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## **Statement for the Record from the National Women's Law Center**

**Submitted by Fatima Goss Graves, President and CEO**

**U.S. Senate Committee on the Judiciary**

**Hearing on the Equality Act – March 17, 2021**

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

The National Women's Law Center submits this statement for the record in support of the passage of the Equality Act.

The Center has worked for more than 45 years to advance and protect women's equality and opportunity, and to remove barriers for all who face sex discrimination including at work, in schools or in healthcare, including LGBTQ individuals. NWLC fights for gender justice – in the courts, in public policy, and in our society – working across the issues that are central to the lives of women and girls, including child care and early learning, education, reproductive rights and health, income security, workplace justice, and addressing sexual harassment or assault.

Since the passage of the Civil Rights Act of 1964 and other key civil rights protections, through the courage of individuals coming forward with claims of discrimination, often risking retaliation, we have expanded and deepened our understanding of the wrongs against which our civil rights laws protect, including protection against sexual harassment, pregnancy discrimination, and same-sex harassment. These efforts to address discrimination through civil rights laws are critical alongside organizing efforts, culture change through the media and other strategies for social change.

The Equality Act would reflect and affirm existing court rulings, as confirmed by the U.S. Supreme Court in the *Bostock v. Clayton County*<sup>1</sup> decision and the decisions that have followed it, by spelling out explicit federal civil rights protections against discrimination based on sexual orientation or gender identity, while also updating our civil rights laws to provide important new protections against sex discrimination and race discrimination. In *Bostock*, the Supreme Court 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 importance guidance as to

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<sup>1</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

interpretations of all federal civil rights protections against sex discrimination, the *Bostock* decision technically only 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. The Equality Act would provide consistent non-discrimination protections for LGBTQ people across key areas of life, including employment, housing, credit, education, public spaces and services, federally funded programs, and jury service.

Additionally, this Act would ensure that individuals gain important new protections against sex discrimination in public spaces and by entities that take federal dollars or run federal programs. The Act also ensures that protections against discrimination in public spaces, including discrimination on the basis of race and religion, extend to all relevant entities that provide goods and services in the public marketplace. As with any bill that seeks to amend existing civil rights laws, this bill must be enacted in a way that expands - and never diminishes - our civil rights protections; Accordingly, this bill cannot be a vehicle for harmful amendments that weaken civil rights protections.

NWLC's remarks are divided into the following areas. First, we detail why the Equality Act is a necessary addition to our nation's civil rights laws due to gaps in current nondiscrimination law. Second, we outline the significant impact that the Equality Act would have on advancing women's rights. Third, we describe Congress's authority to abrogate state sovereign immunity through the Equality Act and why states should not be exempt from the Act. And finally, we note how the Equality Act carries through a range of religious exemptions as contained in our existing civil rights laws.

#### **I. The Equality Act Is a Necessary Addition to Our Nation's Civil Rights Laws**

In its simplest form, the Equality Act is a bill that ensures people cannot be unfairly discriminated against because of their sex, including their sexual orientation or gender identity. It affirms the core value that everyone deserves to be treated fairly and equally under the law.

It does this by amending 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 accommodations and federally funded programs on the basis of sex, sexual orientation, and gender identity.

In amending these existing laws, the Equality Act will accomplish what the current patchwork of inconsistent state legislation and court interpretations fails to do: provide clear and unambiguous protections for LGBTQ people against discrimination in significant areas of their

lives. The Act will also equip businesses, educators, and service providers with clear guidance so that there is no confusion about their obligations toward protected classes. In short, this Act will expand and clarify the reach of existing civil rights statutes that have already been incorporated into much of our national legal and social fabric.

Having unequivocal and explicit prohibitions of discrimination based on sexual orientation and gender identity in areas including education, employment, housing, credit, and jury service are instrumental to realizing greater equality in this country. Providing LGBTQ individuals in this nation, who make up 4.5% of the total U.S. population,<sup>2</sup> with equal opportunity and access means more workers, job-creators, homeowners, and consumers in states that once lacked basic civil rights protections.

The Equality Act would also provide greater security for LGBTQ people. Across state lines, LGBTQ individuals will feel more secure knowing that their livelihoods are protected no matter where they live or work. As a result, their families will also feel safer in the knowledge that their loved ones would have the explicit legal right to be treated with fairness and equality. The Equality Act would make it illegal to fire, refuse service to, or deny a loan to their loved one just because of who they are. Passing the Equality Act is essential to creating this safer reality.

For many, that reality is long overdue. The Equality Act reflects the consensus of the people living in this nation, who support nondiscrimination legislation for LGBTQ citizens in overwhelmingly large numbers. According to polling, around 70% of Americans favor nondiscrimination laws protecting individuals on the basis of sexual orientation and gender identity.<sup>3</sup> This includes a majority of Democrats, Republicans, and independents, members of all major religious groups, and residents of every state.<sup>4</sup> Despite vast support in nearly all demographics and regions, only 20 states provide their citizens explicit protection against anti-LGBTQ discrimination.<sup>5</sup> An individual who rents an apartment in the District of Columbia and the moves just several miles away to Virginia may suddenly find themselves at risk should they be evicted from their new home as a result of their sexual orientation or gender identity. LGBTQ individuals looking to rent will have a decidedly more difficult time making a home in the many states where same-sex couples and transgender individuals continue to have no state or local remedies or explicit federal statutory protections against housing discrimination.

The Equality Act also modernizes federal public accommodations law under Title II of the 1964 Civil Rights Act to provide important protections that are missing from current law. Title II currently only covers lodging, restaurants and other facilities serving food including gas stations, and entertainment spaces including movie theaters or sports arenas. The Equality Act

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<sup>2</sup> *LGBT Demographic Data Interactive*, The Williams Institute, UCLA School of Law, Jan. 2019.

<sup>3</sup> PRRI, *Americans Are Broadly Supportive of a Variety of LGBTQ Rights*, Oct. 30, 2020, <https://www.prr.org/spotlight/americans-are-broadly-supportive-of-a-variety-of-lgbtq-rights/>.

<sup>4</sup> *Id.*

<sup>5</sup> *State Maps of Laws & Policies*, Human Rights Campaign, June 11, 2018, <https://www.hrc.org/state-maps/public-accommodations>.

expands the places to which Title II’s nondiscrimination mandate applies, making Title II similar in its reach to state laws around the country<sup>6</sup> and the Americans with Disabilities Act.<sup>7</sup>

In addition to the places of public accommodation included in the original Civil Rights Act of 1964, the Equality Act includes providers of goods and services like stores, accountants, and hospitals as places of public accommodation. Transportation providers including trains, taxis, and airlines would also be added as places of public accommodation.

In addition, the Equality Act would prohibit sex discrimination under Title II for the first time. LGBTQ people and women, particularly people who are pregnant and breastfeeding, experience discrimination while accessing public accommodations across a wide range of contexts – including restaurants, stores, theaters, and transportation.

People of color also continue to face persistent discrimination on a daily basis in stores, and when accessing transportation including car services and taxis. Whether denied service or experiencing unfair treatment or harassment, this discrimination impedes individuals from fully participating in social and public spaces and creates immense dignitary and other harms.

As further set out in Section II.A below, in the absence of federal protections, women experience discrimination while accessing public accommodations across a wide range of contexts—including in restaurants, stores, theaters, and transportation. The Equality Act would ensure that breastfeeding individuals are not harassed or excluded from public spaces, for example, and would prohibit pharmacies from refusing to fill a birth control prescription. Under current federal law, women can still be charged more for goods and services. For example, studies have shown that women are charged arbitrarily higher prices including in services such as car repairs when there aren’t fixed prices.<sup>8</sup> Under the Equality Act this would be illegal.

The Equality Act would also protect individuals from discrimination on the basis of perceived membership in a protected class. An employer, landlord, or business owner’s perception—rather than the individual’s actual identity—will often drive discrimination. The explicit protection against discrimination based on “perceived” membership in a protected class will ensure, for example, that a woman is not discriminated against because someone misperceives her ethnicity or religion based on her married name, or mistakenly assumes she is a lesbian, or incorrectly identifies her as pregnant. Without this explicit protection, employers have sometimes successfully defended Title VII charges of discrimination because the individual was

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<sup>6</sup> Nat’l Conf. of State Legislatures, *State Public Accommodation Laws* (Apr. 8, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>.

<sup>7</sup> EEOC, *The ADA: Questions and Answers*, <https://www.eeoc.gov/fact-sheet/ada-questions-and-answers-0> (last accessed Mar. 16, 2021).

<sup>8</sup> Meghan R. Busse et al., *Repairing the Damage: The Effect of Price Expectations on Auto-Repair Price Quotes*, National Bureau of Economic Research (2013), <https://www.nber.org/papers/w19154>.

not actually a member of a protected class.<sup>9</sup> This can leave individuals who experience discrimination with little recourse.

Federal funding touches the lives of people in every state and county in America— from schools and community centers to homeless shelters and substance abuse rehabilitation facilities. Taxpayers fund critical social and community services including disaster relief, mortgage assistance, law enforcement, and health care. As further discussed below, by adding sex to the list of protected characteristics under Title VI of the Civil Rights Act of 1964, the Equality Act would prohibit sex discrimination, including pregnancy discrimination and sexual harassment, in federally assisted programs or services. It would also make denying people access to federally-funded benefits or excluding them from a federally assisted program on the basis of their sex or pregnancy unlawful.

The Equality Act also updates civil rights laws to clearly cover claims of associational discrimination— meaning protections for people who may face discrimination because of their relationships to others within a protected class. This would provide civil rights protections, for example, to children who have been turned away from a pediatrician’s office because they have two parents of the same gender or a worker who is denied insurance benefits because they have a transgender child. A person should not lose opportunities or be mistreated because of their friendship, romantic relationship, or familial connection to a person of a different race, religion, gender identity, or sexual orientation.

## **II. The Equality Act Represents a Major Step Forward for Women’s Rights**

Support of the Equality Act is key to the National Women’s Law Center’s mission as a women’s rights organization. First, the protections the Equality Act would provide are vital for LGBTQ women. For example, over one third of transgender women report losing a job because of their gender identity or expression, and studies have found that lesbian, bisexual, and queer women are 30 percent less likely to receive invitations to interview for jobs than their straight counterparts.<sup>10</sup> Lesbian and bisexual women are more likely to live in poverty than heterosexual women, and female same-sex couples typically have lower incomes than married different-sex couples.<sup>11</sup> Transgender women of color also face discrimination in many contexts including experience pervasive housing discrimination—with 31 percent of Black transgender women and 27 percent of Native transgender women reporting being denied a home or

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<sup>9</sup> See, e.g., *El v. Max Daetwyler Corp.*, No. 3:09cv415, 2011 WL 1769805, at \*5 (W.D.N.C. May 9, 2011), aff’d 451 Fed. Appx. 257 (4th Cir. 2011) (rejecting plaintiff’s “claim of religious discrimination based on a perception that he is Muslim,” holding that Title VII does not recognize such claims).

<sup>10</sup> See *Paying an Unfair Price: The Financial Penalty for LGBT Women in America*, Movement Advancement Project and Center for American Progress, March 2015, <http://www.lgbtmap.org/policy-and-issue-analysis/unfair-price-lgbt-women>.

<sup>11</sup> *Id.* at 5, 14.

apartment in the past year because they were transgender.<sup>12</sup> Codifying that protections against sex discrimination on the job, in housing, and elsewhere include protections against sexual orientation or gender identity discrimination will be transformative for LGBTQ women specifically. These protections also help ensure that non-LGBTQ women who depart from gender stereotypes and gendered expectations will not face discrimination or harassment based on, for example, a perception that they are part of the LGBTQ community. It can be difficult or impossible to definitively parse whether harassment or other discrimination is motivated (on the one hand) by an individual's refusal to conform to gender stereotypes or (on the other hand) by the individual's perceived sexual orientation or gender identity; the Equality Act will provide broad protections against such discrimination without the need for such determinations.

Moreover, the Equality Act would provide groundbreaking new civil rights protections for all women, regardless of sexual orientation or transgender status, by closing longstanding gaps in federal law and amending Titles II and VI of the Civil Rights Act of 1964 to for the first time prohibit discrimination on the basis of sex (including pregnancy) in public spaces and services and in all federally-funded programs and activities. These protections against sex discrimination are long overdue.

#### **A. Prohibition of Sex Discrimination in Public Accommodations**

By amending Title II to add a prohibition of discrimination on the basis of sex, the Equality Act would ensure that for the first time federal law reaches discrimination against women in hotels, restaurants, theaters and sports arenas, stores, hair salons, taxi services, and airline services, to name only a few examples. For example, under the Equality Act, women would have new legal protections against sex-based harassment in hotels or restaurants, or on trains, airplanes, and subways, and purveyors of these establishments and services would be on notice that they must institute policies and systems in place to address sex-based harassment of customers. These protections are sorely needed. For example, a 2017 survey of flight attendants found that 20 percent had received a report of passenger-on-passenger sexual assault while working on a flight, but that flight attendants typically have no training on how to respond in such situations.<sup>13</sup> In addition, female solo travelers, of all sexual orientations and gender identities, frequently confront harassment, but do not consistently have access to security measures or

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<sup>12</sup> S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [hereinafter "2015 U.S. Transgender Survey"].

<sup>13</sup> Karl Paul, *After Man Is Arrested for Groping Passenger, Women Speak About #MeToo at 35,000 Feet*, MarketWatch (Oct. 25, 2018), <https://www.marketwatch.com/story/the-metoo-movement-has-now-reached-35000-feet-2018-05-23>.

experience responsiveness from tourism industry employees.<sup>14</sup> The Equality Act would help change this by prohibiting discrimination on the basis of sex in these spaces.

By prohibiting sex discrimination in public places and services, the Equality Act would also prohibit sex-based price discrimination. For example, studies have shown that car dealers typically quote lower prices to male customers than female customers for the same cars,<sup>15</sup> as do auto mechanics when customers do not indicate an expected price.<sup>16</sup> Under the Equality Act, service providers and retailers such as contractors, mechanics, and car dealerships would not be permitted to charge women more for the same work or the same product simply because of their sex.

The Equality Act's prohibition of sex discrimination in Title II would also provide new protection against breastfeeding parents being excluded from public spaces, which remains a persistent problem.<sup>17</sup> Harassment and discrimination based on lactation constitutes sex discrimination and would not be permissible in covered public places.<sup>18</sup> The Act would also provide additional protections in situations where a pharmacy refuses to fill prescriptions for contraception. When pharmacies provide other medications but refuse to provide prescription birth control or emergency contraception, that is sex discrimination.<sup>19</sup> There have been instances in at least 26

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<sup>14</sup> See generally Lucy Vlahakis, *Fly? #MeToo? Two out of Five Women Report Sexual Harassment When Traveling Solo*, Mower, Feb. 8, 2018, <https://www.mower.com/insights/fly-metoo-two-out-of-five-women-report-sexual-harassment-when-traveling-solo/>; Alex Temblador, *Travel Safety Expert Shares Her Best Safety Tips for Women Travelers*, Travel Pulse, March 5, 2019, <https://www.travelpulse.com/news/features/travel-safety-expert-shares-her-best-safety-tips-for-women-travelers.html>.

<sup>15</sup> Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, Faculty Scholarship Series, 1995, [https://digitalcommons.law.yale.edu/fss\\_papers/1523/](https://digitalcommons.law.yale.edu/fss_papers/1523/).

<sup>16</sup> Meghan R. Busse et al., *Repairing the Damage: The Effect of Price Expectations on Auto-Repair Price Quotes*, National Bureau of Economic Research, 2013, <https://www.nber.org/papers/w19154>.

<sup>17</sup> See e.g., Trishna Doroski, *Nursing Mother Asked to Leave a Hospital Waiting Room for Breastfeeding*, Babygaga, March 29, 2019, <https://www.babygaga.com/mom-kicked-out-hospital-waiting-room-breastfeeding/>; *Breastfeeding Mother Asked To Leave Chick-Fil-A Restaurant*, WNEM, Jan. 15, 2018, [https://www.wnem.com/news/breastfeeding-mother-asked-to-leave-chick-fil-a-restaurant/article\\_dc4e9ba4-709f-5a03-921d-7195c6be1363.html](https://www.wnem.com/news/breastfeeding-mother-asked-to-leave-chick-fil-a-restaurant/article_dc4e9ba4-709f-5a03-921d-7195c6be1363.html); Amber Jayanth, *Water Park Staff Told Breastfeeding Mom to Cover Up or Leave, Woman Says*, Fox 19, Jul. 6, 2018, <http://www.fox19.com/story/38586977/silverlake-water-park-in-erlanger-tells-breastfeeding-mom-to-cover-up-or-leave/>.

<sup>18</sup> See generally, e.g., *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (lactation is a related medical condition of pregnancy for purposes of Title VII, and an adverse employment action motivated by the fact that a woman is lactating constitutes sex discrimination).

<sup>19</sup> See generally, e.g., Commission Decision on Coverage of Contraception (Dec. 14, 2000) (because prescription contraceptives are available only for women, employer's refusal to offer insurance coverage for them is a sex-based exclusion), available at <https://www.eeoc.gov/policy/docs/decision-contraception.html>; *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) ("[A]s only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion."); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (exclusion of prescription contraceptives from employer's generally comprehensive prescription drug plan violated PDA).

states of women being refused birth control at the pharmacy, with some pharmacists even refusing to transfer a prescription to another pharmacist or to refer her to another pharmacy.<sup>20</sup>

## **B. Prohibition of Sex Discrimination in Federally Funded Programs and Activities**

While current federal law prohibits sex discrimination in particular types of federally funded programs—most significantly, education programs and activities<sup>21</sup> and health care programs and activities<sup>22</sup>—no comprehensive protection exists against sex discrimination in federally funded programs. The Equality Act would change this, recognizing that federal dollars should never support sex discrimination.

For example, under the Equality Act, recipients of federal funding would be prohibited from discriminating against women or women-owned businesses in making contracting decisions.<sup>23</sup> Expanding Title VI's protections to reach discrimination on the basis of sex would also ensure new protections against sex discrimination and sex-based harassment are available for individuals who perform work in federally funded programs or activities as independent contractors rather than as employees. While Title VII prohibits sex-based harassment and other forms of sex discrimination against employees, workers who are not properly classified as employees frequently lack any such protections under current law. The Equality Act would change this in federally funded programs and activities, ensuring that, for example, a consultant on a federally funded project who was sexually harassed by the director of that project would have a meaningful legal remedy.<sup>24</sup>

Broadly prohibiting sex discrimination in federally funded programs would also provide new tools to address systematically inadequate responses to sexual assault or intimate partner violence by federally funded law enforcement agencies. For example, the Equality Act would provide new protection against a federally funded police department's systematic failure to test rape kits.<sup>25</sup>

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<sup>20</sup> *Pharmacy Refusals 101*, NWLC, Dec. 28, 2017, <https://nwlc.org/resources/pharmacy-refusals-101/>.

<sup>21</sup> 20 U.S.C. § 1681 *et seq.*

<sup>22</sup> 42 U.S.C. § 18116.

<sup>23</sup> *See, e.g., Carnell Const. Corp. v. Danville Redev. and Hous. Auth.*, 745 F.3d 703, 715 (4th Cir. 2014) (contractor has Title VI standing because its president and sole shareholder is African-American, it was eligible for consideration as a contractor on a federally funded public project, and it alleged that defendants discriminated against it based on race); *Jacobson v. Delta Airlines*, 742 F.2d 1202, 1209 (9th Cir. 1984) (holding a contractor, corporate or individual, may be deemed a "person" and covered by Title VI); U.S. Department of Justice, Title VI Legal Manual, at <https://www.justice.gov/crt/fcs/T6manual5> ("Once an entity receives federal financial assistance, jurisdiction under Title VI attaches and if the recipient's program includes selection of contractors to carry out its various functions, then Title VI covers that selection process.").

<sup>24</sup> *See United States v. Harris Methodist Ft. Worth*, 970 F.2d 94, 97 (5th Cir. 1992) (holding that physicians who were neither beneficiaries nor employees of a federally funded hospital were protected by Title VI from race discrimination in admitting privileges by the hospital).

<sup>25</sup> *See generally* Meaghan Ybos, *No Backlog: Why The Epidemic of Untested Rape Kits is not a Symbol of Insufficient Police Budgets But Instead a Failure to Investigate Rape*, *The Appeal*, Oct. 11, 2017, <https://theappeal.org/no->



In protecting against sex discrimination, including discrimination on the basis of pregnancy, childbirth, and related medical conditions, the Equality Act would also ensure that federally funded entities making other forms of healthcare and health information available could not discriminate by refusing to provide individuals with reproductive health care or information.<sup>26</sup> For example, the Equality Act would prohibit an organization that received federal funding to provide services, including health care services, to trafficking victims from refusing to provide them access to reproductive health care. This would help eliminate barriers to comprehensive health care for those in the care of or seeking assistance from a federally funded program.

### **C. The Equality Act Promotes Equal Opportunities, including in Athletics, for All Girls and Women including Transgender Girls and Women**

The Equality Act represents a major step forward for safety, equity, and dignity for all girls and women, including transgender girls and women. While some opponents of the Equality Act have attempted to frame their hostility to the bill in the language of women's rights, cisgender girls and women are not well served by the exclusion of transgender girls and women, whether from bathrooms and locker rooms, sports programs, or other parts of public and civic life. Our country has a long and unfortunate history of justifying sex discrimination and curtailment of women's liberty to make their own decisions about their lives through assertions that such actions are necessary to protect girls and women.<sup>27</sup> Just as this stereotype-driven rationale falls short as a legal or moral justification for excluding girls and women from opportunities or restricting their autonomy, it also fails as a rationale for justifying exclusion of and discrimination against transgender girls and women in any context.

Just as anti-transgender arguments were focused a few years ago on the supposed threat of transgender girls and women in women's restrooms, they are now focused on the supposed threat of transgender girls and women in athletics. None of the purported threats to girls and women in restrooms came to pass<sup>28</sup> because transgender girls and women go to restrooms for

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[backlog-why-the-epidemic-of-untested-rape-kits-is-not-a-symbol-of-insufficient-police-budgets-but-instead-a-failure-to-investigate-rape/](#).

<sup>26</sup> Thus, for example, Title VII's protection against sex discrimination requires employers to make maternity care coverage available on the same terms as they make other health coverage available. 29 C.F.R. § 1604.10(b).

<sup>27</sup> See generally *Muller v. Oregon*, 208 U.S. 412 (1908) (justifying law limiting women's ability to work overtime by holding that State had a valid and overriding interest in women-protective laws); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding law prohibiting women from working in bars based on conclusion that such laws were protective), *disapproved of by Craig v. Boren*, 429 U.S. 190 (1976). In *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), the Court addressed these protective pretexts: "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.* at 684; see also *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("[T]he argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (holding that abortion laws pretextually justified as protections for women's health and safety violated women's liberty).

<sup>28</sup> See, e.g., Stephanie Ebbert, *Study finds no link between transgender rights law and bathroom crimes*, Boston Globe (Sept. 12, 2018), <https://www.bostonglobe.com/news/politics/2018/09/12/study-refutes-link-between->

the same reason as everyone else: to use the facilities and go about their day. Likewise, none of the purported threats to girls and women’s athletics posed by transgender inclusion are rooted in reality.

The Equality Act would not amend Title IX, which already allows for single-sex sports teams,<sup>29</sup> but would simply codify the right for transgender girls and women to play on school sports’ teams consistent with their gender identity, in accordance with Title IX, the reasoning in the Supreme Court’s *Bostock* decision, and President Biden’s January 20, 2021 executive order.<sup>30 31</sup> Unfortunately, however, transgender girls and women who play school sports are being used as a cudgel to attack the Equality Act.

These anti-transgender arguments are especially harmful given that girls and women who are transgender face disproportionately high rates of sex-based harassment and other discrimination that has devastating effects on their ability to stay and succeed in school. According to a 2015 study of more than 27,000 transgender adults, 77 percent of those who were out or perceived as transgender while in K-12 schools faced some form of mistreatment in school due to their gender identity—54 percent were verbally harassed, 24 percent were physically attacked, and 13 percent were sexually assaulted.<sup>32</sup> In higher education, 23 percent of transgender and nonbinary students are sexually assaulted during their time in college.<sup>33</sup>

Unfortunately, school policies that discriminate against transgender students are linked to higher rates of sexual assault among transgender students. In a recent study of more than 3,600 transgender and nonbinary students in grades 7-12 published by the American Academy of Pediatrics, students who were banned from using locker rooms and restrooms that matched their gender identity were significantly more likely to have been sexually assaulted during the previous 12 months.<sup>34</sup> This increased risk of sexual assault was observed among transgender boys (1.3 times higher), transgender girls (2.5 times higher), and nonbinary youth who were assigned female at birth (1.4 times higher).<sup>35</sup>

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[restroom-crime-and-transgender-access/5am4LMI1IHecGvJTW4MBqN/story.html](https://www.lambdalegal.org/blog/20160421_sadv); Lambda Legal, *Coalition of Sexual Assault, Domestic Violence Groups Condemn Anti-Transgender Legislation* (Apr. 21, 2016), [https://www.lambdalegal.org/blog/20160421\\_sadv](https://www.lambdalegal.org/blog/20160421_sadv).

<sup>29</sup> 34 C.F.R. § 106.41(b).

<sup>30</sup> Exec. Order No. 13988, 86 Fed. Reg. 7023 (2021); *Bostock*, 140 S. Ct. at 1747.

<sup>31</sup> Nor would the Equality Act restrict the ability of single-sex educational institutions and other gender-specific programs devoted to addressing race- and gender-based obstacles to education to continue to operate, consistent with legal interpretations of other protections such as the Equal Protection Clause. Such entities, would however, be expected to comply with the anti-discrimination provisions of the Equality Act.

<sup>32</sup> 2015 U.S. Transgender Survey, *supra* note 8, at 11.

<sup>33</sup> Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, at ix (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

<sup>34</sup> Diane Ehrensaft & Stephen M. Rosenthal, *Sexual Assault Risk and School Facility Restrictions in Gender Minority Youth*, 143 *Pediatrics* 1 (May 6, 2019), <https://pubmed.ncbi.nlm.nih.gov/31061221>.

<sup>35</sup> *Id.* at 5.

Anti-transgender victimization in schools has devastating effects on transgender students' safety and wellbeing. Among transgender adults who were out or perceived as transgender in K-12 school, 17 percent of them left at least one school because of the anti-transgender mistreatment they faced.<sup>36</sup> These experiences often had life-threatening consequences: for example, more than 52 percent of transgender adults who faced anti-transgender mistreatment in K-12 education had attempted suicide at least once by the time they took the survey, compared to 37 percent of transgender adults who had not been mistreated in K-12 school and 4.6 percent of their cisgender peers.<sup>37</sup>

Girls and women who are able to play school sports are more likely to succeed in school. For example, they are more likely to graduate from high school, score higher on standardized tests, and have higher grades.<sup>38</sup> They are also more likely to have higher levels of confidence, more positive body image, greater psychological well-being, and lower levels of depression.<sup>39</sup> It is critical that transgender girls and women—who are already subjected to myriad forms of sex-based discrimination that negatively affect their educational outcomes—have the same opportunities as cisgender girls and women to enjoy the educational benefits of school sports.

While some people have only recently learned about the existence of transgender athletes, transgender and cisgender girls and women have played and won together on girls' and women's sports teams for many years. Athletics associations in nineteen states and the District of Columbia have adopted trans-inclusive policies that allow transgender student athletes in K-12 schools to play on teams consistent with their gender identity.<sup>40</sup> Furthermore, fifteen states and the District of Columbia have passed laws protecting transgender students' rights to pursue an education free from discrimination, including in school sports.<sup>41</sup> In the past 13 years since these state laws and association policies were adopted, there has been no categorical dominance by transgender girls and women in these states—despite hundreds, if not thousands, of transgender girls and women competing in girls' and women's sports.<sup>42</sup> In fact, a 2021 study found that girls' overall participation in high school sports either *increased* or

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<sup>36</sup> 2015 U.S. Transgender Survey, *supra* note 8, at 12.

<sup>37</sup> *Id.* at 132. Importantly, the survey did not capture the experiences of the many transgender students who died by suicide.

<sup>38</sup> In fact, a statewide, three-year study in North Carolina found that student athletes had grade point averages that were nearly a full point higher than their non-athlete peers. National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41-42 (2017), available at <https://www.ncwge.org/index.html>.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> National Women's Law Center, *Facts on Trans Inclusion in Athletics* 2 (Sept. 2019), <https://nwlc.org/resources/facts-on-trans-inclusion-in-athletics>.

<sup>41</sup> *Id.* at 1.

<sup>42</sup> David Crary & Lindsay Whitehurst, *Lawmakers can't cite local examples of trans girls in sports*, Associated Press (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7>; Center for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth* 13 (Feb. 8, 2021) [hereinafter CAP Report], available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play>.

remained the same in states with trans-inclusive athletics policies but *declined* in states with trans-exclusionary policies.<sup>43</sup>

Opponents of transgender inclusion in athletics often rely on overbroad stereotypes about transgender girls' and women's bodies to support their discriminatory views. These toxic and inaccurate stereotypes harm not only transgender girls and women but also cisgender girls and women who fall outside stereotypical notions of femininity, including those who are very tall or muscular, have short hair, wear masculine clothing, or otherwise choose to present in more traditionally masculine ways. These stereotypes also harm Black and brown girls and women, who are routinely targeted for not conforming to society's expectations of white femininity. All athletes' bodies are different, and these differences can be advantageous or disadvantageous depending on the sport. For example, professional gymnast Simone Biles is 4 feet, 8 inches tall, and professional basketball player Brittney Griner is 6 feet, 9 inches tall.<sup>44</sup> Both athletes, who are cisgender, have achieved great success, including Olympic gold medals, in part because of their respective heights.<sup>45</sup> Similarly, transgender athletes do not have a single body type, and their bodies do not automatically confer absolute advantages over cisgender athletes. Furthermore, many transgender girls have more physiological traits in common with cisgender girls than cisgender boys.<sup>46</sup>

Recognizing all of these above facts about transgender girls and women, women's rights organizations and elite athletes have repeatedly voiced their unequivocal support of transgender inclusion in athletics. In April 2019, 23 national women's rights and gender justice organizations issued a public letter in support of "Full and Equal Access to Participation in Athletics for Transgender People," including the National Organization for Women, Women Leaders in College Sports, and the Women's Sports Foundation.<sup>47</sup> In December 2020, Billie Jean King, Megan Rapinoe, and Candace Parker joined nearly 200 athletes in an amicus brief opposing an anti-transgender sports ban in Idaho.<sup>48</sup> In February 2021, the National Coalition for Women and Girls in Education—which includes organizations like American Association of University Women (AAUW), Girls Inc., and YWCA USA—issued a statement announcing the coalition's support of transgender and nonbinary students' "full and equal access to sex-separated activities and facilities consistent with their gender identity, including athletics

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<sup>43</sup> CAP Report, *supra* note 37, at 14-16.

<sup>44</sup> Team USA, *Simone Biles*, <https://www.teamusa.org/usa-gymnastics/athletes/Simone-Biles>; Women's National Basketball Association (WNBA), *Brittney Griner*, <https://www.wnba.com/player/brittney-griner>.

<sup>45</sup> Team USA, *supra* note 39; WNBA, *supra* note 39.

<sup>46</sup> *See, e.g., Hecox*, 479 F. Supp. 3d at 980 (finding that "there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all").

<sup>47</sup> *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People* (Apr. 9, 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>.

<sup>48</sup> Lambda Legal, *Billie Jean King, Megan Rapinoe, and Candace Parker Join Nearly 200 Athletes Supporting Trans Youth Participation in Sports* (Dec. 21, 2020), [https://www.lambdalegal.org/news/id\\_20201221\\_billie-jean-king-megan-rapinoe-and-candace-parker](https://www.lambdalegal.org/news/id_20201221_billie-jean-king-megan-rapinoe-and-candace-parker).

teams.”<sup>49</sup> And in March 2021, over 90 women's rights and LGBTQ rights organizations joined a statement endorsing the Equality Act's civil rights protections for all LGBTQ people, including transgender girls and women's rights to participate in school athletics consistent with their gender identity.<sup>50</sup> The Supreme Court recognized decades ago that allowing discrimination and exclusion based on a determination that an individual is insufficiently feminine threatens harm to any woman or girl who departs from traditional gender stereotypes.<sup>51</sup> By rejecting such gender policing, the Equality Act protects the rights of all women and girls.

While some people have more recently become aware of transgender people and the issues they face, there is nothing “novel” or “untested” about the protections the Equality Act creates for this vulnerable population. Over the past two decades, states and municipalities have successfully implemented prohibitions on gender identity discrimination and trans inclusive protections, ensuring that all residents are treated equally under the law.

Twenty-one states, the District of Columbia, and nearly 200 local governments, large and small, already prohibit employment and housing discrimination based on gender identity. Twenty states prohibit discrimination in public accommodations on the basis of gender identity.<sup>52</sup> Many of these laws have been around for years, or even decades – Minnesota adopted its protections for transgender people more than 25 years ago.<sup>53</sup> The Equality Act's definition of gender identity closely tracks these many state and local laws.

### **III. Congress May Validly Abrogate State Sovereign Immunity for Title II Sex Discrimination Claims Under the Equality Act**

Congress possesses authority under §5 of the 14th Amendment to abrogate state sovereign immunity and apply federal civil rights protections against sex discrimination in public accommodations under Title II.<sup>54</sup> Section 5 of the 14th Amendment empowers Congress to provide private rights of action against unconsenting states, abrogating state sovereign immunity, where Congress is attempting to remedy violations of the 14th Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *City of Bourne v. Flores*, 521 U.S. 507 (1997). In doing

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<sup>49</sup> National Coalition for Women and Girls in Education, *NCWGE Supports Transgender and Nonbinary Students' Full and Equal Participation in All Education Programs and Activities* (Feb. 12, 2021), <https://www.ncwge.org/activities.html>.

<sup>50</sup> NWLC, *Statement of Women's Rights and Gender Justice Organizations in Support of the Equality Act* (Mar. 16, 2021), <https://nwlc.org/resources/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act-2/>.

<sup>51</sup> See generally *Price Waterhouse*, 490 U.S. 228.

<sup>52</sup> *State Maps of Laws & Policies*, Human Rights Campaign, June 11, 2018, <https://www.hrc.org/state-maps/public-accomodations>.

<sup>53</sup> Emma Margolin, *How Minneapolis became the first city in the country to pass trans protections*, MSNBC, June 3, 2016, <http://www.msnbc.com/msnbc/how-minneapolis-became-the-first-city-the-country-pass-trans-protections>.

<sup>54</sup> We only address waiver of state sovereign immunity under Title II, and not Title VI. Because Title VI, by contrast, is a spending clause statute that requires states waive their sovereign immunity as a condition of receipt of funding.

so, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Tennessee v. Lane*, 541 U.S. 509 (2004).

The Equality Act meets this standard because the clear purpose of the Act's Title II amendments is to remedy discrimination based on sex, which closely aligns with the Equal Protection Clause's prohibition of sex discrimination. *See generally Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (holding Congress could validly impose Family and Medical Leave Act provisions on unconsenting states as a congruent and proportional response to discriminatory imposition of maternity leave on pregnant state employees). Here, abrogation of state sovereign immunity in sex discrimination public accommodation cases is a congruent and proportional remedy to a history of unconstitutional discrimination on the basis of sex by state actors in public accommodations.<sup>55</sup>

#### **A. The Equality Act's Prohibition on Sex Discrimination Responds to a Long History of Discrimination By States in Public Accommodations.**

The Equality Act aims to explicitly prohibit sex discrimination in public accommodations under Title II, closing a longstanding gap in civil rights law to provide federal protections against sex discrimination in public spaces. This goal would be undermined if states were able to use sovereign immunity to shield themselves from liability for discrimination, as states and their subdivisions often own or operate public accommodations, including "government buildings, public parks, public hospitals, clinics, libraries, museums, and transport facilities."<sup>56</sup> These state-run facilities and spaces are covered under the Equality Act's more expansive definition of "public accommodations," which includes establishments that provide "exhibition, entertainment, recreation, exercise, amusement, public gathering, or public display,"<sup>57</sup> "a good, service, or program,"<sup>58</sup> or "transportation service."<sup>59</sup>

Sex discrimination in public accommodations owned or operated by state government and its subdivisions can manifest in a variety of ways that the Equality Act would remedy. One major way in which sex discrimination occurs in government public accommodations is sexual harassment and assault that occurs in public spaces. Sexual harassment on public transportation, for example, is prevalent. One study conducted by the Mineta Transportation Institute surveyed 891 students at San José State University about whether and how they

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<sup>55</sup> As other submitted testimony explains further in depth, *see* Brad Sears et al., Williams Inst., Testimony in Support of H.R. 5, the Equality Act's prohibition of sexual orientation and gender identity discrimination as forms of sex discrimination is a congruent and proportional response to a history of state discrimination against LGBTQ people in violation of the Fourteenth Amendment. This statement focuses on other aspects of sex discrimination to further complement the record on this point.

<sup>56</sup> N.Y.U. Rev. L. & Soc. Change, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, [https://socialchangenyu.com/wp-content/uploads/2017/12/Lisa-Lerman-Annette-Sanderson\\_RLSC\\_7.2.pdf](https://socialchangenyu.com/wp-content/uploads/2017/12/Lisa-Lerman-Annette-Sanderson_RLSC_7.2.pdf).

<sup>57</sup> Equality Act, H.R. 5, 116th Cong. §3(a)(2)(A) (2019).

<sup>58</sup> *Id.* §3(a)(4).

<sup>59</sup> *Id.* §3(a)(5).

experience sexual harassment on public transportation.<sup>60</sup> The study revealed that 63% of respondents who rode transit had experienced some form of harassment while using transit. Sexual harassment, the study found, affected women far more than men, with approximately twice as many women as men reporting verbal, non-verbal, and physically harassing behavior. Because of the unsafe environment it can create, public transportation is, as *The Washington Post* has termed it, "ground zero" for sexual harassment.<sup>61</sup> Experiencing sexual harassment on public transit can also have serious lasting effects on victims, possibly tainting and changing their use of public transit.<sup>62</sup> Preventing harassment in these settings is "a civil rights issue, and an issue of equal access to urban mobility and public services"<sup>63</sup> that implicates Congress's directive to eradicate gender-based discrimination.

Failure by states to take steps to prevent and respond to sexual harassment in state-operated public accommodations is a violation of the Equal Protection Clause that empowers Congress to create this Title VII remedy abrogating sovereign immunity. "Sexual harassment violates the Equal Protection Clause because, by definition, it is 'motivated by gender.'" *Sampson v. County of Los Angeles ex rel. L.A. Cnty. Dep't of Children & Fam. Servs.*, 974 F.3d 1012, 1024 (9th Cir. 2020) (quoting *Bator v. Hawai'i*, 39 F.3d 1021, 1027 (9th Cir. 1994)). The Equal Protection Clause both "protects the right to be free from sexual harassment at the hands of public officials providing social services," *id.*, and, in some instances, requires the state to address or prevent sexual harassment. *See, e.g., Walsh v. Tehachapi Unified Sch. Dist.*, 827 F.Supp.2d 1107, 1117 (E.D. Cal. 2011) (finding that school officials' failure to take disciplinary action in response to harassment based on student's sexual orientation sufficiently stated discriminatory treatment under the Equal Protection Clause); *Roe v. Grossmont Union High Sch. Dist.*, 443 F.Supp.3d 1162, 1168 (S.D. Cal. 2020) (finding plausible equal protection claim for sex discrimination where plaintiff was sexually assaulted on campus and school officials failed to perform an unbiased investigation of the allegations).

The Equality Act also responds to a history of other forms of sex discrimination in state-operated public spaces and facilities, such as country clubs and athletic facilities. Such discrimination is rooted in a long history of denying women equal access and protection of the law. *See, e.g., Albright v. Southern Trace Cnty. Club of Shreveport, Inc.*, 859 So.2d 238 (2d Cir. 2003) (finding public country club discriminated based on sex in excluding women from club's men's only dining room in violation of equal protection); *see also* ACLU, *A League – and a Field*

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<sup>60</sup> Asha Weinstein Agrawal et al., Mineta Transportation Institute, *Crime and Harassment on Public Transportation: A Survey of SJSU Students Set in International Context 2* (March 2020), <https://transweb.sjsu.edu/sites/default/files/1810-Agrawal-Crime-Harassment-Public-Transit-SJSU.pdf>.

<sup>61</sup> Martine Powers, *Why the #MeToo Movement Is a Public Transportation Issue*, *The Washington Post* (Oct. 20, 2017), <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/10/20/why-the-metoo-movement-is-a-public-transportation-issue/>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

– *of Their Own: ACLU Wins Equality for Girls' Softball League in Oregon* (Nov. 20, 2003)<sup>64</sup>; Marcia Chambers, *Barred from Men's-Only Event, Woman Sues Public Golf Club*, *The New York Times* (Feb. 19, 2008).<sup>65</sup>

As the Supreme Court has emphasized, gender discrimination in places of public accommodation "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). Thus, eradicating sex discrimination in public accommodations and services is an integral part of "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. For these reasons, sex discrimination in state public accommodations directly implicates the 14th Amendment's Equal Protection Clause and its prohibition of gender discrimination that is not substantially related to important governmental objectives. *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986).

#### **B. Abrogation of Sovereign Immunity Is a Congruent and Proportional Response to the History and Pattern of Sex Discrimination in Public Accommodations**

The Equality Act is valid §5 legislation because it exhibits "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Hibbs*, 538 U.S. 721, 722 (2003); *Flores*, 521 U.S. at 507. The Equality Act is directly congruent to the Equal Protection Clause's prohibition of sex discrimination by public actors, as it specifically prohibits discrimination based on sex. The legislation is also responding to a long history of sex discrimination and equal protection violations. The Act is thus a "congruent and proportional response to this history and pattern of unconstitutional discrimination." *Toledo v. Sanchez*, 454 F.3d 24, 38 (1st Cir. 2006).

Moreover, the remedy of the Equality Act is a proportional response to the sex discrimination, as it does not impose an unduly heavy burden in order to remedy sex discrimination. *Id.* (finding that Title II validly abrogated sovereign immunity because the "obligations imposed by Title II are limited in several ways that minimize the compliance costs imposed on states"). The Equality Act does not require any new facilities; it simply requires equal access to the facilities and services that already exist. Thus, because the Equality Act is a congruent and proportional remedy for sex discrimination, it constitutes a valid exercise of Congress's §5 authority to enforce the guarantees of the 14th Amendment.

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<sup>64</sup> <https://www.aclu.org/press-releases/league-and-field-their-own-aclu-wins-equality-girls-softball-league-oregon>.

<sup>65</sup> <https://www.nytimes.com/2008/02/19/sports/golf/19links.html>.



## **IV. Freedom of Religion Is Protected Under the Equality Act**

### **A. Protections Within Existing Civil Rights Laws**

Freedom of religion is already protected by the Constitution and through existing federal civil rights statutes. Currently religious organizations and people of faith benefit from a set of thoughtful exemptions from federal civil rights law that amply protect religious actors from government intrusion. The Equality Act amends existing civil rights law, including the Civil Rights Act of 1964 and the Fair Housing Act, so the protections provided by the Equality Act would retain the exact same religious exemptions that already exist for every other protected characteristic. The Equality Act does not alter these exemptions, as described further below.

#### **i. Title II**

Businesses open to the public are expected to provide services on equal terms to all patrons. The Equality Act would ensure that businesses may not discriminate on the basis of race, religion, sex, sexual orientation, or gender identity, just as they may not discriminate on the basis of disability. Current law provides an exemption for private clubs and other establishments that are not actually open to the general public. Churches and other places of worship providing spaces and services exclusively to their congregations, including meetings spaces or for example, spaghetti dinners, would not be considered places of public accommodation. Further, clergy operating in their ministerial capacity would never be compelled to perform a religious ceremony in conflict with their beliefs – including any marriage ceremony.

#### **ii. Title VII**

Title VII of the Civil Rights Act 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 exemption extends to schools, colleges, and universities that are supported, owned, controlled or managed by a religious organization.<sup>66</sup>

Title VII also requires businesses to provide accommodations to employees provided it does not present an undue hardship. Employees will continue to be able to seek religious accommodations in the workplace, such as seeking time off to attend religious service, receive breaks for daily prayers, or wear a religious head covering.<sup>67</sup> Religious employees may also be

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<sup>66</sup> 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 2000e-2(e)(2).

<sup>67</sup> See e.g., *EEOC v Alamo Rent -A-Car, LLC; ANC Rental Corporation*, CIV 02 1908 PHX ROS available at <https://www.eeoc.gov/eeoc/newsroom/release/5-30-06.cfm>; See generally *What You Should Know About Workplace Religious Accommodation*, EEOC, [https://www.eeoc.gov/eeoc/newsroom/wysk/workplace\\_religious\\_accommodation.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/workplace_religious_accommodation.cfm).

reassigned to different tasks when an assigned task conflicts with religious principles such as production of weapons of war.<sup>68</sup> The Equality Act would maintain these protections.

### iii. Fair Housing Act

Religious entities are exempt from the 1968 Fair Housing Act with regard to the sale, rental, or occupancy of a dwelling owned by the organization for non-commercial purposes.<sup>69</sup> In addition, the law exempts single family homes sold or rented by the owner as well as rooms or units for rent where there are no more than four units and the owner lives on the premises.<sup>70</sup> While the latter provision is not explicitly or only a religious exemption, it effectively allows people of faith to take into consideration the religious beliefs of individuals with whom they will be sharing close living quarters. The Equality Act would maintain these existing exemptions.

## B. The Religious Freedom Restoration Act

In addition to maintaining existing religious exemptions in civil rights laws, the Equality Act includes a provision clarifying that the Religious Freedom Restoration Act (RFRA) cannot be misused to allow entities to violate federal civil rights laws. This does not eliminate RFRA, but rather limits its reach to ensure that it cannot be used as a defense to civil rights law violations.

When passed into law more than two decades ago, RFRA was designed to protect minority religious groups' constitutional right to freely exercise their religious beliefs. RFRA prohibits the federal government from “substantially burden[ing]” a person’s religious exercise unless doing so is the least restrictive means of furthering a compelling governmental interest.<sup>71</sup> RFRA was supported by a broad coalition of organizations including many in the civil rights community, who welcomed the law as an important shield for people of faith from majority rule.

Despite this intent, individuals and businesses have worked to distort RFRA into a blank check to discriminate or as a way to impose their religious beliefs on others. In the 2014 case *Burwell v. Hobby Lobby Stores*, a narrow majority of the U.S. Supreme Court allowed RFRA to be used to discriminate against others and take insurance coverage of contraceptives away from women.<sup>72</sup> In dissent, Justice Ginsburg expressed her concern that decision could be taken still further, and lead to RFRA being used to permit discrimination. In August 2016, this concern materialized in

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<sup>68</sup> See e.g., *EEOC v. Dresser Rand Co.*, 04-CV-6300, W.D.N.Y. available at <https://www.eeoc.gov/eeoc/newsroom/release/11-8-11b.cfm>; See generally *What You Should Know About Workplace Religious Accommodation*, EEOC, [https://www.eeoc.gov/eeoc/newsroom/wysk/workplace\\_religious\\_accommodation.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/workplace_religious_accommodation.cfm).

<sup>69</sup> 42 U.S.C. § 3607 (a).

<sup>70</sup> 42 U.S.C. § 3603 (b).

<sup>71</sup> 42 U.S.C. § 2000bb-1 (b).

<sup>72</sup> The Justices were asked to decide whether requiring a corporation to provide insurance coverage that includes contraception under the Affordable Care Act (ACA) is a “substantial burden” on the corporation with religious objections, and whether corporations are covered by RFRA. The Court ruled that closely held for-profit corporations are exempt from complying with the ACA contraception mandate based on the company’s religious belief under RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

a court decision by a federal judge in Michigan in the case *EEOC v. R.G. & G.R. Harris Funeral Homes*. In the decision, the judge ruled in favor of a Detroit-based funeral home who fired a transgender employee due to her gender identity, stating that RFRA could be used as a defense in a sex discrimination claim under Title VII—exempting the employer from Title VII's non-discrimination requirements. The Judge specifically relied upon *Hobby Lobby* in his decision.<sup>73</sup>

Although the Sixth Circuit overturned the district court decision in *Harris Funeral Homes* in favor of the transgender employee, the case has been appealed to the Supreme Court. While RFRA, if applied as originally intended, should not be able to be used as a defense to discriminate, the district court decision in *EEOC v. R.G. & G.R. Harris Funeral Homes* illustrates the importance of making this intention explicit. The federal government has a well-settled compelling interest in eradicating discrimination through robust enforcement of our non-discrimination laws. The Equality Act would prohibit the use of RFRA as a defense for, challenge to the application of, or enforcement of the civil rights laws amended by the Equality Act, restoring the intention of RFRA to protect religious freedom without allowing harm to others. This would not limit the use of RFRA in contexts outside of federal nondiscrimination laws.

### **C. The Equality Act Strengthens Protections for People of Faith**

By ensuring RFRA cannot be misused as a defense for, challenge to the application of, or enforcement of any of the civil rights laws amended by the Equality Act, the Equality Act strengthens nondiscrimination protections for all protected communities, including people of faith. Additionally, the Equality Act would update the public spaces and services covered in current law to include retail stores, services such as banks and legal services, and transportation services. These important updates would strengthen existing protections for everyone currently covered by these laws, including people of faith.

### **V. Conclusion**

For all the reasons outlined above, the National Women's Law Center urges the Senate to pass the Equality Act.

If there are questions about NWLC's statement, please feel free to reach out to Emily Martin, Vice President of Education and Workplace Justice at [emartin@nwlc.org](mailto:emartin@nwlc.org), and Sunu Chandy, Legal Director, at [schandy@nwlc.org](mailto:schandy@nwlc.org).

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<sup>73</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018).