



ISSUE BRIEF

The Inequality of the “Equality Act” of 2019 (H.R. 5 / S. 788) sponsored by Rep. David Cicilline and Sen. Jeff Merkley

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SUMMARY:

The “Equality Act” is legislation that would massively overhaul our federal civil rights framework in order to mandate special privileges in the private sector for sexual orientation and gender identity (SOGI). It would add these SOGI categories alongside characteristics in civil rights statutes that are innate, inborn, involuntary, and immutable, such as age, race, national origin, or protected under the Constitution, such as religion.

If passed, the “Equality Act” would mandate government-imposed unfairness by requiring acceptance of a particular ideology about sexual ethics.

Its stated goal is equality, but its actual result is harm to vast numbers of communities and individuals, including those it purports to protect. These victims include: family-owned businesses (and thus the economy), women and girls, teachers and students, the medical community (and thus the individuals who this bill purports to help), and Americans as a whole because this bill undercuts our foundational freedom of religion.

1) What is the Equality Act (EA) (H.R. 5 / S. 788)?

The Orwellian-named “Equality Act” (EA) (H.R. 5 / S. 788) should be called the “In-Equality Act.” This bill would create a massive overhaul of our federal civil rights framework by making almost 60 amendments to nearly 10 different laws like the Civil Rights Act of 1964,¹ the Civil Rights Act of 1968,² the Fair Housing Act,³ the Congressional Accountability Act of 1995,⁴ and more in order to mandate special privileges in the private sector for sexual orientation and gender identity (SOGI). It would add these SOGI categories alongside characteristics in civil rights statutes that are innate, inborn, involuntary, and immutable (such as age, race, and national origin), or those explicitly protected under the Constitution (such as religion).

These changes to the Civil Rights Act (CRA) and other civil rights laws would affect numerous areas of the public square, including privately owned and operated entities whether they be for-profit or non-profit, memberships, associations or even private clubs (in certain instances). The bill will affect public accommodations, facilities open to the public even if they are privately owned, public education, all recipients of federal grants and loans, housing, jury service, health care, sports competitions, and more.

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The stated purpose of the bill is to create equality and non-discrimination between private entities and individuals. However, if passed into law, the result of the bill would be a new federal government imposition of a belief system and ideology about sexuality and identity on all Americans with no exceptions. The bill would obliterate from the public square views that Supreme Court Justice Anthony Kennedy said are “held in good faith by reasonable and sincere people here and throughout the world.”⁵

The EA explicitly removes bi-partisan religious liberty protections found in the Religious Freedom Restoration Act (RFRA),⁶ which only requires that any substantial burden placed on religious practice by the government have a compelling governmental interest and be accomplished by the least restrictive means. RFRA is no guarantee of religious freedom; it merely creates a balancing test by which government actions substantially burdening religion can be assessed and a decision made on whether they should be permitted. The EA removes even the possibility that a religious individual or entity could even challenge a government burden placed on them as it relates to SOGI.

2) Why and how are sexual orientation and gender identity different from other classes already protected in law?

The fundamental rights guaranteed by the U.S. Constitution already apply to all Americans – including those who self-identify as lesbian, gay, bisexual, or transgender (LGBT). Because of the history of discrimination against certain classes of people based on innate, inborn, involuntary, and immutable characteristics identifiable at birth (such as national origin, race, sex, and age), civil rights laws have been passed (most importantly, the groundbreaking 1964 Civil Rights Act) to protect people from various forms of discrimination. These laws also protect categories that are not innate, inborn, involuntary, or immutable – such as religion – which is explicitly protected in the Constitution. Other civil rights protections passed since the 1964 law such as the Americans with Disabilities Act⁷ and Pregnancy Discrimination Act⁸ offer protections that, while more limited in scope, are based on an identifiable physical characteristic not rooted in a belief system or ideology, unlike SOGI.

The new SOGI categories the EA would place in law are quite distinct from the current categories in civil rights law, since people’s sexual preferences and behavior can change.⁹ Nor are they specifically protected in the Constitution, like religion. Adding these categories to civil rights laws affords special privileges for beliefs and behaviors that are entirely different in kind and nature from the protections in our current framework of civil rights law.

The EA mandate of special privileges of SOGI would be the first time that such feelings, behaviors, and their accompanying belief system would be elevated to the status of a protected class in federal law.

3) Who would be harmed by the “Equality Act”?

Last fall, when discussing her agenda for the 116th Congress, Speaker Nancy Pelosi said, “if there is some collateral damage for some others who do not share our view, well, so be it.”¹⁰ What she didn’t acknowledge was the vast scope of who would be impacted by this liberal agenda and the degree to which individuals and organizations would be impacted in the public square. Those affected by the EA include:

❖ Family-Owned Businesses and the Economy

The EA amends Title VII of the 1964 CRA by preventing employers from considering SOGI in the context of hiring and “privileges of employment.” Title VII would be further amended to say that, where sex is a bona fide occupational qualification, that individuals are to be categorized and recognized based on their gender identity, not their biological sex. Therefore, employers cannot base their personnel decisions on what is best for their business if they think a person’s biological sex is a legitimate qualification.

The EA would mandate the employment of persons who identify as homosexual or transgender in what some may believe are inappropriate occupations, such as positions that involve bodily searches by a biological male of females, or vice versa (e.g., Transportation Security Administration officials in an airport).

Because employers would almost never be allowed to take SOGI into consideration, the EA would undermine the rights of businesses to set dress and grooming standards or have separate private spaces (e.g., in bathrooms, locker rooms, showers, dormitories, etc.) for biological men and women. The EA would likely lead to costly lawsuits against family-owned businesses, which in turn could threaten the jobs of employees and their families.

The EA’s changes to Title VII also would mean that employers will be forced to provide health care insurance coverage for hormone treatment and/or sex reassignment surgery for individuals with gender dysphoria. If an employer health plan provides coverage of such treatments for other conditions and medical diagnoses like breast cancer, prostate cancer, premenopausal females after oophorectomy, primary testicular hypogonadism, etc., they would then have to provide them as covered benefits for the purpose of changing one’s gender.

While Title VII generally applies to businesses that have 15 or more employees, the EA also amends Title II of the CRA and expands the definition of “public accommodations” to include “any establishment that provides a good, service, or program.” This expansion means the EA captures businesses regardless of their size. For example, this would apply to the wedding vendors and small businesses who have increasingly been subjected to lawsuits for refusing to violate their beliefs about same-sex marriage in the wake of the Supreme Court’s decision in *Obergefell v. Hodges*. Vendors who do not want to be involved in a wedding celebration other than one between one man and one woman would be forced to stifle their religious beliefs or be forced out of the wedding service business. The EA would force them to violate their beliefs in these situations even if the vendor already serves customers who identify as LGBT in every other aspect of their business practice.

❖ Women and Girls

Women have long fought for vital gains toward actual equality and fairness and have achieved great success due to legitimate nondiscrimination protections. The EA would entirely undermine these civil rights protections based on sex, as well as the privacy and safety of women and girls.

The eradication of biological sex distinctions would impact certain business loans designated for women, since the EA applies SOGI to Title VI of the 1964 CRA regarding the distribution of federal funding. Take for instance, the Small Business Administration (SBA) Office of Women’s Business Ownership, which helps women entrepreneurs and oversees Women’s Business Centers (WBCs).¹¹

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 by the EA’s changes. Under the EA, biological men would have access to these funds and programs designed to give equality to women in the work place. 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. Yet under the EA’s SOGI mandates, federal contracts could be issued to biological men to meet this already small quota intended for women.

The EA’s expansion of the Title II “Public Accommodations” definition would also mean that girls and women would no longer have privacy when in publicly accessible bathrooms. Similar local laws mandating SOGI in public accommodations has already resulted in litigation over these privacy violations. In one case, a kindergartener was assaulted by a boy classmate in her school’s bathroom.¹² In another example, a woman who was a rape survivor¹³ was forced to quit her job¹⁴ when her employer began allowing men into women’s locker rooms and bathroom and shower facilities (part of her victimization involved being seen in the shower).

The EA specifically includes shelters in its expanded definition of “public accommodations.” Therefore, shelters created to help battered women heal physically and emotionally from abuse by men would be forced to allow biological men into women’s private spaces, including in showers or sleeping quarters. One unfortunate example of this occurred in Alaska, where a biological man tried to gain residence in a battered women’s shelter (he is now suing the shelter).¹⁵ In California, a biological man was allowed to reside in a women’s shelter, and, according to a legal complaint, sexually harass nine women.¹⁶

❖ Children

In addition to the above, the most disadvantaged children – those in foster care or those needing to be adopted – will be harmed by the EA’s changes to Title VI since that captures all federal funding streams. Faith-based organizations and others play a vital role in the adoption and foster care system and generally receive funding under Title IV of the Social Security Act to do their important work. There are over 440,000 children in foster care and more than 100,000 of them are available for adoption.¹⁷ The numbers are only getting higher; nearly 90,000 children a year enter the foster care system due to the opioid crisis alone.¹⁸ The EA would shut faith-based organizations down, compounding what has already happened in several states and localities across the country due to SOGI laws. Illinois passed a SOGI and it has resulted in nearly 3,000 children being displaced.¹⁹ In Philadelphia, the city put out an urgent call for homes for children, yet due to a SOGI law, it stopped its city contracts for placement with 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.²⁰

Nondiscrimination laws like the EA have been used to force faith-based agencies out of the foster care and adoption space. Yet no LGBT-identifying couple or individual has ever been unable to foster or adopt because they identify as LGBT. All 50 states allow LGBT fostering and adoptions and have multiple organizations willing to facilitate them.²¹

❖ Teachers and Students

The EA would amend Title IV of the 1964 CRA regarding public education. Public elementary, public secondary, collegiate, and university women's sports would no longer exist as a means of allowing fair competition for biological females. Biological men would be allowed to compete in women's sports and the EA would guarantee they would not be excluded. Some states already allow this in high school and collegiate sports. For instance, two biological boys won first and second place at a girl's high school indoor track championship in Connecticut.²² This means that two biological girls fell below the threshold to advance to the next track meet which inhibited their ability to be observed by college recruiters and obtain scholarships. Professional female athletes have already begun speaking out about the unfairness of this; as governmental mandates regarding SOGI become increasingly broad, they could soon affect professional sports.²³ Sports entities such as USA Swimming,²⁴ the US Tennis Association,²⁵ and USA weightlifting²⁶ already allow men to compete in women's sports. The 2020 Olympics could see its first transgender athletes.²⁷

The provision in the EA on public accommodations is also so expansive that it is likely to rope in private religious elementary and secondary as well as university schools. Additionally, the EA amends Title IV on federal funds. Since federal student loans to individuals have been interpreted as a form of "federal financial assistance" to the schools they attend, this would be another hook to apply these mandates on nearly every college and university in the country, including religious ones.²⁸ Any schools which receive federal funds and therefore fall under Title IV of the CRA would be bound in all aspects of its operation, including admissions and housing. The EA would therefore mandate some level of SOGI privileges on almost every school in the country.

❖ Medical Community

The EA's expanded definition of "public accommodations" includes an "establishment that provides health care." This means that all those in the medical profession will be required to offer hormone treatment and surgery for individuals with gender dysphoria, regardless of their moral or medical opinions about the actual health benefit of assisting individuals to physically transform their sex.

There is evidence that suicidal ideation remains higher among those who have had sex change surgery. A 2011 study done in Sweden that is one of the most robust studies of the issue found that post-surgery individuals had a suicide completion rate *19 times higher* than the general population. The risk of psychiatric hospitalization was found to be *2.8 times higher* even after adjustment for prior psychiatric disease. Additionally, death by neoplasm (a benign or cancerous mass) and cardiovascular disease was 2 to 2.5 times higher.²⁹

There is also evidence that puberty blockers and cross-sex hormones have detrimental effects. Puberty blockers actually cause a disease (the absence of puberty – hypogonadotropic hypogonadism). In children, they prevent secondary sex characteristics from developing, inhibit the sex-steroid maturation of the brain, block the child's growth spurt, lead to low bone density which might not recover, and inhibit fertility. In adults, when used properly (such as to treat prostate cancer in men and endometriosis in women), puberty blockers may cause spatial memory and other cognitive deficits. When combined with cross-sex hormones, permanent sterility may result. Cross-sex hormones alone may cause high blood pressure, heart attacks, blood clots, strokes, metabolic endocrine disturbances (e.g. diabetes), and some cancers.³⁰

Moreover, Title VI of the CRA, which is referenced in the Affordable Care Act's (ACA) nondiscrimination clause, is amended by the EA.³¹ By changing Title VI of the CRA to include gender identity, the EA would codify the ACA regulations which redefined "sex" in statute to include "gender identity." The ACA is already interpreted this way under an Obama-era regulation and it is being used to sue hospitals which object to performing transgender surgeries.³² The EA would make this a statutory mandate, not just a regulatory one. Faith-based medical providers should not be forced to violate their religious or medical beliefs or face punishment by the federal government.

The EA could also very well require insurance coverage of hormones and surgical procedures aimed toward changing a person's biological sex.

❖ All Americans

The EA would undermine the First Amendment religious freedom protections. And it explicitly states that the Religious Freedom Restoration Act³³ (RFRA) would not apply to the EA and cannot be used as a possible shield against the government imposition of this sexual belief system. RFRA was signed into law in 1993 by President Bill Clinton and enjoyed broad bi-partisan support. It does not prohibit all federal government burdens on religious belief. It only creates a balancing test that requires any substantial burden on sincere religious practice to be in furtherance of a compelling governmental interest and done in as narrow a manner as possible. It does not guarantee that religious belief is protected or defended in every instance, but only that people whose religious beliefs are seriously burdened can seek redress. Yet the EA removes even the *possibility* that the SOGI provisions it mandates could be found by a court to be an unnecessary burden on a person's religious beliefs.

4) What penalties would there be for violating the EA?

Given the expansive nature of the EA, it is difficult to say what the extent of the harm to organizations, family-owned businesses, and individuals would be. It would certainly increase litigation, which could result in significant legal costs. In the employment context alone, the penalties could be exorbitant. Employers who disagree with the SOGI mandates on their employment decisions could be forced to hire someone ill-fitted for the business or specific position being offered. They could be mandated to pay back wages and benefits, attorney's fees, expert witness fees, court costs, and compensatory and punitive damages. Compensatory damages include paying for the out-of-pocket expenses (such as costs of job searching or medical expenses) to an individual. Punitive damages would be above and beyond whatever other costs are required, but within certain limits. For employers with 15-100 employees, the limit is \$50,000. For employers with 101-200 employees, the limit is \$100,000. For employers with 201-500 employees, the limit is \$200,000. For employers with more than 500 employees, the limit is \$300,000.³⁴ Clearly, small and even medium-sized businesses could be so over burdened with litigation costs that they are forced to close down. That in turn could negatively impact the livelihood of their employees.

Conclusion

The Equality Act does not promote equality, but creates inequality. It would mandate government-imposed unfairness by requiring acceptance of a particular ideology about sexual ethics. It would result in harm to vast numbers of communities and individuals, including those it purports to protect.

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