



## The Unfairness of the “Fairness for All Act”

### SUMMARY:

In the wake of the *Equality Act*'s passage in the House of Representatives, Rep. Chris Stewart (R-Utah) has introduced H.R. 5331, the *Fairness for All Act* (FFA). FFA is supposed to be a grand compromise seeking to find a resolution to the firestorm of litigation and controversy that led up to and has only increased since the Supreme Court's opinion constitutionalizing same-sex marriage in *Obergefell v. Hodges*. However, despite having the best of intentions, FFA is an ill-advised and poorly-drafted bill that does not achieve its goal.

FFA attempts to find a compromise between the First Amendment-protected right to religious liberty and the demands of the lesbian, gay, bisexual, and transgender (LGBT) lobby. However, because the LGBT agenda seeks government-mandated acquiescence to their ideology regarding human sexuality and gender, they are unwilling to allow any divergent views regardless of their basis, be it religion, science, or safety concerns. Their unwillingness to compromise is particularly evident in the fierce attacks directed against faith-based wedding vendors and faith-based adoption and foster care agencies detailed below. The LGBT lobby will not be satisfied until the government forces all Americans to accept their ideology.

FFA is anything but fair. It sends the message that anyone who holds to a traditional view of marriage and lives their lives and operates their business according to that view is a bigot and their actions are unacceptable and discriminatory.

If FFA passed into law, the federal government would impose a belief system and ideology about sexual behavior and identity on all Americans, with few exceptions. It is poorly drafted and sacrifices religious freedom, true equality, and the privacy and safety of women in an attempt to find a solution which will remain beyond reach.

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### 1) What is “Fairness for All?”

*Fairness for All*, like the EA, would amend numerous sections of the *Civil Rights Act* (CRA) of 1964, massively overhauling our federal civil rights framework to mandate special privileges for sexual orientation and gender identity (SOGI) in the private sector.<sup>1</sup> These categories would be added alongside innate, inborn, involuntary, and immutable characteristics – such as race, color, and national origin – or rights that are expressly protected under the Constitution, such as religion.

Despite having “fairness” in its name, FFA would mandate government-imposed unfairness by requiring acceptance of an ideology about human sexuality and gender. The only differences

between the EA and FFA are that FFA includes minimal protections for religious organizations and that it does not gut the *Religious Freedom Restoration Act* (RFRA).

## 2) Why Can't a "Compromise" Work?

The goal of finding a resolution to the firestorm of litigation and controversy surrounding SOGI is admirable; unfortunately, "compromise" is not a feasible option. Some in the LGBT community have a "live and let live" philosophy and understand the harms of gender ideology. For example, one writer who identifies as gay authored a piece defending faith-based adoption and foster care agencies.<sup>2</sup> The Women's Liberation Front (WoLF), a radical leftist feminist group that counts numerous members who identify as lesbian, strongly opposed the EA because of the harms to women it would cause – harms that would also result from the passage of FFA.<sup>3</sup> Unfortunately, their voices have been drowned out by the loud voices of LGBT lobbyists and activists who will not be satisfied until their demand for government-mandated ideological change is met and all opposing views are eradicated from the public square.

This is exemplified by the fierce attacks leveled against faith-based adoption and foster care providers over the last few years. Catholic Charities and others have been shut down in several states and localities.<sup>4</sup> In Michigan, St. Vincent Catholic Charities is being sued by the American Civil Liberties Union (ACLU) for operating according to the Charities' sincerely-held religious beliefs, even though children in St. Vincent's care have been adopted to LGBT-identified individuals through other agencies. Notably, the couple bringing the lawsuit lives closer to numerous other agencies that they could have used instead, but they deliberately targeted St. Vincent.<sup>5</sup> As noted below, the real victims of these attacks are the children for whom these agencies care.

Many mainstream LGBT groups, such as Human Rights Campaign (HRC), have mischaracterized and opposed legislative efforts to ensure that a diversity of agencies are working to help needy children and families affected by our country's foster care crisis.<sup>6</sup> Speaker Nancy Pelosi called some of these efforts "a sickening new low" and "disgusting, deeply immoral and profoundly offensive."<sup>7</sup> When speaking about her agenda for the 116th Congress, she said, "[a]nd if there is some collateral damage for some others who do not share our view well, so be it."<sup>8</sup> Clearly, there can be no "compromise" with the LGBT movement, because total acquiescence, not coexistence and tolerance, is their goal.

Furthermore, unlike the "Utah Compromise," which this bill is loosely based upon, FFA has a severability clause, allowing a court to strike down the few protections FFA affords to religious liberty while leaving the rest of the bill standing. This increases the likelihood that these protections could easily be stripped away. This will pave the way for the government-mandated ideology in FFA to apply to all Americans with no recourse for anyone, religious or otherwise.

If passed, FFA would forever label the traditional views that Supreme Court Justice Anthony Kennedy said in his *Obergefell* opinion are "held in good faith by reasonable and sincere people here and throughout the world," as discriminatory, bigoted, and hateful.<sup>9</sup>

It would affirm what Justice Samuel Alito said in his dissent in the same opinion: "Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences. It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-

Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.”<sup>10</sup>

Chief Justice John Roberts expressed the same concern when he said, “These apparent assaults on the character of fair-minded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s ‘better-informed understanding’ as bigoted.”<sup>11</sup> We are seeing this warning manifest. As mentioned previously and discussed more later, traditional views of marriage and sexuality are indeed being labeled as bigoted – thus the push to remove them from the public square.

### 3) Who Would Be Harmed by “Fairness for All”?

All Americans deserve dignity, respect, and the equal protection of the law. This is why all Americans already have these protections under our law. Giving special protections based on SOGI will always have negative implications because these categories are based upon behavior, feelings, and ideology. American civil rights laws protect characteristics that are innate, inborn, and inherent – along with religious belief, a fundamental right protected by the First Amendment.

FFA’s victims are the same as the EA’s – just to a lesser degree. They include the following:

#### ❖ Family-Owned Businesses

Like the EA, FFA expands the definition of a “public accommodation” in Title II of the CRA and adds special privileges for SOGI. FFA would also add SOGI as a protected category in Title VII of the CRA – the section of that statute dealing with employment discrimination.

There is scant protection in FFA for individuals like Jack Phillips, Barronelle Stutzman, the Aaron and Melissa Klein, and others who have been repeatedly attacked for operating their businesses in accordance with their beliefs. FFA only exempts employers with 15 employees or less. If FFA were to become law, only employers who do not robustly engage in the economy and pursue the American dream could maintain their religious character.

While virtually no distinctions on the basis of race may be permitted, non-discrimination laws have long recognized that there are areas in which a person’s *sex* may legitimately be related to the requirements of a job. In such a case, it is referred to in the law as a “bona fide occupational qualification,” or “BFOQ.”<sup>12</sup> For example, a health club hiring a women’s locker room attendant can lawfully give preference to filling that job with a female. FFA would prohibit making hiring decisions on the basis of an applicant’s *biological sex*. Instead, it would require that “an individual is recognized as qualified in accordance with gender identity when sex is a bona fide occupational qualification.” This means that a *biological male* who “identifies” as a “woman” would be a victim of “discrimination” if denied the job of women’s locker room attendant.

Furthermore, FFA includes an exemption from the SOGI employment discrimination provision for churches and some other religious organizations. However, one of the exemptions applies to “a religious corporation, association, or society” only if it “employs only individuals of the employer’s religion.” However, there may be some employers who are willing to hire people outside their denomination or religion, but only if they live up to certain moral standards taught by their religion. Such employers might not qualify for this exemption. (In addition, there is a concern that employers

who *do* hire “only individuals of the employer’s religion” might be forced to hire people who violate their *moral* standards, *so long as* the applicant *identifies* as a member of the employer’s religion. For example, a Catholic social service agency might be required to hire an applicant who identifies as homosexual because the applicant is Catholic.)

### ❖ Women and Girls

The bill is also problematic for women and girls, as it would broadly obliterate sex distinctions in federal law. Attempts to maintain biologically sex-separated facilities where the privacy and safety of women may be of concern will fail under FFA. The definition of gender identity (GI) is nearly identical to the definition contained in the EA and relies solely upon self-professed identification. The additional language describing how GI can be shown is not clear enough to protect privacy and safety. There is no set, mandatory method of “proving” GI. The attempt to create additional privacy also falls flat – it puts the onus on the 99 percent of biological females to speak up about being uncomfortable and not feeling safe. Instead of trying to accommodate the one percent or fewer of men who claim a female identity, women must fight for their right to privacy all over again.

FFA would also amend Title VI of the 1964 CRA regarding the distribution of federal funding by adding SOGI. This would be especially harmful to women. Women have long fought for vital gains toward actual equality and fairness and have achieved great success through civil rights protections in federal law. Despite its title, FFA would be unfair to women and undermine these civil rights protections based on sex in the same way the EA would.

The eradication of biological sex distinctions would impact certain business loans reserved for women, such as the Small Business Administration (SBA) Office of Women’s Business Ownership, which helps women entrepreneurs and oversees Women’s Business Centers (WBC). WBCs are designed to “level the playing field for all women entrepreneurs, who still face unique obstacles in the business world,” but the distinctly female character of this program would be undermined.<sup>13</sup> Biological men would now have access to these funds and programs, which were intended to give equality to women in the workplace. The same would happen to the Women-Owned Small Businesses Federal Contracting program, which helps women-owned small businesses compete for federal contracts. The federal government has a five-percent contracting goal for women-owned businesses, and, under FFA’s SOGI mandates, federal contracts could now be issued to biological men to meet this already small quota intended for women.

The Title VI SOGI requirements make the bill’s exemption of Title IX ineffective and still subject to litigation. FFA would allow men to play women’s sports at the secondary school and collegiate level and does nothing to protect female athletes. Title VI is a “catch-all” provision attached to all federal dollars. Because almost all schools get some federal funding, including religious schools, this would require them to accept GI, including in their sports programs. The Title IX carveout only applies to claims of discrimination based on sex, not SOGI. Without changing Title IX to include SOGI, this carveout cannot be truly effective, and changing Title IX alone would be counterproductive to the goal of protecting female athletes.

### ❖ Children

Some of the greatest harms resulting from FFA would be done to the most disadvantaged children – those in foster care or those in need of being adopted. Faith-based adoption and foster care agencies would be ineligible to receive federal funds for their work if they refuse to leave their religion at

home, and thus would be relegated to second class status. FFA would create a voucher system that prospective parents could use at faith-based agencies if they so choose—which is an admirable attempt to protect them, but ultimately feeds the notion that they are “second-tier.” FFA also attempts to maintain the ability of faith-based agencies to acquire the contracts and licensure necessary for them to operate. This falls far short of ensuring a robust foster care system with a diversity of numerous agencies working on behalf of children in need. There is no state that would prevent anyone from fostering or adopting on the basis of sexual orientation or gender identity. Likewise, every state has agencies that facilitate adoptions to LGBT-identified individuals. There is no discrimination that needs to be remedied in this area.

Faith-based organizations play a vital role in the adoption and foster care system. They were providing care and services to these needy children long before the government ever got involved and are particularly skilled at finding good homes. Since the government became involved in this space with the passage of the Social Security Act (SSA), these agencies generally receive funding under Title IV of SSA and government contracts and licenses to do their important work.<sup>14</sup>

There are over 440,000 children in foster care, and more than 100,000 of them are available for adoption. The situation is only getting worse: nearly 90,000 children a year enter the foster care system due to the opioid crisis alone.<sup>15</sup> FFA would exacerbate a problem that already exists in several states and localities across the country due to SOGI laws. Illinois passed a SOGI law, and it resulted in Catholic Charities being forced to close and nearly 3,000 children being displaced.<sup>16</sup> In Philadelphia, the city put out an urgent call for homes, yet due to a SOGI law, it stopped its contracts for placement with two faith-based agencies. This, in turn, led to former foster-parents, including the winner of the Foster Parent of the Year Award, to have empty homes, and in some cases, siblings were almost forced to remain in separate homes.<sup>17</sup>

If FFA were law, religious parents could effectively be labeled as ineligible to foster because they could be required to treat a little boy as a little girl or vice versa if the child claims an identity different from their biology. They could also be prevented from seeking assistance for that child in order to help them accept and become happy with their biological reality. This would be the first federal ban on Sexual Orientation Change Efforts (SOCE), which have been proven to be effective in providing a road to freedom out of the LGBT lifestyle for those who seek one.

The voucher program created by FFA does not alleviate the harms caused by the bill. It still treats the faith-based agencies as second-rate, even though their long history of service means they have the most expertise to actually assist children in need of homes.

### ❖ Teachers and Students

The bill has a lengthy section on “Safe Schools.” It requires all schools to have policies against bullying and harassment that include SOGI as protected categories. *All* bullying should be prevented, and specific categories of victims should not be singled out. FFA also includes extensive record-keeping and reporting requirements that would be burdensome. While the bill does provide some protection for students’ freedom of speech, these protections are not likely to be adequate in practice.

## ❖ Medical Community

FFA changes Title II to include medical providers. The conscience protections FFA attempts to give these medical providers are weak at best. Under the bill, medical providers may provide care on the same medical terms or criteria applicable to individuals needing that care without regard to protected status. This seems to be an attempt to allow medical professionals to not perform medical procedures on otherwise healthy organs because there is no physical basis for care, but this would just generate litigation on whether the decision is “without regard to protected status” and not a “smokescreen for discrimination.” Medical professionals may also make evidence-based medical determinations; however, this again invites litigation because the LGBT lobby claims that the treatments and care they desire are evidence-based. They have gone so far as to give knowingly false testimony before legislative bodies regarding the “harm” of treatments that have been proven helpful but are not in line with their demands.<sup>18</sup>

The only protection in FFA for mental health care professionals is when an LGBT-identified individual wants marriage counseling to either enter or sustain a marriage. There is no mention of what is required for patients who are seeking counseling for their struggles with same-sex attraction or gender confusion; however, in another section of the bill, it expressly forbids counseling minors who are struggling in one or both areas in a way that would help them accept their biology.

## ❖ All Americans

Non-religious Americans who have safety and privacy concerns about biological men being in women’s private spaces would have no recourse but to let men in women’s spaces. Public schools who have an equality and fairness concern about letting biological men compete in women’s sports would have no recourse but to let men compete in women’s sports. Non-religious doctors and parents who have health concerns about placing children on puberty blockers, cross sex hormones, or allowing them to undergo surgery to make their bodies look more like those of the opposite sex would have little to no recourse.

Religious freedom isn’t just for Christians, or even just those who are religious. It is a protection on the freedom of belief and expression that is imperative for all Americans. This freedom to believe is a vital part of the fabric of America, and its erosion is detrimental to all.

## Conclusion

The *Fairness for All Act’s* goal is laudable, but the “compromise” of a fundamental tenant of American law – religious freedom – in order to appease the agenda of a minority would have tragic policy outcomes as outlined above. Therefore, it should not be passed into law.

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<sup>1</sup> Rep. Chris Stewart, 12/6/2019, H.R. 5331: To prohibit discrimination on the basis of sex, sexual orientation, and gender identity; and to protect the free exercise of religion, <https://www.congress.gov/bill/116th-congress/house-bill/5331?q=%7B%22search%22%3A%5B%22chris+stewart%22%5D%7D&s=3&r=3>.

<sup>2</sup> Brad Polumbo, “Protecting Religious Adoption Agencies Won’t Stop LGBT People from Adopting,” *National Review*, July 31, 2018, accessed December 12, 2019, <https://www.nationalreview.com/2018/07/protecting-faith-based-adoption-agencies-will-not-stop-lgbt-people-from-adopting/>.

<sup>3</sup> “US Equality Act: Gender Identity Impact Summary,” Women’s Liberation Front, Hands Across The Aisle, and Concerned Women for America Joint Statement, <https://concernedwomen.org/wp-content/uploads/2019/04/Equality-Act-HR5-2019-Summary.pdf>.

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- <sup>4</sup> Travis Weber, “The Child Welfare Provider Inclusion Act: Ensuring a Free Market of Adoption Provides,” Family Research Council, April 2018, <https://downloads.frc.org/EF/EF18D31.pdf>.
- <sup>5</sup> *Buck v. Gordon*, Complaint filed in the United States district court for the Western District of Michigan Southern Division, April 2019, <https://s3.amazonaws.com/becketnewsite/Complaint-in-Buck-v.-Gordon.pdf>.
- <sup>6</sup> “Child Welfare Provider Inclusion Act,” Human Rights Campaign, accessed December 13, 2019, <https://www.hrc.org/resources/child-welfare-provider-inclusion-act>.
- <sup>7</sup> Nancy Pelosi, “Pelosi Statement on GOP License to Discriminate Amendment,” press release, July 11, 2018, <https://pelosi.house.gov/news/press-releases/pelosi-statement-on-gop-license-to-discriminate-amendment>.
- <sup>8</sup> Paul Crookston, “Pelosi: If There is ‘Collateral Damage’ for Those Who Don’t Share Our Views, ‘So Be It,’” *The Washington Free Beacon*, October 18, 2018, accessed April 17, 2019, <https://freebeacon.com/politics/pelosicollateral-damage-dont-share-view/>.
- <sup>9</sup> *Obergefell v. Hodges*, 135 S. Ct. 2596 (2015), <https://casetext.com/case/obergefell-v-hodges>.
- <sup>10</sup> *Ibid.*
- <sup>11</sup> *Ibid.*
- <sup>12</sup> “bona fide occupational qualification (BFOQ),” Cornell Law – Legal Information Institute, accessed December 12, 2019, [https://www.law.cornell.edu/wex/bona\\_fide\\_occupational\\_qualification\\_\(bfoq\)](https://www.law.cornell.edu/wex/bona_fide_occupational_qualification_(bfoq)).
- <sup>13</sup> “Women-Owned Small Business Federal Contracting program,” U.S. Small Business Administration, accessed December 13, 2019, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contracting-program>.
- <sup>14</sup> “Title IV – Grants to States For Aid and Services to Needy Families With Children and for Child-Welfare Services,” Social Security Administration, accessed December 13, 2019, [https://www.ssa.gov/OP\\_Home/ssact/title04/0400.htm](https://www.ssa.gov/OP_Home/ssact/title04/0400.htm).
- <sup>15</sup> “The Adoption and Foster Care Analysis and Reporting System (AFCARS) Report – FY 16,” U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth, and Families, Children’s Bureau, <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.
- <sup>16</sup> Kelsey Bolar, “Here’s What Happened After Liberal Activists Shut Down Catholic Adoption Providers in Illinois,” *The Daily Signal*, May 21, 2018, accessed December 13, 2019, <https://www.dailysignal.com/2018/05/21/heres-what-happened-after-liberal-activists-shut-down-catholic-adoption-providers-in-illinois/>.
- <sup>17</sup> *Fulton v. City of Philadelphia*, Complaint Filed in the United States District of Pennsylvania, May 16, 2018, <https://s3.amazonaws.com/becketnewsite/Fulton-EDPA-Complaint-to-file.pdf>.
- <sup>18</sup> Christopher Doyle, “Transgender ‘woman’ lies about therapy ‘torture,’” *WorldNetDaily*, March 21, 2013, accessed December 16, 2019, <https://www.wnd.com/2013/03/transgendered-woman-lies-about-therapy-torture/>.