and non-economic activity, the *Sebelius* Court focused the distinction between activity and inactivity. *Sebelius* held that Congress could not regulate what the Court deemed to be inactivity (non-participation in the insurance market) through the Commerce Clause. As the Equality Act clearly regulates only activity (discrimination against LGBT individuals), it remains unaffected by *Sebelius*.

Longstanding precedents establish that Congress has the power under the Commerce Clause to pass the Equality Act in its entirety.

²⁴ *United States v. Lopez*, 514 U.S. 549, 567 (1995).

²⁵ *Id.*

²⁶ *Id.* at 565.

²⁷ *United States v. Morrison*, 529 U.S. 598, 615 (2000).

²⁸ *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 611–12.

²⁹ *Lopez*, 514 U.S. at 556 (explaining that an economic contribution can be aggregated when, “taken together with that of many others similarly situated, [it] is far from trivial” (quoting *Wickard v. Filburn*, 317 U.S. 111, 128 (1942))).

³⁰ Equality Act, H.R. 5, pg. 13, 116th Cong. (2019).

³¹ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557–58 (2012). The majority of the Court nonetheless upheld the individual mandate on the basis that it fell under Congress’s Taxing Power. *See id.* at 574.

Another basis for Congress’s power to enact the Equality Act is Section 5 of the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”³² Under established precedent, courts apply intermediate scrutiny to discrimination by state actors on the basis of sex.³³ Section 5 states that Congress “shall have the power to enforce, by appropriate legislation, the provisions of this article.”³⁴ The Court has held that Congress can pass laws to enforce any violation of the Equal Protection or Due Process Clauses in a “congruent and proportional” manner.³⁵

In *Nevada v. Hibbs*, the Court held that, because Congress had identified many instances of sex discrimination—and because sex discrimination received heightened scrutiny—the family-care provision of the Family Medical Leave Act (FMLA) was permitted under Section 5.³⁶ To be sure, the Court later struck down the FMLA’s self-care provision, but only because the Court concluded that Congress’s purpose in enacting the self-care provision was “unrelated” to sex discrimination.³⁷ The Equality Act directly addresses sex discrimination on the basis of sexual orientation and gender identity and documents many examples of such discrimination in employment, education, housing, and criminal justice.³⁸ Thus, a court is highly unlikely to conclude that any of its provisions are “unrelated” to sex discrimination.

Additionally, many courts have held that governmental discrimination on the basis of sexual orientation and/or gender identity require heightened scrutiny under the equal protection guarantees of the Fifth and Fourteenth Amendments not only as a type of sex discrimination, but also because they are themselves suspect classifications. Two circuit courts have held that sexual orientation is a quasi-suspect class and that heightened scrutiny under the Equal Protection Clause must therefore be applied.³⁹ Similarly, numerous district courts have held that transgender status is a quasi-suspect class that merits heightened scrutiny.⁴⁰ Because these courts held that these violations are subject to heightened scrutiny, they allow Congress expansive

³² U.S. CONST. amend. XIV, § 1.

³³ See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (explaining that the State must show an “exceedingly persuasive” justification and that the classification “serves important governmental objectives and that the discriminatory means employed are substantially related to . . . those objectives” (internal citations omitted)); see also *Craig v. Boren*, 429 U.S. 190, 197–99 (1976).

³⁴ U.S. CONST. amend. XIV, § 5.

³⁵ *Boerne v. Flores*, 521 U.S. 507, 520 (1997).

³⁶ *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (holding that Section 5 authorized Congress to address subtle discrimination stemming from “employers’ stereotypical views about women’s commitment to work and their value as employees”).

³⁷ *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 38 (2012).

³⁸ See also Ryan Thoreson, “*All We Want is Equality*”, HUMAN RIGHTS WATCH (Feb. 19, 2018), <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people> (describing “religious exemption” laws passed by eight state legislatures and proposed in many more). These laws permit discrimination against LGBT people in adoption/foster care services, mental/physical health care, and/or counseling. *Id.* The religious exemption in Mississippi’s HB 1523 is particularly broad. *Id.*

³⁹ *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff’d on other grounds*, 570 U.S. 744 (2013).

⁴⁰ See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

power to legislate in a way that is “congruent and proportional.”⁴¹ Additionally, some courts have held that discrimination on the basis of sexual orientation or gender identity violate other rights such as the right to privacy in the Due Process Clause.⁴² Violations of other constitutional rights—including the Eighth Amendment right to be free from cruel and unusual punishment⁴³—may also be addressed by Congress, as they are incorporated against the states through the Due Process Clause of the Fourteenth Amendment. Still other courts have held that discrimination is so irrational that it fails even rational basis review.⁴⁴ All of these Fourteenth Amendment violations form an independent part of the record that Congress may consider in legislating under its Section 5 powers.

Because the Equality Act’s provisions that apply to state actors are authorized under its Section 5 powers, the Act can pierce sovereign immunity. It is well settled that “Congress may authorize private suits against nonconsenting States pursuant to its enforcement power”⁴⁵ provided that Congress makes its intention “unmistakably clear in the language of the statute.”⁴⁶ As noted, the Equality Act is a proper exercise of § 5 power. Moreover, the text of Title VII and the other statutory provisions that the Equality Act amends clearly state an intention to abrogate sovereign immunity.⁴⁷ For these reasons, the Act can pierce sovereign immunity.

III. The Equality Act shows the benefits of “our federalism” at work.

Currently, twenty-one states and the District of Columbia have enacted equivalents of most key provisions of the Equality Act.⁴⁸ These twenty-two jurisdictions have explicit protections against discrimination in employment or housing on the basis of sexual orientation or gender identity. All but one of these twenty-two jurisdictions also provide explicit protections against discrimination in public accommodations on the basis of sexual orientation or gender identity, with one additional state forbidding public accommodations discrimination solely on the basis of sexual orientation.⁴⁹ Sixteen of those jurisdictions also explicitly prohibit discrimination

⁴¹ *Boerne v. Flores*, 521 U.S. 507, 520 (1997).

⁴² *See, e.g., Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (holding that a state policy disallowing gender marker changes on driver’s licenses violated the substantive due process right to privacy of transgender people).

⁴³ *See, e.g., Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (holding that a state statute banning treatment for inmates with gender dysphoria violated the Eighth and Fourteenth Amendments).

⁴⁴ *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014).

⁴⁵ *Alden v. Maine*, 527 U.S. 706, 756 (1999).

⁴⁶ *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

⁴⁷ 42 U.S.C. § 2000e (2012) (defining “person” under the Act to include “governments, governmental agencies, [and] political subdivisions”).

⁴⁸ *What Is the Equality Act?*, HUMAN RIGHTS CAMPAIGN, March 12, 2019, https://assets2.hrc.org/files/assets/resources/EqualityAct_TwoPager_Coalition.pdf. Note that as these state laws differ from the Equality Act, the number twenty-one quoted here is not an exact count. The Transgender Law Center counts 17 states plus the District of Columbia with a “high overall policy tally.” *See Equality Maps: Overall Policy Tally*, TRANSGENDER LAW CENTER, <https://transgenderlawcenter.org/equalitymap> (last visited March 31, 2019).

⁴⁹ *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/public-accommodations> (last visited March 31, 2019). Utah is the one exception that has employment and housing protections but no public accommodations protections, and Wisconsin is the state protecting discrimination in public accommodations only on the basis of sexual orientation.

in education on the basis of sexual orientation or gender identity, with another two prohibiting discrimination solely on the basis of sexual orientation.⁵⁰

A few additional states explicitly provide LGBT people protection against discrimination in more conscribed contexts.⁵¹ Specifically, an additional four states bar discrimination on the basis of both sexual orientation and gender identity only in *public* employment.⁵² Beyond those, eight states bar discrimination on the basis of sexual orientation but not gender identity, and only in public employment.⁵³

Opponents of the Equality Act have contended that there will be many negative consequences to its passage. A letter from the United Conference of Catholic Bishops maintains that the Equality Act would regulate thought, belief, and speech, retract religious freedom, hinder quality health care, endanger privacy, threaten charitable services, and exclude people from various career paths and livelihoods.⁵⁴ Opponents of protections for transgender people have argued that predators would use them to infringe on the privacy rights of young women.⁵⁵

These arguments and arguments like them have been raised in response to every gain in equality for LGBT people. Opponents of gay rights argued that pedophilia and predatory behavior would result from gays, lesbians, and bisexuals teaching in schools, getting married, and adopting children.⁵⁶ Concerns about privacy in showers and locker rooms were also used to justify the military's Don't Ask Don't Tell policy.⁵⁷ Yet once LGBT people gained rights in each of these arenas, these objections were shown to be baseless.⁵⁸

Moreover, if we examine the twenty-two jurisdictions with cognates of the Equality Act, we do not see the threatened parade of horrors. Some states have had these laws for decades. A recent study comparing jurisdictions in Massachusetts with different ordinances regarding whether people may use the restroom or locker room of their gender identity found that assault, sex crimes, and voyeurism did not increase in jurisdictions where gender identity was

⁵⁰ *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/education> (last visited March 31, 2019).

⁵¹ *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/employment> (last visited March 31, 2019).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Letter to Representative, U.S. Conf. of Catholic Bishops, March 20, 2019, <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/upload/Equality-Act-Letter-to-Congress-House-1.pdf>

⁵⁵ See, e.g., *340,000 Pledge to Boycott Target over Transgender Bathroom Policy*, FOX NEWS INSIDER (April 24, 2016), <https://insider.foxnews.com/2016/04/24/340000-sign-pledge-boycott-target-over-transgender-bathroom-statement> (noting that the American Family Association, the conservative Christian group that started the boycott, alleged that “[t]his means a man can simply say he ‘feels like a woman today’ and enter the women’s restroom.”).

⁵⁶ Eugene Scott, *How Correlating Homosexuality to Child Molestation Influenced Politics*, WASH. POST (Oct. 30, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/10/30/how-correlating-homosexuality-to-child-molestation-influenced-politics/>.

⁵⁷ Eric Schmitt, *Military Cites Wide Range of Reasons for Its Gay Ban*, N.Y. TIMES (Jan. 27, 1993), <https://www.nytimes.com/1993/01/27/us/military-cites-wide-range-of-reasons-for-its-gay-ban.html> (quoting a Navy spokesman’s claim that heterosexuals who showered with gay men would have an “uncomfortable feeling of someone watching”).

⁵⁸ See, e.g., Elisabeth Bumiller, *One Year Later, Military Says Gay Policy Is Working*, N.Y. TIMES (Sept. 19, 2012), <https://www.nytimes.com/2012/09/20/us/dont-ask-dont-tell-anniversary-passes-with-little-note.html> (explaining that military “recruiting, retention and overall morale have not been affected” and that “[n]one of the dire predictions of opponents” have occurred).

protected.⁵⁹ This study did not locate a single example of a transgender perpetrator of one of these crimes. Nor did it find a single example of people pretending to be transgender committing these crimes.⁶⁰ This should not be surprising: whether gender identity is protected under antidiscrimination law or not, criminals are still subject to prosecution for whatever crimes they commit.

As Justice Brandeis famously said, states are “laboratories of experimentation.”⁶¹ We have had ample time to see these experiments at work, and they have been successful. Millions of LGBT Americans have gained dignitary rights. At the same time, the slippery slope simply has not materialized.

IV. The Equality Act codifies judicial precedents interpreting discrimination on the basis of sex to encompass discrimination on the basis of sexual orientation and gender identity.

Similarly, the sky has not fallen in the wake of multiple federal appellate courts adopting the same interpretation of sex discrimination as that embodied in the Equality Act. Over the last fifteen years, the EEOC and a number of Circuit Courts of Appeals have determined that discrimination “because of . . . sex”⁶² in Title VII includes discrimination on the basis of gender identity and/or sexual orientation.

These courts have drawn largely on the reasoning of two Supreme Court cases interpreting Title VII. In the path-marking case of *Price Waterhouse v. Hopkins*, a plurality of the Court explained that discrimination “because of . . . sex” encompassed discrimination rooted in sex stereotypes.⁶³ *Price Waterhouse* concerned a female accountant who, despite being at the top of her class, was passed over for partnership because she supposedly was “macho” and needed to act “more femininely.”⁶⁴ In ruling in her favor, the plurality observed that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype attached to their group.”⁶⁵ In Title VII, Congress “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁶⁶

More recently, the Court observed that interpretations of the word “sex” in Title VII should be interpreted according to text rather than intent. Writing for a unanimous Court in *Oncale v. Sundowner Offshore Services*, Justice Scalia acknowledged that “male-on-male sexual harassment in the workplace was assuredly not the principal evil congress was concerned with when it enacted Title VII.”⁶⁷ Nevertheless, he observed that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions

⁵⁹ Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms and Changing Rooms*, 16 SEXUALITY RES. & SOC. POL’Y 70, 80 (2019).

⁶⁰ *Id.* at 78–79.

⁶¹ *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁶² Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1).

⁶³ 490 U.S. 228 (1989).

⁶⁴ *Id.* at 235.

⁶⁵ *Id.* at 251.

⁶⁶ *Id.* (internal quotations and citations omitted). Note that

⁶⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

of our laws rather than the principal concerns of our legislators by which we are governed.”⁶⁸ Under this view, courts should directly interpret the meaning of phrases such as “because of . . . sex” without reference to legislative intent.⁶⁹

Increasingly, circuit courts have adopted the reasoning of these Supreme Court cases to address a fuller range of sex discrimination in the workplace. Taking note that Title VII covered “reasonably comparable evils” (*Oncale*), including discrimination on the basis of sex stereotypes (*Price Waterhouse*), these courts have concluded that discrimination on the basis of gender identity and sexual orientation was actionable under extant law.

For the past fifteen years, circuit courts have been coming to the conclusion that gender identity discrimination was a form of sex discrimination. In 2004, the Sixth Circuit held that discrimination against transgender people was sex discrimination under Title VII because it turned on sex stereotypes.⁷⁰ The Sixth Circuit explained that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”⁷¹ In 2011, the Eleventh Circuit applied this reasoning under the Equal Protection Clause to find a state employer liable for discriminating against a transgender employee.⁷² In 2012, the Equal Employment Opportunity Commission (EEOC) adopted the view that discrimination on the basis of transgender status is sex discrimination.⁷³ In 2016, the Sixth Circuit applied this reasoning to Title IX to find that that a school had unlawfully discriminated against a transgender student.⁷⁴ A year later, the Seventh Circuit did the same.⁷⁵ Many district courts have also arrived at the same conclusion.⁷⁶

More recently, the EEOC and two circuit courts have held sexual orientation discrimination to be a subset of sex discrimination. In 2015, the EEOC took this position in the case *Baldwin v. Foxx*.⁷⁷ Two years later, the Seventh Circuit⁷⁸ and the Second Circuit⁷⁹ heard these claims en banc and held, in light of *Oncale* and *Price Waterhouse*, that sexual orientation discrimination is a form of sex discrimination. As the Seventh Circuit noted, in a society that views heterosexuality as the norm, a person with a different sexual orientation “represents the

⁶⁸ *Id.*

⁶⁹ *E.g.*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 111–12 (2d Cir. 2018) (en banc) (“In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase ‘because of . . . sex.’”)

⁷⁰ *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004). The Sixth Circuit has of course followed this precedent in more recent Title VII cases. *See* *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018) (“[D]iscrimination ‘because of sex’ inherently included discrimination against employees because of a change in their sex.”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005).

⁷¹ *Smith*, 378 F.3d at 575.

⁷² *Glenn v. Brumby*, 663 F.3d 1312, 1320–21 (11th Cir. 2011).

⁷³ *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *4 (Apr. 20, 2012) (holding that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition”).

⁷⁴ *Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016).

⁷⁵ *Whitaker ex rel. Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

⁷⁶ *See, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 741–42 (E.D. Va. 2018) (Title IX); *M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. 2018) (Title IX).

⁷⁷ *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *7–9 (July 16, 2015) (finding that sexual orientation discrimination is a subset of sex discrimination because it necessarily depends on the concept of sex itself, association on the basis of sex, and sex stereotypes).

⁷⁸ *Hively v. Ivy Tech. Coll. Cmty. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

⁷⁹ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).

ultimate case of failure to conform” to gender stereotypes.⁸⁰ Despite the change in administration, the EEOC has not repudiated its position that both gender identity and sexual orientation discrimination are sex discrimination, and it argued for the plaintiff in the Second Circuit case.⁸¹

In addition to advertent to the sex stereotyping argument, courts have noted that discrimination on the basis of gender identity or sexual orientation cannot be analytically distinguished from sex discrimination. After all, the concept of sex is a necessary foundation to gender identity (which focuses on the sex with which one identifies) and sexual orientation (which focuses on the sex to whom one is attracted). The Sixth Circuit held that “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.”⁸² Another court made an analogy to religious discrimination, noting that firing someone for a transitioning from male to female violated Title VII just as firing an individual for “convert[ing] from Christianity to Judaism” would.⁸³ Similarly, courts have held that, if a man can marry a woman but a woman cannot, that is discrimination “because of . . . sex.” The Second Circuit explained that sexual orientation discrimination was a “subset” of sex discrimination because “sexual orientation is defined by one’s sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account.”⁸⁴

To be sure, the courts have not been unanimous in interpreting “sex” to encompass “gender identity” or “sexual orientation.” Even after *Price Waterhouse* and *Oncale*, the Tenth Circuit effectively rejected the idea that sex discrimination under Title VII could encompass gender identity discrimination.⁸⁵ A divided Eleventh Circuit panel recently followed that circuit’s precedent that sexual orientation discrimination was not sex discrimination.⁸⁶

The lack of unanimity on these questions only emphasizes why Congress must step in with a clear answer. In the Pregnancy Discrimination Act of 1978, Congress stated that sex discrimination encompassed pregnancy discrimination. In doing so, it superseded a Supreme Court interpretation to the contrary.⁸⁷ Here, Congress should pass the Equality Act to clarify that sex discrimination encompasses discrimination on the basis of gender identity and sexual orientation. By aligning federal statutory law with the dominant jurisprudential view, Congress will be codifying this precedent and setting the same uniform standard across the nation.

⁸⁰ *Hively*, 853 F.3d at 346.

⁸¹ Chris Opfer, *Trump LGBT Rift Should Be Solved by Court, Congress: EEOC Leaders*, BLOOMBERG LAW (Nov. 14, 2018, 10:36 AM), <https://www.bloomberglaw.com/document/X2207FJ4000000>.

⁸² *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018).

⁸³ *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (“Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’”); *see also* *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012).

⁸⁴ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018) (en banc). There is also a pending appeal on this same issue in the Eighth Circuit. *See Horton v. Midwest Geriatric Management*, 2017 WL 6536576 (E.D. Mo. Dec. 21, 2017).

⁸⁵ *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007). The case is ambiguous, implying there might be certain situations when gender identity discrimination would be actionable, but the scope is very narrow.

⁸⁶ *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) (internal quotations omitted).

⁸⁷ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)), *superseding* *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976),

V. The statute carefully maintains many protections for freedom of religion in the context of advancing civil equality for LGBT individuals.

Some critics of the Equality Act have suggested that the law could threaten religious liberty, pointing to provisions that bar the use of the Religious Freedom Restoration Act as a defense to actions brought under the statute. Yet the statute in fact seeks to protect religious freedom without allowing it to become the freedom to discriminate against LGBT individuals.

Civil rights statutes safeguarding vulnerable groups have never included an unlimited license to refuse compliance on religious grounds. Such license would eviscerate the protections of these statutes. In the 1968 case *Newman v. Piggie Park Enterprises, Inc.*, the Supreme Court addressed a challenge to the Civil Rights Act by a barbecue chain restaurant owner who argued that his religious beliefs did not permit him to serve black customers.⁸⁸ The Court rejected this claim, explaining that the “defendants’ contention that the Act was invalid because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of the Defendant’s religion’” was “patently frivolous.”⁸⁹

Whenever Congress promulgates safeguards for vulnerable minorities, individuals may argue that religious freedom should allow them to refuse to accord such protections. As the Supreme Court noted last Term in *Masterpiece Cakeshop*, exemptions from civil rights statutes must be confined or else “a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with . . . civil rights laws.”⁹⁰ We anticipate that courts will determine that application of nondiscrimination laws governing businesses, landlords and publicly funded programs is narrowly tailored to serve a compelling interest in eradicating discrimination and ensuring the ability to fully participate in public life for all, thus satisfying RFRA. However, claimants in civil rights cases should not be required to litigate this question in every case. For this reason, the Equality Act cabins the extent to which claims under RFRA can be used to evade the requirements of the statute.

To be clear, however, the Equality Act only seeks to limit the potential abuse of religious exemptions, not to eliminate them altogether. The Act leaves in place the long-standing exemptions that have governed the operation of our civil-rights laws for decades. Since 1972, courts have held that Title VII has a “ministerial exemption.” In that year, the Fifth Circuit held that the First Amendment prevented a female minister from bringing a sex discrimination claim against a church.⁹¹ In 2012, the Supreme Court unanimously upheld the ministerial exemption in the Americans with Disabilities Act (ADA), explaining that “the authority to select and control who will minister to the faithful . . . is the church’s alone.”⁹² Courts have also found that the exemption applies not only to Title VII and the ADA, but also to the Age Discrimination in Employment Act, the Family Medical Leave Act, and other anti-discrimination statutes.⁹³ Title VII also contains a religious organization exemption, which exempts religious employers “with respect to the employment of individuals of a particular religion to perform work connected with

⁸⁸ 390 U.S. 400 (1968) (per curiam).

⁸⁹ *Id.* at 403 n.5.

⁹⁰ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018).

⁹¹ *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

⁹² *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 (2012).

⁹³ Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1975-76 (2007).

the carrying on by such corporation, association, educational institution, or society of its activities.”⁹⁴ Similarly, the Fair Housing Act already includes an anti-discrimination exemption for religious organizations, allowing them to give preference to those of the same religion in “the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose.”⁹⁵ The Equality Act retains all these protections for people of faith.

Moreover, the free exercise guarantees of the U.S. Constitution provide protections for religious liberties. Under the Supremacy Clause, no statute can affect those protections. In *Employment Division v. Smith*, the Court held that “valid and neutral law[s] of general applicability” could not be challenged under the Free Exercise Clause simply because they place a burden on a given religion.⁹⁶ Yet the Court subsequently clarified in *Church of Lukumi Babalu Aye v. Hialeah* that an ordinance motivated by animus against a certain religious group, even though it appeared neutral on its face, was invalid under the Free Exercise Clause.⁹⁷ Finally, just last term, the Court explained in *Masterpiece Cakeshop* that religious animus in the enforcement of civil-rights statutes was impermissible.⁹⁸ Religious people are “entitled to the neutral and respectful consideration of [their] claims,” and disputes must be resolved “with tolerance [and] without undue disrespect to sincere religious beliefs.”⁹⁹ Under this long line of post-*Smith* jurisprudence stretching from *Lukumi Babalu Aye* to *Masterpiece Cakeshop*, any enforcement of the Equality Act based on religious animus would be swiftly invalidated.

VI. The Act appropriately protects conduct alongside status.

Some have argued that sexual orientation and gender identity are distinguishable from sex—or other protected classifications like race—because they are defined by conduct, rather than by status alone. This distinction is unavailing.

Civil-rights protections in our nation have never been limited to status alone. Religious conduct is not immutable, and Title VII explicitly protects it. Thus, in 1972, Congress specified that “[t]he term ‘religion’ includes *all aspects of religious observance and practice*, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship.”¹⁰⁰ Similarly, pregnancy, which was included in Title VII with the Pregnancy Discrimination Act of 1978, concerns an intrinsically mutable characteristic. The statutory text provides that “because of sex” must “include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions.”¹⁰¹ Although pregnancy is not an immutable status but rather a temporary condition—and one that in many cases is planned and chosen voluntarily—

⁹⁴ 42 U.S.C. § 2000e-1(a); *see, e.g.*, *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 617–18 (9th Cir. 1988) (explaining how to properly construe the provision in light of the statutory text and legislative history).

⁹⁵ 42 U.S.C. § 3607(a); *see, e.g.*, *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988, 996 (9th Cir. 2011) (holding that § 3607(a) permitted a non-profit Christian-based homeless shelter to give preference to Christians).

⁹⁶ *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

⁹⁷ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”).

⁹⁸ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018).

⁹⁹ *Id.* at 1729, 1732.

¹⁰⁰ An Act to Further Employment Opportunities for American Workers, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972), *codified at* 42 U.S.C. § 2000e(j) (emphasis added).

¹⁰¹ 42 U.S.C. § 2000e (2012).

Congress still included it within the scope of Title VII “sex” protections. The same can and should be done with gender identity and sexual orientation.

Moreover, in the context of sexual orientation and gender identity, status and conduct are inextricably linked. In *Christian Legal Society v. Martinez*, the Court observed that “[o]ur decisions have declined to distinguish between status and conduct” in the context of sexual orientation.¹⁰² The same logic would apply to gender identity. If gender identity is the status, then the relevant conduct would presumably be gender expression (including but not limited to transition). Yet here too, the conduct is almost inextricably intertwined with the status. As the *CLS* Court said, quoting an earlier case: “A tax on yarmulkes is a tax on Jews.”¹⁰³ Thus, the Equality Act protects both status and conduct to ensure that LGBT people are adequately protected from discrimination.

Conclusion

I end where I began, by noting that I am the Chief Justice Earl Warren Professor of Constitutional Law. I wish to elaborate that when the title was first offered to me in 2008 by my then-Dean, I rejected it. I reminded him that I was of Japanese descent, and that, as Attorney General of California, Earl Warren superintended the internment of people of Japanese ancestry without due process or criminal charges.¹⁰⁴ In his wisdom, my Dean responded that after he became Chief Justice of the United States Supreme Court, Earl Warren not only expressed regret for his role the internment,¹⁰⁵ but also wrote canonical civil-rights opinions like *Brown v. Board of Education*¹⁰⁶ and *Loving v. Virginia*.¹⁰⁷ My Dean asked me what better title I could have than the name of an individual who had been able to travel so far on issues of civil rights over the course of a single lifetime, at the point where he was completing his journey. So I now wear that title with pride, wondering in how many countries a racial minority could move so quickly from being outside the protection of the Constitution, to holding a place of honor as a scholar and teacher of that document.

I consider it a matter of grace that I can tell the same story in a different register. I am a gay man who was born in 1969, the year of the Stonewall Riots. In 2003, when the Court decided *Lawrence v. Texas*,¹⁰⁸ often called the *Brown v. Board* of the gay-rights movement, I became a full member of the American polity. Even then, the idea that I could marry and raise children seemed unimaginable. And yet because of judicial and legislative decisions like the one you are asked to make today, I married my husband ten years ago in Connecticut and have two children. Today it is a life without them—my husband, my daughter, and my son—that seems unimaginable.

¹⁰² *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal . . . that declaration in and of itself is an invitation to subject homosexual persons to discrimination.”)).

¹⁰³ *Id.* at 689 (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993)).

¹⁰⁴ JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 134–35 (2007).

¹⁰⁵ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 149 (1977) (“I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens.”).

¹⁰⁶ *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

¹⁰⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁰⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

Yet the movement for LGBT equality is far from complete. Even with all the forms of privilege we possess as a family, we still feel unsafe traveling to certain areas of this country. As a family, we have encountered exclusion and bias even in our home state of New York—in a restaurant here, or a water park there. I worry less about myself when these events occur, and more for my young children. I worry, as Dr. King did for his own six-year-old daughter, about “see[ing] ominous clouds of inferiority begin to form in [their] little mental sk[ies].”¹⁰⁹

So it is no small matter you consider today. I have dedicated much of my life to civil-rights law because it has a unique capacity to transform the morally impossible into the morally inevitable. Over the course of the last half-century, I have lived two versions of the American Dream. That journey has led me to believe that the experience of discrimination on the basis of race on the one hand and discrimination on the basis of sex, sexual orientation, or gender identity, on the other, are not entirely different. And it has led me to believe the dignity the law can bestow in welcoming us into the light of the public sphere is entirely the same.

Thank you.

¹⁰⁹ Martin Luther King, Jr., Letter from a Birmingham Jail, Apr. 16, 1963, AFRICAN STUDIES CENTER, UNIVERSITY OF PENNSYLVANIA, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (last visited March 31, 2019).