



## Questions and Answers about the Proposed Federal “Equality Act”

*Peter Sprigg*

### What is the “Equality Act?”

The so-called “Equality Act” (“EA”) is a bill introduced in both the U.S. House of Representatives and the Senate on July 23, 2015 which would give special protections to persons who identify as homosexual or transgender by adding “sexual orientation” and “gender identity” as protected categories under federal civil rights laws.

The principal sponsor of the House bill ([H.R. 3185](#)) is [Rep. David N. Cicilline \(D-RI\)](#); the principal sponsor of the Senate bill ([S. 1858](#)) is [Sen. Jeff Merkley \(D-OR\)](#).

### Is the EA the same as the “Employment Non-Discrimination Act”?

No. H.R. 3185/S. 1858 is a successor to the “Employment Non-Discrimination Act” (ENDA)—but it is far more sweeping in scope. [ENDA](#),<sup>1</sup> which had been introduced in every Congress but one since 1994, has not been introduced in the current (114<sup>th</sup>) Congress.

### What is the difference between ENDA and the EA?

One difference is that ENDA was a stand-alone bill creating one new law. The EA, on the other hand, would amend a whole series of already existing federal laws to add “sexual orientation” and “gender identity” as protected categories within them. It would make 59 substantive amendments to the following federal laws:

- The [Civil Rights Act of 1964](#)<sup>2</sup>
- The [Government Employee Rights Act of 1991](#)<sup>3</sup>
- The [Congressional Accountability Act of 1995](#)<sup>4</sup>
- The [Civil Service Reform Act of 1978](#)<sup>5</sup>
- The [Fair Housing Act](#)<sup>6</sup>
- The [Civil Rights Act of 1968](#)<sup>7</sup>
- The [Equal Credit Opportunity Act](#)<sup>8</sup>
- [28 U.S. Code Chapter 121 \(Juries; Trial by Jury\)](#)<sup>9</sup>

The other key difference is that ENDA would have applied to employment *only*. The EA, in addition to both public and government employment, would be applied to a large number of different areas of life and the law, including:

- Public accommodations
- Public facilities

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February 2016  
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Various provisions of the EA would be enforced by the Equal Employment Opportunity Commission and/or the courts, and it is difficult to know exactly how every provision of the bill would be applied in every situation. This paper describes some of the specific provisions of the bill and what Family Research Council believes would be the most likely applications of it.

### **Does the EA have a religious exemption?**

No. There is *no* religious exemption found anywhere in the text of the EA.

The omission of *any* religious exemption makes the EA far more radical, and more dangerous to freedom of belief and the freedom to act on one's beliefs, than even its predecessor, ENDA. Family Research Council and other conservative and religious organizations felt that the religious exemption in ENDA was inadequate, because it would not protect profit-making businesses or individual employees, and there was concern it would be interpreted narrowly by the courts. (For example, under similar laws, courts have sometimes granted fewer protections to religious non-profits than to churches,<sup>10</sup> or exempted only positions that involve actually teaching religious doctrine, rather than all the jobs in an avowedly religious ministry.<sup>11</sup>)

Title VII, the employment portion of the Civil Rights Act of 1964, exempts certain religious employers ("a religious corporation, association, educational institution, or society") only from its provision prohibiting employment discrimination *on the basis of religion*, but that means such employers can give preference to hiring members of their own religion. Similarly, the Fair Housing Act has a limited exemption for housing owned by a religious organization and provided to members of that religion on a non-commercial basis. (Even religious organizations are not permitted to discriminate in employment or housing on the basis of *race*, however.) These provisions, as they apply to employment or housing decisions based on *religion*, would remain in place under the EA.

However, the EA exempts *no one* from its provisions regarding "discrimination" based on "sexual orientation" and "gender identity." It treats those categories exactly the same way the Civil Rights Act treats race – not the way it treats religion. This means, for example, that a Roman Catholic charity could give preference to hiring Roman Catholics, under the Title VII exemption regarding religion. However, under the EA, that same organization might be *required* to hire an otherwise qualified job applicant who identifies as homosexual or transgender (if he or she is Roman Catholic), even though the individual's personal conduct violates the church's moral teaching.<sup>12</sup>

### **How would the EA apply to public education?**

The EA would amend the Civil Rights Act of 1964 to add "sexual orientation" and "gender identity" as protected categories in two sections of the law that apply to public schools and public colleges. One is Title IV, which forbids discrimination in "the assignment of students to public schools and within such

schools,” as well as authorizing lawsuits on behalf of those “denied admission to or not permitted to continue in attendance at a public college.” The other is Title VI, which, while not specific to education, forbids “discrimination under any program or activity receiving federal financial assistance.”<sup>13</sup>

### **Would the EA apply to religious colleges and universities?**

Yes. The EA does not directly apply to laws governing higher education. However, because the EA contains no religious exemption, it seems likely that its provisions regarding employment would apply to religious colleges and universities. It is also likely that the public accommodations provisions would apply, at least to events and programs that are open to the public. However, what makes it virtually certain that the EA would be applied to religious colleges and universities is the fact that it would add “sexual orientation” and “gender identity” to [Title VI](#) of the Civil Rights Act of 1964, which prohibits discrimination in “any program or activity receiving federal financial assistance,” including any “grant, loan, or contract.” Since federal student loans to individuals have been interpreted as a form of “federal financial assistance” to the schools they attend, this would affect nearly every college and university in the country, including religious ones.<sup>14</sup> (It is [estimated](#) that only seven out of the 4,700 colleges in the country decline all federal financial assistance.<sup>15</sup>) The EA would bind a religious college that accepts federal aid in *all* aspects of its operation, including admissions and housing.

### **Would the EA apply to religious K-12 schools?**

The EA does not directly apply to laws governing primary and secondary education. Because private K-12 schools are less likely than colleges and universities to receive any form of federal financial aid, it is also less likely that they would automatically be covered by the EA on those grounds.

However, to the extent that courts find such schools or any of their programs or activities (such as sporting events) to be “public accommodations,” they might well be covered. Furthermore, as with colleges and universities, the employment provisions of the EA *would* likely apply to religious K-12 schools in at least some instances,<sup>16</sup> because the EA contains no religious exemption.

### **Could the federal “Religious Freedom Restoration Act” currently in law be invoked to protect against infringements on the free exercise of religion under the EA?**

No. In a particularly shocking provision, the bill expressly forbids any claim or defense based on the Religious Freedom Restoration Act (RFRA) to prevent application or enforcement of most of the provisions of the EA.<sup>17</sup>

In 1993, in response to a [Supreme Court ruling](#) which made it easier for governments to infringe upon the free exercise of religion,<sup>18</sup> a nearly unanimous Congress passed, and President Bill Clinton signed, [RFRA](#)<sup>19</sup> to restore the earlier legal test. It said that if a person can demonstrate that a government action “substantially burdens” the free exercise of religion, then the government must demonstrate that its action serves a “compelling” purpose, and is being accomplished by the “least restrictive” means.

RFRA does *not* say that the exercise of religion trumps any and every law. It merely provides a balancing test for courts to employ whenever a person claims that a government action infringes upon the free exercise of religion (a right which is guaranteed by the First Amendment to the Constitution). The whole point of establishing such a balancing test is for the courts to apply it on a case-by-case basis, and it therefore makes no sense to exempt an entire law, such as the Civil Rights Act of 1964, from its application.

The EA seems intended to codify the conclusion drawn by law professor Chai Feldblum (who identifies as homosexual and was later appointed by President Obama to the Equal Employment Opportunity Commission). Conservative writer Maggie Gallagher has [quoted Feldblum](#) as having told her, at a conference in December 2005, “There can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win.”<sup>20</sup>

### **What are the implications of the EA’s inclusion of “public accommodations” and expansion of their definition?”**

The EA *dramatically expands* the definition of what constitutes a “public accommodation” under the provisions of the Civil Rights Act of 1964. When that law was passed, it was defined in a more literal sense, applying to businesses such as an “inn, hotel, or motel” (a place providing “lodging to transient guests”); a “restaurant, cafeteria, lunchroom,” etc. (“selling food for consumption on the premises”); or a “theater, concert hall, sports arena,” etc. (a “place of exhibition or entertainment”). These limitations were seen as necessary in order to justify the federal intervention in private economic transactions under the guise of Congress’s enumerated power under the Constitution to regulate interstate commerce.

The EA expands these covered activities to include “any establishment that offers a good, service, or program.” Although the courts in recent decades have been reluctant to recognize limits on the power of Congress, believers in limited government should be concerned about such an expansive grant of power to the federal government.

Including “public accommodations” also means that federal law would now govern the best-publicized cases involving a conflict between the homosexual movement, on the one hand, and the freedom to believe and to act on one’s beliefs, on the other. Those are the cases involving Christian photographers, bakers, and florists who, although they happily serve customers who self-identify as gay with services unrelated to weddings, conscientiously object to being compelled to participate in the celebration of a homosexual relationship as a “marriage.”<sup>21</sup> The EA would likely compel such vendors to violate their deeply-held beliefs, face crippling fines, or go out of business.

Non-profit organizations, including religiously-based organizations, services (such as a soup kitchen), or properties may also be treated as public accommodations in certain cases.<sup>22</sup> In fact, the EA explicitly includes a “food bank” or “shelter” – services often provided by a religious organization or church – in the definition of “public accommodations,” on the same terms as a “store, shopping center,” or “gas station.”

### **Is the EA a federal “Bathroom Bill?”**

“Bathroom Bill” is a term sometimes used by critics of laws making “gender identity” a protected status under civil rights laws.<sup>23</sup> It refers to one implication of such laws – which is that transgender persons (who claim to be, and present themselves as, the opposite of their biological sex) are entitled to use the restrooms, locker rooms and showers that correspond to their chosen “gender identity” rather than their inborn biological sex. And since people are *not required* to have sex reassignment surgery before adopting a new “gender identity,” it would mean (for example) that women might be exposed to, or expose themselves to, someone who is fully biologically male.

Some [earlier versions of ENDA](#) sought to alleviate this concern by explicitly excluding such facilities from the bill’s application.<sup>24</sup> The EA, however, does the exact opposite – explicitly *including* such facilities

in its scope and declaring that “an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual’s gender identity.”

The EA essentially creates a government mandate that includes sex-segregated facilities in such a way as to significantly threaten the individual privacy rights of both men and women.

In the absence of a religious exemption, this provision would probably apply to religious organizations and even to churches, insofar as they provide services to the public.

### **Are there additional reasons to oppose the “Equality Act?”**

Yes. Most of these reasons apply to all legislation to make “sexual orientation” and “gender identity” into protected categories, whether at the local, state, or federal level (for more information, see [“Sexual Orientation and Gender Identity \(SOGI\) Laws: A Threat to Free Markets and Freedom of Conscience and Religion.”](#) Here are additional concerns:

- **Sexual orientation and gender identity are unlike most other characteristics protected in civil rights laws.** Unlike with race or sex, they are not inborn or immutable, and they include behavioral aspects that are not involuntary or innocuous; unlike with religion, they are not explicitly protected in the Constitution.
- **The EA would increase government interference in the free market.**
- **The EA would mandate the employment of persons who identify as homosexual or transgender in inappropriate occupations,** such as positions that involve being a role model to children.
- **The EA would undermine the rights of businesses to set dress and grooming standards.**
- **The EA would lead to costly lawsuits against businesses.**
- **The EA is unnecessary,** since most large companies already forbid “discrimination.”
- **The EA would make it more difficult to select unbiased juries** in federal cases where “sexual orientation” or “gender identity” may be an issue, such as hate crime trials or lawsuits involving AIDS drugs.
- **The EA would “legislate morality” – the “morality” of the sexual revolution –** with no religious or conscience protections for those who disagree.
- **The EA would prepare the way for reverse discrimination.** The more open people who identify as homosexual or transgender become, the more people who hold traditional values will be forced to conceal their views – or face punishment for expressing them.

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<sup>1</sup> The most recent version of ENDA was H.R. 1755, introduced in the 113<sup>th</sup> Congress by Rep. Jared Polis (D-CO) on April 25, 2013, [https://www.congress.gov/bill/113th-congress/house-bill/1755?q={%22search%22%3A\[%22ENDA%22\]}&resultIndex=2](https://www.congress.gov/bill/113th-congress/house-bill/1755?q={%22search%22%3A[%22ENDA%22]}&resultIndex=2).

<sup>2</sup> *Civil Rights Act of 1964*, Public Law 88-352, *U.S. Statutes at Large* 78 (1964): 241, codified at 42 U.S. Code 2000a, [http://library.clerk.house.gov/reference-files/PPL\\_CivilRightsAct\\_1964.pdf](http://library.clerk.house.gov/reference-files/PPL_CivilRightsAct_1964.pdf).

<sup>3</sup> *Government Employees Rights Act of 1991*, codified at 42 U.S. Code 2000e, <http://www.eeoc.gov/laws/statutes/gera.cfm>.

<sup>4</sup> *Congressional Accountability Act of 1995*, Public Law 103-283, *U.S. Statutes at Large* 108 (1995): 1444, <http://www.gpo.gov/fdsys/pkg/BILLS-104s2enr/pdf/BILLS-104s2enr.pdf>.

<sup>5</sup> *Civil Service Reform Act*, Public Law 95-454, *U.S. Statutes at Large* 92 (1978): 1113, <https://www.law.cornell.edu/uscode/text/5/2301>.

<sup>6</sup> *Fair Housing Act*, Public Law 90-284, *U.S. Statutes at Large* 82 (1968): 81, <http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/html/USCODE-2009-title42-chap45-subchapI.htm>.

<sup>7</sup> *Civil Rights Act of 1968*, Public Law 90-284, *U.S. Statutes at Large* 82 (1968): 89, <http://legcounsel.house.gov/Comps/civil68.pdf>.

<sup>8</sup> *Equal Credit Opportunity Act*, Title V of Public Law 93-495, *U.S. Statutes at Large* (1974): 1525, codified at *U.S. Code* 15 (1974), § 1691 et seq., <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title15/html/USCODE-2011-title15-chap41-subchapIV.htm>.

<sup>9</sup> *U.S. Code* 28, Chapter 121, <https://www.law.cornell.edu/uscode/text/28/part-V/chapter-121>.

<sup>10</sup> *Bernstein v. Ocean Grove Camp Meeting Association*, New Jersey Division of Civil Rights, DCR Docket No. PN34XB-03008 (2012), <http://www.adfmedia.org/files/OceanGroveNJDCRdecision.pdf>.

<sup>11</sup> *Archdiocese of Washington v. Moersen*, 399 Md. 637 (2007), <http://www.mdcourts.gov/opinions/coa/2007/69a05.pdf>.

<sup>12</sup> For example, in 2013 a teacher at a Catholic high school who was fired for being in a lesbian relationship filed a complaint under a Columbus, Ohio non-discrimination ordinance with the Columbus Community Relations Committee. The Diocese of Columbus ended up settling the case before it was adjudicated. See: Denise Yost, “Fired Bishop Watterson Teacher Carla Hale Reaches Agreement with Diocese,” August 15, 2013, NBC4i.com, accessed February 9, 2016,

<http://nbc4i.com/2013/08/15/fired-bishop-watterson-teacher-carla-hale-reaches-agreement-with-diocese/>. A similar complaint against the Catholic Diocese of Richmond, Virginia was filed in 2015 with the federal Equal Employment Opportunity Commission (even without the Equality Act) by a man who claims he was fired from his job at a Catholic assisted living facility because he is in a same-sex marriage. See: Alanna Durkin, “Man claims he lost job at Catholic home because he’s gay,” Associated Press, October 13, 2015, accessed February 9, 2016, <http://bigstory.ap.org/article/6b3db94195664a7b81cb0eb0f686b8eb/man-claims-he-lost-job-catholic-home-because-hes-gay>.

<sup>13</sup> Similar but more detailed protection against “discrimination” in public schools based on “sexual orientation” and “gender identity” has been proposed in separate legislation, the “Student Non-Discrimination Act” ([H.R. 846, S. 439](#)). In addition, the Obama administration’s Department of Education has issued “policy guidance” declaring that the prohibition on sex discrimination in education, found in Title IX of the Education Amendments of 1972 (“Title IX”) also encompasses “claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.” See: “Questions and Answers on Title IX and Sexual Violence,” U.S. Department of Education, Office for Civil Rights, April 29, 2014, accessed February 9, 2016, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>14</sup> “Education and Title VI,” U.S. Department of Education, ED/OCR 91-27R, accessed February 9, 2016, <http://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>.

<sup>15</sup> “Why Christendom College Rejects Federal Funding,” Christendom College, accessed February 9, 2016, <http://www.christendom.edu/support/why-christendom-college-rejects-federal-funding/>.

<sup>16</sup> The Supreme Court has ruled, on constitutional grounds under the First Amendment, that there is a “ministerial exception” to employment laws, meaning that the government may not interfere with the selection of “ministers” by churches. In a unanimous 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Court ruled that the ministerial exception can apply to teachers at a religious school under certain circumstances. However, it remains unclear whether it would apply to a religious school not directly affiliated with a church or denomination; to a teacher not specifically identified as a “minister” by the employer; or to a teacher or staff



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member who has no responsibility for teaching religious subjects. Therefore, religious schools cannot necessarily count on the constitutional “ministerial exception” to protect them from the employment provisions of the EA in the absence of an express statutory exemption in the law. See: *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. \_\_\_\_ (2012), Docket No. 10-553; 132 S. Ct. 694, <http://www.supremecourt.gov/opinions/11pdf/10-553.pdf>.

<sup>17</sup> The text of the EA includes the addition of a new “Section 1107: Claims” to the Civil Rights Act of 1964, stating that “The Religious Freedom Restoration Act of 1993 . . . shall not provide a claim concerning, or a defense to a claim under” this law. However, for each of the other laws amended by the EA except one, the text of the EA includes a statement to the effect that “Section[] . . . 1107 of the Civil Rights Act of 1964 shall apply to this title,” thus extending the *exclusion* of RFRA claims to those laws as well. The only law amended by the EA that would not have this language added is the Civil Rights Acts of 1968. The Civil Rights Act of 1968 is a law which penalizes anyone who “by force or threat of force willfully injures, intimidates or interferes with” someone exercising rights under federal housing nondiscrimination laws. It is extremely unlikely that anyone would ever attempt to offer a RFRA defense for the use of “force or threat of force,” and even more unlikely that a court would uphold such a claim.

<sup>18</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990), <https://supreme.justia.com/cases/federal/us/494/872/case.html>.

<sup>19</sup> *Religious Freedom Restoration Act of 1993*, Public Law 103-141, *U.S. Statutes at Large* 107 (1993): 1488, <http://www.gpo.gov/fdsys/pkg/STATUTE-107/pdf/STATUTE-107-Pg1488.pdf>.

<sup>20</sup> Maggie Gallagher, “Banned in Boston: The coming conflict between same-sex marriage and religious liberty,” *The Weekly Standard*, May 15, 2006, accessed February 9, 2016, <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>.

<sup>21</sup> Nathan Koppel and Ashby Jones, “Some Businesses Balk at Gay Weddings: Photographers, Bakers Face Legal Challenges After Rejecting Jobs on Religious Grounds,” *The Wall Street Journal*, October 3, 2013, accessed February 9, 2016, <http://online.wsj.com/news/articles/SB10001424052702304795804579101343898974538>.

<sup>22</sup> *Bernstein v. Ocean Grove Camp Meeting Association*, *op. cit.*

<sup>23</sup> Peter Sprigg, “‘Gender Identity’ Protections (‘Bathroom Bills’),” Family Research Council, July 2010, accessed February 9, 2016, <http://www.frc.org/onepagere/gender-identity-protections-bathroom-bills>.

<sup>24</sup> E.g., *Employment Non-Discrimination Act*, H.R. 1397, 112<sup>th</sup> Congress, 1<sup>st</sup> Session (April 6, 2011), <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1397ih/pdf/BILLS-112hr1397ih.pdf>.