

# The Equality Act of 2021: Expanding Antidiscrimination Protections for LGBTQ People and Women

While the Supreme Court's marriage decision in 2015<sup>1</sup> and workplace rights decision in 2020<sup>2</sup> expanded explicit protections for LGBTQ people, there is still much to be done to ensure equal treatment under the law. Federal law and the majority of states lack explicit non-discrimination protections for LGBTQ people in housing, at school, and elsewhere, leaving many vulnerable to discrimination.

The Equality Act<sup>3</sup> would amend the Civil Rights Act of 1964 and other key federal nondiscrimination laws to provide clear, explicit protections clarifying that the prohibitions against sex discrimination include discrimination based on sexual orientation and gender identity. These protections would apply in the contexts of housing, public accommodations, credit, federally funded programs (including education), and federal jury service. In line with the U.S. Supreme Court's decision in *Bostock*, the Equality Act would make clear that discrimination against LGBTQ individuals in all of these settings is unlawful.

The protections the Equality Act would provide are vital for LGBTQ individuals across many areas of their lives. For example, 8% of LGBTQ individuals and 29% of transgender individuals reported that healthcare professionals refused to see them based on their actual or perceived sexual orientation or gender identity.<sup>4</sup> Further, nearly one quarter of transgender respondents said they did not seek necessary healthcare for fear they would be mistreated based on their trans identity.

As a further example, transgender women of color also face pervasive housing discrimination - with 31% of Black transgender women and 27% of Native transgender women reporting being denied a home or apartment in the past year because they were transgender.

The Equality Act would also close longstanding gaps in federal law and for the first time prohibit discrimination on the basis of sex in public spaces, services, and all federally funded activities, providing important new legal protections for women and LGBTQ individuals. Finally, the Act would expand the scope of what kinds of entities count as a place of public accommodation, thereby creating new protections for all protected identities including race and national origin.

## Creating explicit federal protections for LGBTQ people across all areas of their lives

The 2020 Supreme Court decision, *Bostock v. Clayton County*, held that discrimination on the basis of gender identity or sexual orientation is an impermissible form of sex discrimination in employment under Title VII of the Civil Rights Act of 1964. While this decision is a welcome advancement and provides important guidance as to interpretations regarding all federal civil rights protections against sex discrimination, the *Bostock* decision technically applies to the employment setting. Without the Equality Act, no federal law explicitly and comprehensively protects LGBTQ people from discrimination in other sectors, leaving many schools, landlords, and others without a clear understanding that discrimination against LGBTQ people is prohibited. When it comes to public accommodations and many federally funded programs, there are also currently no protections on the federal level against discrimination on the basis of sex, including sexual orientation and gender identity. The Equality Act would close these gaps in existing civil rights laws by providing explicit and consistent non-discrimination protections on the basis of sex, and clarify that this includes sexual orientation and gender identity.

The Equality Act provides protections for LGBTQ people in the following areas:

- **EMPLOYMENT:** While *Bostock* prohibits workplace discrimination against LGBTQ individuals, the Equality Act would include language to reflect this decision, and thereby solidify these protections through legislation. Title VII applies to businesses with more than 15 employees—and these same parameters would apply in the Equality Act.<sup>6</sup>
- **FEDERALLY FUNDED PROGRAMS AND ACTIVITIES (INCLUDING EDUCATION):** Any program that receives federal funds would be prohibited from discriminating on the basis of sex, including sexual orientation or gender identity. This provision would protect LGBTQ people from discrimination by institutions that receive federal funds – including schools, hospitals, domestic violence shelters, and police departments.<sup>7</sup>
- **HOUSING:** The Equality Act provides explicit protections for LGBTQ people against housing discrimination by defining sex to include sexual orientation and gender identity.<sup>8</sup>

- **PUBLIC SPACES AND SERVICES:** LGBTQ people would be protected from discrimination in “public accommodations,” including stores, restaurants, hotels, transportation, and providers of health care services.<sup>9</sup>
- **CREDIT:** The Equality Act would explicitly prohibit sex discrimination on the basis of sexual orientation and gender identity in credit, financing, and lending.<sup>10</sup>
- **FEDERAL JURY SERVICE:** The Equality Act would explicitly prohibit sex discrimination against LGBTQ people in selecting federal juries.<sup>11</sup>

## New sex discrimination protections

The Equality Act amends Title II and Title VI of the Civil Rights Act of 1964, to prohibit discrimination on the basis of sex in public spaces and services and in all federally funded programs and activities for the first time. These prohibitions will help ensure that women and LGBTQ people are treated equally in all aspects of their lives.

### *In Public Spaces and Services*

The Equality Act closes a longstanding gap in civil rights law to provide federal protections against sex discrimination in public places like restaurants, stores, banks, health care providers, and transportation. For example:

- The Act would make it unlawful for contractors, mechanics, and car dealerships to charge a woman more than a man for the same work.
- The Act would ensure that breastfeeding mothers have rights and remedies if they are excluded from or harassed in public places.
- The Act would ensure that chain pharmacies cannot refuse to fill a woman’s birth control prescription or a transgender individual’s hormone prescription.
- The Act would provide protections against sexual harassment in public transportation, restaurants, and other public accommodations.

## In Federally Funded Programs and Activities

While multiple courts have now applied the *Bostock* analysis of “sex” — as inclusive of gender identity and sexual orientation — to Title IX protections against sex discrimination in federally funded educational settings,<sup>12</sup> the Equality Act would prohibit any program that receives federal funds from discriminating against women and LGBTQ individuals. For example:

- A developer with a federal grant could not discriminate against women-owned or LGBTQ-owned businesses in its contracting.
- Women would have new tools to challenge a police department’s systematically inadequate response to sexual violence or intimate partner violence, if the police department received federal funds.
- An organization getting federal funding to provide services to trafficking victims could not refuse to provide them with access to reproductive health care.

## Ensuring that religion is not used as an excuse to discriminate

The Equality Act makes it clear that the Religious Freedom Restoration Act (RFRA)<sup>13</sup> cannot be used to block these important protections against discrimination or the protections against discrimination on the basis of sex, race, national origin, or religion in the Civil Rights Act of 1964. This is necessary because in recent years, individuals, organizations, and for-profit corporations have misused RFRA to argue that any number of laws, including but not limited to child labor laws, domestic violence laws, and nondiscrimination laws, do not apply to them because they have religious objections to these laws.<sup>14</sup> Given that *Bostock* did not address how RFRA would interact with federal civil rights protections in the workplace, this is a critical way in which the Act is important to secure rights for LGBTQ individuals in the workplace and beyond.<sup>15</sup> The Equality Act is imperative to make clear that religion does not give employers, landlords, schools or others a license for discrimination.

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1 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

2 *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

3 The Equality Act, H.R. 5, 116th Cong. (2019).

4 Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CENTER FOR AMERICAN PROGRESS (Jan. 18, 2018, 9:00 AM), <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

5 Sandy E. James et al., *The Report of the 2015 Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY 98 (Dec. 2016) <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

6 H.R. 5 § 7.

7 *Id.* at §§ 5-6, 9.

8 *Id.* at § 10.

9 *Id.* at § 3.

10 *Id.* at § 11.

11 *Id.* at § 12.

12 See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020); *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, 2020 U.S. App. LEXIS 27234 (4th Cir. Aug. 26, 2020).

13 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2018).

14 See, e.g., NAT’L WOMEN’S LAW CTR., *The Hobby Lobby “Minefield”: The Harm, Misuse, and Expansion of the Supreme Court Decision 3-6* (Aug. 2015), <https://nwlc.org/wp-content/uploads/2015/08/nwlc-hobbylobbyreport2015.pdf>.

15 See *Bostock*, 140 S. Ct. at 1753-54.