United States House of Representatives
Committee on Education and Labor
Subcommittee on Civil Rights and Human Services
The Equality Act (H.R. 5): Ensuring the Right to Learn and Work Free from Discrimination
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Testimony of Sarah Warbelow, Legal Director of the Human Rights Campaign

Thank you for the opportunity to submit testimony to the Subcommittee on Civil Rights and Human Services on the Equality Act, H.R. 5. My name is Sarah Warbelow, and I am the legal director at the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality. It is both an honor and a privilege to submit this testimony on behalf of our over 3 million members and supporters nationwide. In addition to submitting this testimony as a legal expert on nondiscrimination law, I do so as a bisexual woman who is the proud parent of my transgender daughter and sister and sister-in-law of married lesbian mothers who are engaged and beloved members of their community.

Despite recent advancements in LGBTQ civil rights, millions of Americans still lack guaranteed, explicit basic protections from discrimination on the basis of sexual orientation and gender identity. Although marriage equality is the law of the land, LGBTQ people remain at risk of losing their job, being kicked out of their apartment, or being denied important services because of their sexual orientation or gender identity. The Human Rights Campaign is proud to support the Equality Act as a critical step towards ensuring civil rights for all people, regardless of who they are or who they love.

The Equality Act is Necessary to Address Discrimination and is Widely Supported

What the Equality Act Does

The Equality Act builds upon the legacy of the landmark civil rights statutes that have made this country a stronger nation that recognizes diversity as an asset, not a liability. It is essential that these foundational statutes continue to be vigorously enforced by the courts and respected by this body. When adopted, the 1964 Civil Rights Act was crafted in an effort to dismantle the racist, sexist infrastructure that framed the daily lives of people of color and women in this country, recognizing that absent these protections, ordinary people were denied the ability to fully participate in public life. The Equality Act serves an analogous purpose by providing critical protections from discrimination across key aspects of life not only for the LGBTQ community but also for all women, communities of color, and people of faith. Everyone must have the right to fully participate and contribute to public life.

The Equality Act amends existing civil rights law—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and several laws regarding employment with the federal government—to explicitly include sexual orientation and gender identity as protected characteristics. The legislation also amends the Civil Rights Act of 1964 to prohibit discrimination in public spaces and services and federally funded programs on the basis of sex.

Additionally, the Equality Act modernizes Title II of the Civil Rights Act to update the public spaces and services covered in current law to include retail stores, services such as banks, legal services, and transportation services. These important updates, comparable to protections under many state laws and the Americans with Disabilities Act, would strengthen existing protections for everyone and more accurately reflect the services we rely upon and places we move through in the 21st century.

Broad Support for the Equality Act

Importantly, the Equality Act would ensure our laws more accurately reflect the attitude of the American public. LGBTQ nondiscrimination protections are supported by nearly 70% of American citizens, including democrats, republicans, and independents.[1] In every state, a majority of residents favor extending civil rights to LGBTQ individuals in the areas of employment, housing, and public accommodations.

Business leaders and employers across the country have also voiced support for a nationwide standard for all workers, regardless of their sexual orientation or gender identity. HRC's Business Coalition for the Equality Act is joined by 185 companies across the country who are responsible for the employment of over 9.8 million people. The Equality Act is also backed by organizations like the National Association of Manufacturers, the largest manufacturing association in the United States, and the Business Roundtable, whose members employ more than 15 million workers. A national standard for LGBTQ protections ensures that these companies can better support a growing and diversified workforce.

In addition, a diverse group of 325 organizations and associations support the Equality Act including the National Women's Law Center, the Anti-Defamation League, the Child Welfare League, the American Medical Association, the NAACP, the National Alliance to End Sexual Violence, UnidosUS, and the National Association of Secondary School Principals.

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[1] DANIEL GREENBERG ET AL., *AMERICANS SHOW BROAD SUPPORT FOR LGBT NONDISCRIMINATION PROTECTIONS*, PRRI (MARCH 12, 2019), Available at: https://www.prri.org/research/americans-support-protections-lgbt-people/.

The Need for the Equality Act

A system that relies on a patchwork of laws to guarantee protection for LGBTQ people facilitates unequal treatment across state lines and even from city to city. While courts and agencies have increasingly interpreted existing sex discrimination protections in our civil rights laws to include LGBTQ people, enforcing these judicially-crafted protections requires a legal awareness coupled with the financial or other resources to bring a case, where the question of whether you are even covered by the law is often contested. This is a luxury that is far out of reach for a majority in our community. Explicit, statutory protections can vary state to state and city to city. In 28 states there are no explicit statutory nondiscrimination protections on the basis of sexual orientation and in 29 there are none on the basis of gender identity. As a result, LGBTQ people facing serious discrimination in employment, including being fired, being denied a promotion, experiencing harassment on the job, and being denied health benefits, may not have access to legal recourse.

Trista and Tracey are a lesbian couple who live in a small town in Kentucky more than a two hour drive from any large city. Trista worked successfully at loan service provider until a mutual friend accidentally outed her to her employer. Afterward, Trista's manager would keep her after work for extended periods of time telling her she needed to attend church and change her "lifestyle". Nine months later she was let go for differences in "ethics and morals." Two years later, in 2015, Tracey put Trista as a spousal beneficiary on her life insurance policy through work. Tracey was approached and asked if it was a mistake. After confirming the information was correct, Tracey was terminated within three days. Tracey and Trista have struggled financially since that time and fear being out about their relationship.

Lack of clarity regarding access to basic rights also means that LGBTQ people face disparities in education and other key areas of life. This was the case for Gavin Grimm, a Virginia public high-school student who received permission from school administrators to use the boys' restroom when he informed his school that he is a boy. When some parents and community members complained, in a public hearing in which his life, body and experiences were discussed, the school board adopted a policy requiring students to use restrooms corresponding to their sex assigned at birth, barring Gavin from using boys' restrooms solely because he is transgender and was designated female at birth. Rather than use the facilitates available to all other boys, he was forced to use a janitor's closet converted to a single user restroom, effectively segregating him from his classmates.

LGBTQ people who live in states without explicit nondiscrimination laws may also discover that they lack local-level protections as well. While some businesses and organizations operating in these states advise their staff and members against discrimination on the basis of sexual

orientation or gender-identity, that guidance is not regularly adhered to. I am reminded of a phone call we received from Lindsay a service member who was stationed along with her wife at a base in rural Missouri. The couple had been stationed separately for years and now united hoped to start a family. However, after initially being told that they could receive fertility treatments on the base the doctor available to do the procedure refused. Lindsay and her wife completed paperwork to have the treatments done off base only to find that no provider in the area would serve them. They finally found a doctor who would provide treatment -- a five hour drive each way from their home.

Transgender people are routinely turned away from care simply because of who they are. Transgender patients report being told that certain hospitals or doctors just don't serve transgender people, including in emergencies completely unrelated to gender transition. Cecilia Chung, a transgender woman living in San Francisco knows the life-threatening impact this discrimination can have on an individual. Cecilia visited the emergency room with severe stomach pain, but was abruptly turned away because she is a transgender. After struggling with pain and vomiting for two weeks she returned and was diagnosed with severe bowel obstruction and gangrene. She had to undergo emergency surgery that could have been avoided with earlier treatment.

The stories of Trista and Tracy, Gavin, Lindsay and Cecilia are far from unique. Rather, they reflect the humiliation, economic damage, physical harm and loss of opportunity experienced by so many LGBTQ people across our country. While the Equality Act covers many facets of life particularly for LGBTQ people and all women, this testimony will focus on the areas of the Act for which this subcommittee has jurisdiction.

Employment

Every day qualified, hardworking lesbian, gay, bisexual, transgender, and queer (LGBTQ) Americans are denied job opportunities, fired or otherwise discriminated against just because of who they are or who they love. Recent surveys have shown that 42% of lesbian, gay, and bisexual people, and 78% of transgender people, have experienced mistreatment on the job because of who they are.[2] In addition, studies show significant wage disparities between LGBTQ and heterosexual people, with one analysis showing gay men make 10 to 32% less than their straight male counterparts.[3] 1 in 5 LGBTQ workers reported that they had been passed over for a promotion because of their sexual orientation or gender identity and almost half of LGBTQ

[2] BRAD SEARS AND CHRISTY MALLORY. *DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE.* THE WILLIAMS INSTITUTE (July 2011). Available at: https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf

[3] M.V. LEE BADGETT ET AL., *BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 1998–2008*, 84 CHI.-KENT L. REV. 599 (2009). Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol84/iss2/7

workers are completely closeted on the job.[4] Discrimination on the job -- whether it be in hiring, termination, or promotion -- has very real impacts on the financial and emotional well-being of LGBTQ individuals and their families.

Benefits

The denial of equal access to healthcare and retirement benefits for LGBTQ people is also common and has very real impacts on LGBTQ workers and their families. Jacqueline Cote and her wife Diana Smithson know the cost of this discrimination too well. Jackie had been a long time Walmart employee in Massachusetts when she married Diana in 2004. Beginning in 2008, Jackie continually tried to add Diana as her spouse to her company-provided health insurance plan like other married couples. She was repeatedly denied on the grounds that she was married to a woman. In 2012 Diana was diagnosed with ovarian cancer. Without insurance, the couple was forced to take on hundreds of thousands of dollars of medical debt for Diana's treatments.

Transgender employees, including those who work for state or local government entities, are regularly forced to shoulder costly medical debt for gender-affirming medical care that frequently goes uncovered by employer health plans. These discriminatory exclusions save companies little, if any, resources, but often drain an individual employee's savings and paying out of pocket for maintenance medication can stand in the way of achieving long term financial stability. For many people, without the coverage, the care remains altogether out of reach leading to other physical and psychological harm, which are then borne by the employer and the employee.

While courts and agencies have increasingly interpreted existing sex discrimination protections in our civil rights laws to include LGBTQ people, enforcing these judicially-crafted protections requires a legal awareness coupled with the financial or other resources to bring a case, where the question of whether you are even covered by the law is often contested. This is a luxury that is far out of reach for a majority in our community. Explicit, statutory protections can vary state to state and city to city. In 28 states there are no explicit statutory nondiscrimination protections on the basis of sexual orientation and in 29 there are none on the basis of gender identity. As a result, LGBTQ people facing serious discrimination in employment, including being fired, being denied a promotion, experiencing harassment on the job, and being denied health benefits, may not have access to legal recourse.

Implementation

[4] DEENA FIDAS & LIZ COOPER, HUMAN RIGHTS CAMPAIGN FOUNDATION, *A WORKPLACE DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS NATIONWIDE*, 10, 17 (2018).

The Equality Act would ensure that our existing sex discrimination protections in workplace discrimination laws include protections from discrimination on the basis of sexual orientation or gender identity, affording LGBTQ workers the security they need to provide for themselves and their families. The Equality Act amends Title VII of the Civil Rights Act of 1964, the Government Employees Rights Act, the Congressional Accountability Act, and the Civil Service Reform Act to ensure that candidates and employees who are otherwise qualified will not be discriminated against in any terms or conditions of employment. Title VII exempts small businesses and the military, as well as provides an accommodation for religious organizations. The Equality Act treats protections based on sexual orientation and gender identity the same as other protected personal characteristics such as race, sex, and national origin.

The implementation of state and municipal level nondiscrimination laws reveals that these essential protections can transform the lives of LGBTQ people and their families, and do not lead to excessive and costly litigation for companies. A 2013 GAO study found that "relatively few employment discrimination complaints based on sexual orientation and gender identity" have been filed in those states.[5] The New York City Bar's Labor and Employment Committee has also studied the impact of nondiscrimination laws on litigation rates, and concluded that that since New York City amended its laws less than 1 percent of total claims to the New York City Commission on Human Rights from 2002 to 2010 were related to sexual orientation or gender identity.[6] A 2011 study conducted by the Williams Institute also found that in states with protections for lesbian, gay, and bisexual workers complaint filing rates for sexual orientation discrimination were slightly lower than but similar to, complaints made by other protected classes including sex discrimination complaints by female workers and race discrimination complaints.[7]

The Equality Act ensures the same litigation standards regarding burden of proof under existing law apply to sexual orientation and gender identity discrimination. Individuals claiming discrimination bear the burden of proving that discrimination based on sexual orientation or gender identity occurred and that they were otherwise qualified for the opportunity. The employer can present evidence to show the adverse action was taken because of a legitimate, non-discriminatory reason. For example, it is acceptable differential treatment for a company to refuse hire a lesbian teenager for a full-time position based on her age and experience level.

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[5] LETTER FROM THE U.S. GEN. ACCOUNTABILITY OFFICE TO THE U.S. SENATE, *UPDATE ON STATE STATUTES AND ADMINISTRATIVE COMPLAINT DATA ON EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY* (July 31, 2013). Available at: http://www.gao.gov/assets/660/656443.pdf

[6] NEW YORK CITY BAR LABOR AND EMPLOYMENT COMMITTEE. *THE EMPLOYMENT NONDISCRIMINATION ACT* (APRIL 2011).

[7] BRAD SEARS & CHRISTY MALLORY, *EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN STATE AND LOCAL GOVERNMENT: COMPLAINTS FILED WITH THE STATE ENFORCEMENT AGENCIES 2003-2007*, 8 (Williams Institute ed., 2011).

However, it is impermissible discrimination for a company to refuse to hire a woman simply because she is married to another woman.

Education

The Equality Act addresses education through Title IV and Title VI of the Civil Rights Act of 1964, but leaves Title IX of the Education Amendments of 1972 unamended. Title IV prohibits discrimination in public elementary and secondary schools in addition to public institutions of higher education. The Equality Act clarifies that the sex discrimination prohibition in Title IV also prohibits discrimination on the basis of sexual orientation and gender identity. The Equality Act's protections under Title VI from exclusion from participation in, denial of benefits, and discrimination under federally assisted programs on the basis of sex, sexual orientation, and gender identity extend to federally assisted schools. Any school receiving federal funding would not be able to discriminate against students or prospective or current employees (please see the exceptions addressed later in the religious exemptions section).

The Equality Act codifies protections that the Department of Education has already put in place through case law and guidance, including protection from harassment on the basis of sex stereotyping. The Equality Act broadly prohibits discrimination against any LGBTQ youth. Discrimination can take many forms including exclusion from programs and facilities in addition to harassment by other youth or by teachers and staff. The Equality Act codifies current case law ensuring that transgender students are treated consistent with their gender identity, including when accessing locker rooms and restroom facilities.

For LGBTQ students, inclusion and equal treatment at school is important to both academic success and safety. Research suggests that LGBTQ students are twice as likely as non-LGBTQ students to be verbally harassed, physically attacked, or excluded at school.[8] LGBT students who experience higher levels of victimization have higher levels of depression and lower self-esteem than those who experience lower levels of victimization.[9] Academic performance is also acutely affected. Thirty percent of LGBT students reported skipping a class, or an entire day of school in the month prior to the survey because they felt unsafe or uncomfortable at school.[10] Those students who experience higher levels of victimization were more than twice as likely to miss class or school as those who experience lower levels.[11] Overall, LGBT students who experience higher levels of victimization have lower GPAs and are twice as likely to report that they do not

[8] HUMAN RIGHTS CAMPAIGN FOUNDATION, *GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS*, 16 (2012).
[9] JOSEPH G. KOSCIW ET AL., *GAY, LESBIAN, & STRAIGHT EDUCA. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS*, 68-70 (2012).
[10] *Id.* at 122.
[11] *Id.* at 68-70, 122.

plan to pursue postsecondary education as those students who experience lower levels.[12] Permitting the inclusion of LGBTQ students in all areas of academic life, including access to restrooms and locker rooms, encourages acceptance of LGBTQ people and promotes a more welcoming environment.[13]

The Equality Act would also equip teachers and staff with strong employment protections. This means that schools will be prohibited from discriminating against a teacher on the basis of sexual orientation or gender identity in the context of hiring, firing, promotion or benefits. This protection is critical to our nation's educators who should be able to devote time to their students not to fears of termination unrelated to their job performance. However, Stacy Bailey knows first hand what it means to work at a school that believes it has a right to terminate teachers because of their sexual orientation or transgender status. A two-time teacher of the year in Texas, Stacy was put on administrative leave and removed from her elementary art class room after she showed her class an age-appropriate photo of herself with her wife dressed as Dory and Nemo as was a standard practice among by her straight colleagues. A parent complained that Stacy was "promoting the homosexual agenda" and Stacy was not allowed to return to the school where she has taught for a decade.

Single-Sex Spaces

Policies and practices that exclude transgender students from access to single-sex spaces and activities have devastating consequences for the health and well-being of transgender young people. When students who are transgender are prohibited from using restrooms and locker rooms that align with their gender identity it impairs their ability to attend school and receive an education at all. Not only do these policies physically exclude transgender students from spaces available to their peers, they cast transgender students as outsiders contributing to isolation and shame in the educational setting and beyond. When forced to use facilities corresponding to their sex at birth, many transgender students have reported feeling unsafe and therefore avoid going into locker rooms or restrooms altogether.[14] Avoiding restroom use contributes to a range of physical health problems including urinary tract infections.

The suggestion that inclusion of transgender students in single-sex spaces that accord with who they are will pose a threat to the privacy or safety of non-transgender students is not supported by the experience of schools across the country that protect transgender students from discrimination. Indeed, as school administrators representing inclusive school districts in 33 states and the District of Columbia responsible for educating 1.7 million students explain: "In the rare instances that amici have needed to address locker room misbehavior issues, it has been to

[12] *Id.* at 39-44.
[13] *Id.* at 62-70.
[14] ELLEN KAHN ET AL., HUMAN RIGHTS CAMPAIGN FOUNDATION, *2018 LGBTQ YOUTH REPORT 14* (2018).

ensure the safety of the transgender students. The sad truth is that our transgender children are significantly more likely to be the targets of student misconduct, rather than the perpetrators of it." [Judy] Chiasson Interview.[15]

Often the protection of cisgender girls is used as a justification for excluding transgender students from restrooms and locker rooms that match who they are. But as the National Women's Law Center has explained: "This stated goal of protecting women—specifically, white women—similarly served as justification for segregationist policies, many of which were rooted in anti-miscegenation sentiment… Thus, restrooms and similar spaces were at the center of the effort to entrench racial segregation… [T]he arguments here against transgender students using shared facilities echo those made in efforts to sustain racially segregated bathrooms in various kinds of institutions, and are rooted in unfounded fears and stereotypes."[16]

It is simply untrue that including girls and women who are transgender in women's spaces pose safety risks to non-transgender girls and women. In the words of a statement by a coalition of more than 300 sexual assault and domestic violence organizations, led by the National Task Force to End Sexual and Domestic Violence Against Women: "States across the country have introduced harmful legislation or initiatives that seek to repeal nondiscrimination protections or restrict transgender people's access to gender-specific facilities like restrooms. Those who are pushing these proposals have claimed that these proposals are necessary for public safety and to prevent sexual violence against women and children. As rape crisis centers, shelters, and other service providers who work each and every day to meet the needs of all survivors and reduce sexual assault and domestic violence throughout society, we speak from experience and expertise when we state that these claims are false... Non-discrimination laws do not allow men to go into women's restrooms—period. The claim that allowing transgender people to use the facilities that match the gender they live every day allows men into women's bathrooms or women into men's is based either on a flawed understanding of what it means to be transgender or a misrepresentation of the law."[17]

Athletics

Transgender students are often excluded from participation in single-sex activities consistent with who they are. This can be extremely harmful to their social, emotional and educational

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[15] BRIEF FOR SCHOOL ADMINISTRATORS FROM THIRTY STATES AND THE DISTRICT OF COLUMBIA AS AMICUS CURIAE, *PARENTS FOR PRIVACY, ET AL. V. DALLAS SCHOOL DISTRICT NO. 2, ET AL.*, CASE NO. 18-35708 (9TH CIR. MARCH 11, 2019). Available at: https://www.aclu.org/sites/default/files/field_document/states_amicus.pdf

[16] BRIEF FOR WOMEN'S LAW PROJECT, ET AL., *DOE, ET AL. V. BOYER AREA SCHOOL DISTRICT, ET AL.*, CASE NO. 17-3113 (3RD CIR. JANUARY 23, 2018).
Available at: https://www.aclu.org/sites/default/files/field_document/womens_law_project.pdf

[17] STATEMENT OF WOMEN'S RIGHTS AND GENDER JUSTICE ORGANIZATIONS IN SUPPORT OF FULL AND EQUAL ACCESS TO PARTICIPATION IN ATHLETICS FOR TRANSGENDER PEOPLE.
Available at: https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.1.19.pdf

development. School athletic programs foster a sense of teamwork and promote the improvement of physical health and wellness. When transgender students cannot participate in athletics consistent with their gender, many find themselves completely excluded from sports.[18]

Similarly, policies that bar transgender students from locker rooms that match their gender compound discrimination experienced by transgender students who participate in school athletics.Exclusion from the locker room does more than force transgender athletes to use facilities that do not correspond to their gender, it isolates them from their teammates. Other members of their team will have spent additional time together in the locker room, forming and cultivating important relationships.

Opponents of equality in athletics for transgender athletes have argued that girls who are transgender have unfair physiological advantages over cisgender girls and as a result, will dominate women's competitive sports. Some have also suggested that girls who are transgender pose a threat to their cisgender teammates both on the field and in shared locker rooms. None of these arguments are rooted in fact. Existing evidence shows that denying opportunities and access to students based on their gender identity causes actual harm to those students, while there is no data to suggest that girls who are transgender are dominating athletics or posing a harm to their cisgender counterparts.[19]

As leading women's sports and rights groups explain: "As organizations that fight every day for equal opportunities for all women and girls, we speak from experience and expertise when we say that nondiscrimination protections for transgender people—including women and girls who are transgender—are not at odds with women's equality or well-being, but advance them. Equal participation in athletics for transgender people does not mean an end to women's sports. The idea that allowing girls who are transgender to compete in girls' sports leads to male domination of female sports is based on a flawed understanding of what it means to be transgender and a misrepresentation of nondiscrimination laws. Transgender girls are girls and transgender women are women. They are not and should not be referred to as boys or men, biological or otherwise. And when transgender people are excluded from participation on teams that align with their gender identity, the result is often that they are excluded from participating altogether."[20]

By expanding current civil rights laws to include "sexual orientation" and "gender identity" in education, the Equality Act ensures that all students have equal access and opportunity in the classroom and on the field.

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[18] *Id.*
[19] *Id.*
[20] *Id.*

Federally Funded Programs

The Equality Act amends Title VI of the Civil Rights Act of 1964 by adding sex, sexual orientation, and gender identity to the existing protected categories of race, color, and national origin. It explicitly prohibits exclusion from participation in, denial of benefits, and discrimination under federally assisted programs on these bases. This would provide equal access to programs directly conducted by federal agencies, like supplemental nutrition programs, as well as those administered by private organizations receiving federal funding, as grantees. The Equality Act would ensure that any federally-funded program would be open to all eligible beneficiaries regardless of sexual orientation, gender identity, or sex.

Federal programs and services are implemented through regulation and guidance documents published by individual agencies. Like state level nondiscrimination statutes, nondiscrimination provisions incorporated in federal regulations vary by program, service, and administering agency. While some federal agencies have incorporated prohibitions on discrimination across all agency-funded programs to include sexual orientation, sex, and gender identity, others, like the Department of Health and Human Services have not. For example, in a broad rule governing many HHS programs published in 2004, the Department expressly declined to adopt explicit protections for LGBTQ people.[21] Implementation of this rule over the past 15 years has revealed that the federally mandated and administratively created protections outlined in this rule have failed to adequately address and prevent discrimination against beneficiaries due to sexual orientation and gender identity.

Protection for LGBTQ beneficiaries is crucial to ensure that every person has equal access to the services funded by federal agencies as intended by Congress. The consequences of discrimination in federally funded programs and activities are far reaching, particularly for LGBTQ individuals. Given the expansive web of federal programs and services --spanning from unincorporated townships to major urban areas—the extension of this protections would be life changing. As a result of systemic discrimination, LGBTQ people are at an increased risk for poverty and homelessness, making access to safety net programs like TANF, Social Security, and Medicare/Medicaid critical. In addition to these federal programs, billions of taxpayer dollars are directed to organizations and state and local governments to provide services directly to their communities.

[21] HEALTH AND HUMAN SERVICES DEPARTMENT, *PARTICIPATION IN DEPARTMENT OF HEALTH AND HUMAN SERVICES PROGRAMS BY RELIGIOUS ORGANIZATIONS*, 69 FR 42586 (July 16, 2004). Available at: https://www.federalregister.gov/documents/2004/07/16/04-16130/participation-in-department-of-health-and-human-services-programs-by-religious-organizations

Twenty-six federal grant-dispensing agencies disperse approximately $500 billion annually to fund over 1,000 grant programs that provide a myriad of services.[22] These grant programs are most often run by state and local governments and nonprofit organizations to serve diverse missions and populations across the country. These include public welfare agencies and programs, housing and nutrition assistance programs, and public safety services. These organizations, in turn, rely on thousands of employees to carry out the federal grant programs. Some federal agencies, including the Department of Housing and Urban Development, have incorporated nondiscrimination provisions within their grant-making process, however these protections are far from universal across federal programs.[23] LGBTQ people seeking crisis intervention services or job training from a federally funded grantee are at risk of discrimination and may find themselves without legal recourse. A recent waiver from the Department of Health and Human Services granting a child placement agency an exception from existing nondiscrimination requirements on the basis of religion opens the door to possible anti-LGBTQ discrimination in the future.[24]

Discrimination on the Basis of Gender Identity and Sexual Orientation Is Unlawful Sex Discrimination

Modern sex discrimination jurisprudence has been shaped by the landmark 1989 Supreme Court case, *Price Waterhouse v. Hopkins*.[25] In *Price Waterhouse*, the Court held that "remarks at work that are based on sex stereotypes" may be evidence of sex discrimination in violation of Title VII.[26] "[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be," has acted on the basis of sex the Court explained.[27] Following this decision, courts and the federal government have extended this sex stereotyping logic to develop a clear legal trajectory affirming these protections for LGBTQ people. As a result, federal courts and the EEOC have clearly found that discrimination on the basis of gender identity and sexual orientation is illegal under Title VII of the 1964 Civil Rights Act, the Fair Housing Act, Title IX of the Education Amendments of 1972, and for gender identity under the Equal Credit

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[22] VERONIQUE DE RUGY, ET AL. *FEDERAL GRANT AID STATE AND LOCAL CHART ANALYSIS.* GEORGE MASON UNIVERSITY, MERCATUS CENTER. Available at: https://www.mercatus.org/system/files/Federal-grant-aid-state-and-local-chart-analysis-pdf.pdf

[23] *See, e.g.,* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, *EQUAL ACCESS TO HOUSING IN HUD PROGRAMS REGARDLESS OF SEXUAL ORIENTATION OR GENDER IDENTITY*, 77 FR 5661 (Feb. 3, 2012). Available at: https://www.federalregister.gov/documents/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity

[24] MECKLER, LAURA. "TRUMP ADMINISTRATION GRANTS WAIVER TO AGENCY THAT WORKS ONLY WITH CHRISTIAN FAMILIES." *THE WASHINGTON POST* (January 23, 2019). Available at: https://www.washingtonpost.com/local/education/trump-administration-grants-waiver-to-agency-that-works-only-with-christian-families/2019/01/23/5beafed0-1f30-11e9-8b59-0a28f2191131_story.html?utm_term=.d36d9c3abbe0

[25] 490 U.S. 228 (1989).

[26] *Id.* at 251.

[27] *Id.* at 250.

Opportunity Act and Affordable Care Act as well.[28] In addition to these explicit decisions, long standing legal interpretation and precedent dictate that these interpretations be transferred when deciphering the scope of protections under other similar statutes and regulations.

The EEOC Has Established Gender Identity Discrimination and Sexual Orientation Discrimination as Unlawful Sex Discrimination

In 2011 the EEOC decided *Macy v. Holder*, holding that transgender employees were protected from discrimination based on gender identity under Title VII's prohibition on sex discrimination.[29] In that case, the complainant alleged that she was not hired for a position due to her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."[30] The complainant used each of these classifications to state a claim of sex discrimination because at that time the EEOC only recognized Title VII claims based on sex as "biological differences between men and women—and gender."[31] Relying on *Price Waterhouse* and its progeny, including *Glenn v. Brumby* -- discussed in more detail below-- the Commission held:

> Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort . . . Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.[32]

The principle announced by the EEOC in *Macy*, includes protections for transgender individuals in single-sex spaces, the Commission explained in *Lusardi v. McHugh*. In *Lusardi*, the EEOC held that an employer's refusal to allow a transgender individual access to the restroom that matched their gender identity constituted sex discrimination under Title VII.[33] Since these rulings, several complaints alleging gender identity discrimination have been taken up by the

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[28] *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that a man who was denied a loan because he dressed femininely could bring a claim of sex discrimination under the Equal Credit Opportunity Act).
[29] E.E.O.C. Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2010).
[30] *Id*. at 14.
[31] *Id*. at 15.
[32] *Id.* at 30-32. This position has been affirmed by subsequent EEOC decisions. *See, e.g., Lusardi v. McHugh*, E.E.O.C. Appeal No. 0120133395 (Mar. 27, 2015); *EEOC v. Deluxe Financial Services Corp.*, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled January 20, 2016); and *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla., Civ. No. 8:14-cv-2421-T35 AEP, filed Sept. 25, 2014, settled April 9, 2015).
[33] E.E.O.C. Appeal No. 0120133395 (Mar. 27, 2015) (relying on *Macy v. Holder* in finding that "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort").

EEOC.[34] Two complaints were settled in favor of transgender complainants after *Macy* and consent decrees have been issued against the employers.[35]

Four years later the EEOC determined in *Baldwin v. Foxx*, that a claim of sexual orientation discrimination is "necessarily" a claim of sex discrimination for the purposes of Title VII.[36] In *Baldwin*, the Commission found that an employer had unlawfully relied on "sex-based-considerations" when denying an employee a promotion based on his sexual orientation. The Commission recognized that "'sexual orientation' as a concept cannot be defined or understood without reference to sex."[37] Because of the inextricable way in which sexual orientation and sex are tied, they must be looked at through the same legal lens.

The EEOC adopted the gender stereotype theory of sexual-orientation-as-sex discrimination, building off *Price Waterhouse v. Hopkins* and subsequent cases.[38] The Commission explained that the expectation of heterosexuality, i.e., the expectation that men will only date women and women will only date men, is itself a sex stereotype, and to rely on in it employment decisions is evidence of sex discrimination.[39]

The EEOC took the same position in *Cote v. Wal-Mart*, where it found that the refusal to enroll an employee's same-sex spouse in employer-sponsored health care benefits constituted sex discrimination under Title VII.[40] In March 2016, the EEOC filed Title VII sex discrimination lawsuits in two cases where employees were subjected to harassment based on their sexual orientation.[41]

Federal Case Law Reinforces the EEOC's Application of Sex Stereotyping Theory and Reflects a Clear Legal Trajectory

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[34] *EEOC v. Bojangles Restaurants, Inc.*, (E.D. N.C., Civ. No. 5:16-cv-00654-BO, filed July 6, 2016); *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (E.D. Mich., Civ. No. 2:14-cv-13710-SFC-DRG, filed Sept. 25, 2014); and *Broussard v. First Tower Loan LLC* (E.D. La., Civ. No. 2:15-cv-01161-CJB-SS) (court granted EEOC's Motion to intervene on September 17, 2015).

[35] *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla., Civ. No. 8:14-cv-2421-T35 AEP, filed Sept. 25, 2014, settled April 9, 2015) (finding that the employer had improperly dismissed complainant in violation of Title VII, the consent decree included injunctive relief and damages); *EEOC v. Deluxe Financial Services Corp.*, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled January 20, 2016) (finding that the employer had created a hostile work environment and violated Title VII by not allowing complainant to use the restroom that matched her gender identity, the consent decree included damages, competency training, and a change in employer's health care and workplace policies).

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

[37] *Id.*

[38] 490 U.S. 228 (1989).

[39] E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *10.

[40] No. 15-cv-12945-WGY (D. Mass. 2016).

[41] *EEOC v. Scott Med. Health Ctr.*, P.C., No. CV 16-225, 2017 WL 5493975 (W.D. Pa. Nov. 16, 2017)(finding that a man who had been harassed at his place of employment for his sexual orientation was entitled to damages and injunctive relief); *EEOC v. Pallet Companies*, No. 1:16-cv-00595-CCB (D. Md., filed Mar. 1, 2016, settled June 28, 2016).

Discrimination Against Transgender People Based on Gender Identity as Impermissible Sex Stereotyping

The overwhelming majority of courts to consider claims of discrimination by transgender people have held that discrimination against someone based on gender identity is impermissible sex stereotyping in violation of prohibitions on sex discrimination under federal law.

In the employment context, the Eleventh Circuit held in *Glenn v. Brumby* decision that the Georgia General Assembly's Office of Legislative Counsel violated the Equal Protection Clause by firing a transgender employee because she was transgender .[42] The *Glenn* court reasoned that discriminating against someone on the basis of their gender identity constitutes sex-based discrimination under the Equal Protection Clause, relying on *Price Waterhouse*. [43] Under *Price Waterhouse*, the court explained, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[44]

In addition to the Eleventh Circuit, the First, Sixth, Seventh and Ninth Circuits[45] and many district courts[46] have all likewise recognized that claims of discrimination on the basis of gender identity is per se sex discrimination under Title VII and other federal civil rights laws based on *Price Waterhouse*. Even before the EEOC's ruling, several district courts had followed this reasoning under Title VII[47] and under the Equal Protection Clause of the United States Constitution.[48] Courts have also held that under Title VII limiting access to facilities based different restrictive notions of "biological sex" is "too narrow."[49]

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[42] *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); The Circuits have developed this interpretation in a long series of decisions prior to Glenn. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1198-1203 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); and *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008).
[43] *Id.* (relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).
[44] *Id.* at 1317.
[45] *See, e.g., Smith*, 378 F.3d 566; and *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-50 (7th Cir. 2017).
[46] *See, e.g., Valentine Ge v. Dun & Bradstreet, Inc.*, No. 6:15-CV-1029-ORL-41GJK, 2017 U.S. Dist. LEXIS 9497, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, (D. Nev. Nov. 28, 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Schroer* , 577 F. Supp. 2d at 305; *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015); and *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008).
[47] *See, e.g., Rene*, 305 F.3d at 1068; Smith, 378 F.3d at 573; and Schwenk, 204 F.3d at 1201.
[48] *See, e.g., Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); and *Barnes*, 401 F.3d at 739.
[49] *Whitaker*, 858 F.3d at 1046-50 (7th Cir. 2017) (relying on *Price Waterhouse*, *Oncale*, *Hively*, and *Glenn* to establish gender identity as sex discrimination under Title VII).

In May 2017, the Seventh Circuit in *Whitaker v. Kenosha School District* recognized that discrimination against a transgender person because of their gender identity is sex discrimination under Title IX and Equal Protection.[50] The Seventh Circuit relied on *Price Waterhouse* and its progeny holding in determining that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[51] In distinguishing contrary circuit precedent, the Seventh Circuit found that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[52] The circuit took a broad view of sex discrimination, stating that it "encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[53]

In 2017, the Colorado District Court ruled in favor of a woman who is transgender in a same-sex relationship who was denied housing by a landowner who feared her low-profile in the community would be ruined by the "uniqueness" and "unique relationship" of the couple.[54] The court found that the Fair Housing Act's sex discrimination provisions apply to stereotypes about gender identity, marking the first time a federal court has applied the FHA to LGBTQ discrimination.[55] [56] The *Smith* court similarly relied on Price Waterhouse and held that "discrimination against women (like [Smith]) for failure to conform to stereotype norms concerning to or with whom a woman should be attracted, should marry, and/or should have children is discrimination on the basis of sex under the FHA."[57] The ruling reaffirms the legal trajectory courts are following in extending federal sex discrimination protections to discrimination based on gender identity.

Courts have also included discrimination against transgender people within the ACA's prohibition on sex discrimination. In 2015, the Minnesota District Court ruled in favor of a transgender man who alleged that he received poor care from a health-care organization because of his gender identity.[58] The court relied on *Price Waterhouse* and found that "[b]ecause the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."[59] In 2017, the California District Court found that discrimination based on

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[50] *Whitaker*, 858 F.3d at 1050.
[51] *Id.* at 1048.
[52] *Id.* (quoting *Glenn*, 663 F.3d at 1316).
[53] *Id.* at 1049 (quoting *Smith*, 378 F.3d at 566).
[54] *See Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017) (holding that a defendant unlawfully relied on "stereotypes of to or with whom a woman (or man) should be attracted, should marry, or should have a family" in denying plaintiff's housing).
[55] *Id.* at 1200.
[56] *Price Waterhouse*, 490 U.S. 228 (1989).
[57] 249 F. Supp. 3d 1194 (D. Colo. 2017).
[58] *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).
[59] 523 U.S. 75 (1998).

gender identity is sex discrimination for purposes of the Affordable Care Act "[b]ecause Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex."[60] The court cited the *Glenn* decision from the 11th Circuit and *Whitaker* from the 7th Circuit for guidance on its reasoning. These decisions reflect a clear legal trajectory of including gender identity discrimination as a form of sex discrimination.

Sexual Orientation and Sex Stereotyping

Several federal district courts have recognized the ability of plaintiffs to bring claims of sexual orientation discrimination under the prohibition on sex discrimination in Title VII.[61] Notably, both the Second [62] and Seventh[63] Circuits have ruled *en banc* that sexual orientation discrimination is covered by Title VII's prohibition on sex discrimination.

In 2017, the Seventh Circuit agreed to rehear *en banc* the case on Kimberly Hively, a lesbian woman who claimed she was denied full-time employment at her work because of her sexual orientation.[64] Hively brought a claim of sex discrimination against her employer under Title VII and received a right to sue letter from the EEOC, but her claims in district court were ultimately dismissed on the grounds that Seventh Circuit precedent did not acknowledge sexual orientation as a protected classification under Title VII.[65] In its *en banc* decision, the circuit court relied on the EEOC's decision in *Baldwin* as well as recent shifts in the Supreme Court Title VII jurisprudence to overturn its own precedent and rule in Hively's favor.

The Seventh Circuit used the comparative method, the gender stereotype method, and the associational method to validate Hively's claim. First, under the comparative method, the circuit court compared Hively's treatment to a similarly-situated male (one who also dates women) and found that the logical explanation for the disparity in treatment was that "Ivy Tech is disadvantaging [Hively] because she is a woman."[66] The court then examined Hively's claim "through the lens of the gender nonconformity line of cases," and found that she "represents the ultimate case of failure to conform to the female stereotype … which views heterosexuality as the norm.[67] The court then concluded that "the line between a gender nonconformity claim and one based on sexual orientation … does not exist at all."[68] Finally, under the associational theory,

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[60] *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017).
[61] *See Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Boutillier v. Hartford Pub. Sch*., 221 F. Supp. 3d 255 (D. Conn. 2016); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'r*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *United States EEOC v. Scott Med. Health Ctr., P.C*., 217 F. Supp. 3d 834 (W.D. Pa. 2016).
[62] *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).
[63] *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).
[64] *Id.* at 339.
[65] *Id.* at 341.
[66] *Id.* at 345.
[67] *Id.* at 346.
[68] *Id.*

the court found that "to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of … the sex of the associate."[69] Because each theory led the court to determine that Hively's negative treatment was in some way because of her sex, the Seventh Circuit ruled that her sexual orientation claim was actionable under Title VII.

The Second Circuit took a similar approach months later when it overturned its own precedent and ruled in favor of plaintiff Donald Zarda, a gay man who alleged he was fired because of his sexual orientation. The circuit court found that the comparative, gender stereotyping, and associational methods were different ways of reaching the same conclusion: that "sexual orientation is a function of sex."[70] The court found that each of these theories illustrated how one's sexual orientation is always defined in relation to one's own sex. Because the two traits could not be separated in common understanding, it made no sense to draw such a distinction under the law. Therefore, the court found that to ignore the "sex-dependent nature of sexual orientation" was to evade the natural protections of Title VII.[71]

Similarly, in the Title IX context in the 2015 case *Videckis v. Pepperdine University* a California federal judge determined that two female students had an actionable sex discrimination claim under Title IX against Pepperdine University for alleged discrimination on the basis of sexual orientation.[72] The two students alleged that the coach of the basketball team, of which they were both members, assumed the two were in a relationship with one another, and based on that assumption, asked inappropriate questions and made discriminatory comments toward them. The university argued that the students could not allege discrimination on the basis of sexual orientation as an independent claim under Title IX. The court rejected this argument and held discrimination on the basis of sexual orientation is an actionable claim on the basis of sex under Title IX. The court reasoned "A plaintiff's 'actual' sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis." This determination relied heavily on the EEOC's decision in *Baldwin v. Foxx* addressing Title VII coverage for sexual orientation discussed in greater detail above.[73]

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[69] *Id.* at 349.
[70] *Zarda*, 883 F.3d at 113.
[71] *Id.* at 114.
[72] *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).
[73] 2015 WL 4397641 at *5 (E.E.O.C. July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to Baldwin. See, e.g., *Complainant v. Cordray,* 2014 WL 7398828 (E.E.O.C. Dec. 18, 2014); *Complainant v. Donahoe,* 2014 WL 6853897 (E.E.O.C. Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, 2014 WL 5511315 (E.E.O.C. Oct. 23, 2014); *Complaint v. Johnson,* 2014 WL 4407457 (E.E.O.C. Aug. 20, 2014); *Couch v. Dep't of Energy,* 2013 WL 4499198(E.E.O.C. Aug. 13, 2013); *Brooker v. U.S. Postal Serv*., 2011 WL 3555288 (E.E.O.C. May 20, 2013); Castello v. U.S. Postal Serv., 2011 WL 3560150 (E.E.O.C. Dec. 20, 2011); *Veretto v. U.S. Postal Serv*., 2011 WL 2663401 (E.E.O.C. July 11, 2011).

Videckis builds on the 2014 determination in *Hall v. BNSF Railway Co.,* in which a federal judge allowed a gay plaintiff's sex discrimination claim under Title VII and the Equal Pay Act to proceed to the next step of litigation.[74] In *Hall*, a worker challenged the company's denial to provide healthcare coverage to a same-sex spouse when the coverage was available to workers with different-sex spouses. The judge explicitly provided that the plaintiff "experienced adverse employment action in the denial of spousal health benefit due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." This 2014 decision echoed the holding in *Heller v. Columbia Edgewater Country Club,* a 2002 case in which the court clearly stated that an employer is engaged in unlawful discrimination if the employee would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.[75]

Statutory Codification of this Case Law Is Critical

These judicial advances equip LGBTQ plaintiffs with meaningful legal recourse after they have experienced discrimination. However, they have not provided the broad and clear protection that uniform, explicit, federal statutory protections bring. In the absence of clear protections, individuals facing discrimination must file suit against an employer, landlord, or business owner and present the above tested arguments. This demands access to the legal system and a representative, as well as the luxury of time to file a suit and wait for a judicial conclusion. Not to mention, this assumes that an individual or their attorney knows of this existing case law in the first place and that courts will continue to apply this precedent faithfully.

The Equality Act would equip individuals with more knowledge of their rights to be free from discrimination, and ensure that business owners, employers, landlords and other covered entities are aware of their obligations under the law. Incorporating these protections within the U.S. Code would make it possible for individuals and businesses to know their rights by reading a sign posted in the break room instead of heading to the courtroom.

Religious Exemptions

Employment

Title VII of the Civil Rights Act, which prohibits discrimination in employment, contains an exemption for religious entities with regard to expressing a religious preference in employment. Title VII's limited exemption allows religious corporations, associations, or societies to limit employment to members of their own faith, or co-religionists. This narrow exemption also extends to schools, colleges, and universities that are supported, owned, controlled or managed by a religious organization.

[74] 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).
[75] 195 F. Supp. 2d 1212, 1223-24 (D. Or. 2002).

The Equality Act leaves intact all the religious exemptions in Title VII. First, it does not alter the scope of religious entities that may exercise the religious hiring exemption. Decades of case law interpreting Title VII have made clear that this language includes a broad range of organizations. Federal courts have found many types of religious entities, well beyond houses of worship alone, may be considered exempt from compliance with these provisions, including:

- A tax-exempt, non-profit organization associated with the LDS Church[76]
- A retirement home operated by Presbyterian Ministries[77]
- A newspaper published by the First Church of Christ, Scientist[78]
- Christian elementary schools and universities,[79] and
- A non-profit medical center operated by the Seventh-Day Adventist Church.[80]

In addition to Title VII's religious exemption, the Supreme Court has identified a "ministerial exception" under the First Amendment that religious organizations are entitled to use in their employment practices.[81] The "ministerial exception" applies to employees serving in roles beyond those with a formal title of minister, and includes roles that that involve teaching or inculcating the faith. Under this exemption, federal courts have recognized a variety of roles to be entirely exempt under nondiscrimination laws including:

- a cemetery employee who organized religious services,[82]
- a theology professor,[83] and
- a music director.[84]

However, employees serving in "purely custodian or janitorial" roles have not been considered ministerial.[85] Similarly, an organist who had no control over order of service and no contact with parishioners fell outside of the scope of the exception.[86] This means that while religious organizations can make employment decisions about their ministers or faith leaders free from any government interference, those organizations cannot otherwise discriminate on the basis of religion against a custodian, janitor, or administrative staff unless they are utilizing the co-

[76] *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).
[77] *EEOC v. Presbyterian Ministries*, 788 F. Supp. 1154 (W.D. Wash. 1992).
[78] *Feldstein v. Christian Science Monitor,* 555 F. Supp. 974 (D. Mass. 1983).
[79] *See, e.g.*, Ganzy v. Allen Christian School, 995 F. Supp. 340 (E.D.N.Y. 1998); Killinger v. Samford University, 113 F.3d 196 (11th Cir. 1997); Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991).
[80] *Young v. Shawnee Mission Med. Ctr.*, 1988 U.S. Dist. LEXIS 12248 (D. Kan. 1988).
[81] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).
[82] *Fisher v. Archdiocese of Cincinnati*, 6 N.E.3d 1254 (Ohio Ct. App. 2014).
[83] *See, e.g.*, *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594 (N.D. Tex. 2008).
[84] *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999).
[85] *E.E.O.C. v. Roman Catholic Diocese,* 213 F.3d 795 (4th Cir. 2000).
[86] *Archdiocese of Washington v. Moersen*, 925 A.2d 659 (Md. 2007).

religionist exemption. In order to claim the co-religionist exemption a religious organization would have to always hire, or prefer to hire, members of their own faith. This would be unchanged by the Equality Act.

In addition, Title VII provides accommodations for individual employees' sincerely held religious beliefs and practices, where that requested accommodation does not provide an undue hardship for the employer. Under this provision, courts and the EEOC have determined that employees are entitled to accommodations that do not harm others, such as to allow the wearing of head coverings and conservative garb where they conflict with workplace dress codes,[87] scheduling changes to attend religious services,[88] breaks for prayer,[89] and a change in tasks to avoid working on war weapons.[90] Title VII also prohibits harassment of religious employees for religious views that may be uncommon or unpopular.[91]

Neither Title VII nor the "ministerial exception," however, permits any secular employer, which is not a religious organization, to discriminate based on individuals' prejudices, morals, or religious-based beliefs. This is true of all civil rights laws, including those that protect Christians, Jews and other religious individuals from discrimination. A secular employer, organization, or company that markets its good and services to the general public cannot, and under the Equality Act could not, circumvent civil rights laws for a religious purpose. But nothing in the Equality Act, or in any civil rights law before it, affects the ability of a person to hold contrary beliefs, based on religion or otherwise. The Equality Act remains true to the purpose of civil rights laws historically—focusing on issues of fundamental fairness and ensuring that individuals are able to live and work in environments free of discrimination.

Education and Federally Funded Programs

Public educational programs may not discriminate on the basis of sexual orientation or gender identity regardless of the religious views of a principal or administrator, just as a public school may not discriminate against a student based on the student's religion even if that student's religious beliefs conflict with those of the principal or administrator.

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[87] *See, e.g.*, *E.E.O.C. v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006).
[88] *See, e.g.*, *E.E.O.C. v. White Hall Nursing and Rehabilitation Center,* No. 5:08-cv-00185 (E.D. Ark. settled on July 20, 2009).
[89] *See, e.g.*, *E.E.O.C. v. Electrolux Group*, (voluntary resolution reached on Sept. 24, 2003). Press Release Available at: https://www1.eeoc.gov//eeoc/newsroom/release/9-24-03.cfm?renderforprint=1
[90] *E.E.O.C. v. Dresser Rand Co.*, No. 04-CV-6300, (W.D.N.Y. filed in Sept. 2004, settled in Nov. 2011).
[91] *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (although animal sacrifice may seem "abhorrent" to some, Santerian belief is religious in nature and is protected by the First Amendment); *U.S. v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) ("one man's religion will always be another man's heresy").

Title VI as amended by the Equality Act would prohibit recipients of federal funds, including educational institutions and programs, from discriminating on the basis of sex including sexual orientation and gender identity. Title VI does not contain a religious exemption because it does not include religious discrimination in its scope. There is no prohibition on religious organizations taking religion into account when making decisions regarding employment or recipients of services.[92] Thus, a religious elementary school may accept federal funds such as National Federal School Lunch funds while limiting enrollment to co-religionists. Likewise a church could accept federal disaster grants for reconstruction without having to open its doors to the general public. Both the school and the church continue to be permitted to determine who is and who is not a member of the faith.

The Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) was passed with the best of intentions and with the goal of rectifying a troubling Supreme Court decision that permitted a government agency to deny unemployment benefits to two practitioners of a Native American faith tradition who used peyote in a religious ceremony.[93] Unfortunately, over time, use of RFRA has shifted from providing a shield for individual's religious freedom to being used as a sword to discriminate. The successful use of RFRA to permit employers to not comply with federal law has inspired litigation designed to circumvent our nation's civil rights laws by arguing that assertion of religious belief permits an individual to be unencumbered by complying with any provision which they consider inconsistent with their world view.[94] In *EEOC v. Harris Funeral Homes*, U.S. District Court Judge Sean Cox turned a blind eye to the ways in which religiously motivated sex-stereotyping results in real harm to transgender people.[95] Aimee Stephens had worked for the funeral home for nearly six years when she informed the owner that she would be transitioning and that when she returned she would be presenting as a woman, including wearing attire consistent with the dress code for women. The funeral home owner terminated Stephens' employment based on his belief that sex is an unchangeable characteristic set at birth.[96] In providing the funeral home a pass from complying with Title VII, Judge Cox cited Supreme Court's decision in *Hobby Lobby* but disregarded the cautionary note contained in the majority opinion:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction… Our decision today provides no such shield. The Government has a compelling interest in

[92] 42 U.S.C. § 2000d et seq.
[93] Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.
[94] *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).
[95] 884 F.3d 560 (6th Cir. 2018).
[96] *Id. at* 569.

> providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[97]

While the Sixth Circuit overturned the district court decision, and Harris Funeral Homes has chosen to drop their RFRA defense upon appeal to the Supreme Court,[98] this case provides a road map of bad intentions that will influence future litigation strategy. Recently, a group of pastors and a Texas based health and wellness center sued the EEOC and the US Attorney General because the text of Title VII and EEOC regulatory guidance fail to "make any exemptions or accommodations for churches[99] or corporations that oppose homosexual or transgender behavior."[100] The suit asserts that failure to provide an exemption violates RFRA and seeks to enjoin enforcement of Title VII against any employer who objects to LGBT people.[101]

In crafting and passing RFRA, Congress contemplated that the need might arise to except particular areas of law from coverage. The text of RFRA explicitly permits statutes to exclude application of RFRA.[102] The Equality Act does not repeal RFRA. Rather, it affirms that the government has a compelling interest in eradicating discrimination by removing RFRA as a defense to discrimination under the civil rights laws that the act amends. RFRA will still be available to address burdens on religious beliefs and practices in other contexts. For example, in 2016, a Native American pastor won the right to use eagle feathers in religious ceremonies even though possession of the feathers violated a federal law.[103] In 2014, a Sikh woman won settlement that resulted in the federal government changing its policies to ensure that Sikhs federal employees have the right to carry an article of their faith which resembles a blunt knife into federal buildings.[104] RFRA will still be available in situations such as these.

Limiting usage of RFRA does not affect Constitutional rights. The First Amendment remains in full force. Any individual or organization that is concerned that their religious beliefs or practices are being unjustly burdened retain the ability to bring a claim under the First Amendment.

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[97] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 856 (E.D. Mich. 2016), *rev'd and remanded sub nom. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

[98] REPLY BRIEF OF PETITIONER-APPELLANT, *HARRIS FUNERAL HOMES V. E.E.O.C.*, NO. 18-107 (on petition for a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit). Available at: https://www.supremecourt.gov/DocketPDF/18/18-107/71127/20181106101951980_18-107%20Reply%20Brief.pdf

[99] Churches have an exemption under Title VII to limit employment to co-religionists and a "ministerial exception" under the First Amendment. For more information on exemptions applicable to churches and other religious organizations, see the "Religious Exemptions" section of this testimony.

[100] Complaint at 4, U.S. Pastor Counsel v. Equal Employment Opportunity Comm'n, No. 4:18-cv-824 (N.D. Tex. Oct. 6, 2018).

[101] *Id.* at 9-10.

[102] 42 U.S. Code § 2000bb–3 (b).

[103] *McAllen Grace Church v. S.M.R. Jewel*, No. 7:07-cv-060 (S.D. Tex., filed March 10, 2015, settled June 13, 2016).

[104] *Tagore v. United States of America, et al.*, No. 12-20214 (5th Cir. settled in Nov. 2013).

Conclusion

Now is the time to pass the Equality Act. LGBTQ people live in every state and virtually every county coast to coast. We are your neighbors, co-workers, friends and family. We are a part of the diverse and dynamic fabric of our country. No one should be subject to discrimination based upon who they are whether at work, in school, seeking emergency services, or picking up the groceries. At its core, the Equality Act would deliver on the promise of equal opportunity for all.