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The “Equality Act”: Threatening Life and Equality

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Former vice-president Joseph Biden has made it clear that on becoming President, he hopes to advance his party's stand on so-called "social issues" such as abortion and the LGBTQ agenda. His ability to do so will depend on whether he will be working with a Congress that shares his goals.

In particular he has declared that in his [first hundred days](#) he plans to sign into law "The Equality Act" ([H.R. 5](#) in the 116th Congress). He has reason to see this bill as low-hanging fruit for his agenda. In May 2019 it passed the House of Representatives, 236 to 173, supported by all Democrats and eight Republicans. Its Senate companion, S. 788, had 47 sponsors including one Republican, the recently re-elected Susan Collins (R-ME). The Senate did not act on the legislation in 2019 or 2020 because its Republican leadership did not schedule it. In an evenly divided Senate, where one or more Republicans may support the bill and vice-president Kamala Harris (an original sponsor of S. 788) can break a tie, this bill may well become law.

H.R. 5 bears its name and enjoys such support because supporters describe it as simply a way of ensuring that gay, lesbian, and transgender Americans have equal rights with other Americans. But this description is grossly inaccurate. Among other things this bill attacks the lives of countless unborn children, endangers Catholic and other pro-life health care providers, provides a basis for rescinding all state and federal limits on public funding of abortion, and treats religious believers as second-class citizens who must violate their fundamental moral convictions to serve the goals of the pro-abortion movement.

The analysis that follows documents these claims.

How the Equality Act would change current law on sex and pregnancy

The Act adds a new protected category to four major parts or "titles" of the Civil Rights Act of 1964 that, until now, have been directed against discrimination based on factors such as race, color, or national origin: Titles II (public accommodations), III (desegregation of public facilities), IV (desegregation of public education), and VI (nondiscrimination in federally assisted programs). Now all these titles will also be directed against discrimination based on "sex (including sexual orientation and gender identity)." Title VII (equal employment opportunity), which is already directed against sex discrimination, will be amended with the Act's new broader definition of "sex." The new Act makes similar changes to other laws such as the Fair Housing Act (see H.R. 5, Sec. 10).

Then Section 9 of the Equality Act makes the following changes in Title XI of the Civil Rights Act, which includes definitions and miscellaneous provisions for that Act, to apply the following changes to *all* these "covered titles":

First change: “Sex” includes “pregnancy, childbirth, or a related medical condition” (Sec. 1101 (a)(4)(B)).

Second change: In this respect “pregnancy, childbirth, or a related medical condition shall not receive less favorable treatment than other physical conditions” (Sec. 1101 (b)(1)).

Third change: Nothing in these new provisions, or in the “covered titles” that they amend, “shall be construed (1) to limit the protection against an unlawful practice on the basis of pregnancy, childbirth, or a related medical condition provided by section 701 (k);¹ or (2) to limit the protection against an unlawful practice on the basis of sex available under *any* provision of Federal law other than that covered title, prohibiting a practice on the basis of sex” (Sec. 1106 (a), emphasis added).

Fourth change: “Nothing in section 1101 *or a covered title* shall be construed to support *any* inference that *any* Federal law prohibiting a practice on the basis of sex does *not* prohibit discrimination on the basis of pregnancy, childbirth, or a related medical condition...” (Sec. 1106 (c), emphasis added).

Fifth change: “The Religious Freedom Restoration Act of 1993 ([42 U.S.C. 2000bb et seq.](#)) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.”²

How do these legal changes impact abortion?

The intent of these provisions is best understood, first, by understanding how the Equality Act’s treatment of “pregnancy discrimination” differs from the two major laws that already exist on this topic, and second, by reviewing the openly stated agenda of the political coalition promoting the Equality Act.

A comparison with current law on pregnancy discrimination

As noted above, Title VII of the Civil Rights Act of 1964 already bars sex discrimination in employment. In 1978 the Pregnancy Discrimination Act added a new subsection 701 (k) to

¹ Section 701 (k) is the subsection of Title VII of the Civil Rights Act that prohibits discrimination in employment, including employee health benefits, based on pregnancy or related conditions.

² RFRA, as it is commonly known, was deemed necessary because a 1990 Supreme Court decision had made it much more difficult to seek a religious exemption from a neutral law of general applicability under the First Amendment itself. *Employment Division v. Smith*, 494 U.S. 872 (1990). The legislation was called a “restoration” because it sought to restore an earlier and stronger understanding of religious freedom: Even a law that applies to everyone should not override a sincere religious objection unless its application to the objector serves a compelling state interest, and that interest cannot be advanced in any way less restrictive of religion. Applying RFRA, the Supreme Court found that a law fails that test when it forces employers whose religious beliefs reject contraception or early abortifacients to include them in their employee health plans.

Title VII ([42 USC 2000e \(k\)](#)) to forbid discrimination based on “pregnancy, childbirth, or related medical conditions” in employment, including employee benefits such as health coverage. But that subsection states:

This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.³

The Equal Employment Opportunities Commission (EEOC) and a federal appellate court have held that Title VII’s reference to medical conditions “related” to pregnancy includes abortion. This suggests that, if not for the legislation’s explicit disclaimer, the mandate for health coverage of abortion would have been unlimited; and this title still forbids other kinds of discrimination, such as firing or refusing to hire a woman because she has had an abortion.⁴

The Equality Act’s new freestanding ban on pregnancy discrimination, which will govern Title VII and four other titles of the Civil Rights Act, pointedly excludes Title VII’s disclaimer (First change noted above). It adds the new requirement for women to receive “treatment” for pregnancy that is as “favorable” as treatment for any other “physical condition” -- and of course, treatments are routinely provided for other physical conditions on an elective basis and for many reasons that have nothing to do with life endangerment (Second change). It provides rules of construction indicating that the new requirement should be interpreted as broadly as possible (Third and fourth changes). And it negates the existing religious freedom law that allows believers to seek an exemption from such requirements based on sincere religious beliefs such as respect for human life (Fifth change).

What about the Equality Act’s insistence that sex discrimination provisions in “any” Federal law cannot be construed to limit such requirements? This seems directed at another major existing law on sex discrimination, Title IX of the Education Amendments of 1972.

Title IX was directed against discriminatory treatment and sexual harassment of women; it also required educational institutions to provide support for women’s athletics comparable to

³ The exception here for cases of danger to the mother’s life was of concern to the Catholic bishops of the U.S., whose ethical directives call for respect for the life of both mother and child and oppose direct killing of the unborn child for any reason. A lawsuit raising this concern was dismissed by federal courts because there was no “case or controversy” -- that is, the government had not acted to force the bishops to reimburse for direct abortions that violate their moral teaching -- and that remains the situation four decades later. *National Conference of Catholic Bishops v. Bell*, 490 F. Supp. 734 (D.D.C. 1980).

⁴ “We now hold that the term ‘related medical conditions’ includes an abortion.” *Doe v. C.A.R.S. Protection Plus*, 527 F.3d 358, 364 (3d Cir. 2008).

that provided for men.⁵ By regulation it was interpreted to forbid discrimination based on pregnancy as well.

In 1984 the U.S. Supreme Court interpreted Title IX narrowly to apply only to a particular program or activity that receives federal funds. *Grove City College v. Bell*, 465 U.S. 555 (1984). Congress resolved to amend the law, so it would clearly apply to entire educational institutions that receive federal funds for some programs or activities. Discussion of this issue focused attention on the prospect that the Title IX regulations could require educational institutions to provide abortions (for example, through their student health plans) and to violate their institutional religious tenets, since the scope of any such mandates would be greatly magnified by the proposed expansion of Title IX's scope.

After years of debate, the Civil Rights Restoration Act (Public Law 100-259) was finally enacted into law in 1988, including two key amendments to Title IX. First, this Act stated that the subsection of Title IX defining sex discrimination “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization” ([20 USC 1681 \(a\)\(3\)](#)). Second, it added a new “abortion-neutral” provision to Title IX ([20 USC 1688](#)):

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

The Equality Act has none of these exceptions or qualifications. It requires that pregnancy be treated merely as a “medical condition” to be addressed with “treatment” that is at least as favorable as that provided for other physical conditions; and it explicitly denies any claim against this requirement based on religion. Because it would supplement, and in effect supplant, even the pregnancy discrimination provisions *already found in existing law* such as in Title VII of the Civil Rights Act, this requirement for abortion and for ignoring religious objections seems to be the chief *purpose* of the new language on pregnancy discrimination. A

⁵ The Equality Act's potential negative impact on women's athletics was debated when the House of Representatives considered the Act last year, as biological males who identify as women have been winning tournaments in some women's sports. It seems that under the Act an educational institution could fulfill the requirement of equitable support for women's sports by fielding two teams – one made up of men, the other made up of men who identify as women. A House member proposed an amendment to state that the Act would *not* have this effect which diminishes current protections for women under Title IX. He observed: “Requiring that biological females face competition from biological males will mean the end of women's sports in any meaningful sense.” The amendment failed, 181 to 228. *Cong. Record*, May 17, 2019, H3950-52.

standard rule of statutory construction demands that when two provisions in the same area of law use similar language but with a difference, courts must give effect to the difference.⁶

Of especially grave concern is that the Equality Act introduces this same language on sex and “pregnancy discrimination” into Title VI of the Civil Rights Act, forbidding discrimination in “federally assisted programs.” This applies to a wide range of entities that may receive federal funds, including state and local government agencies, educational institutions, organizations providing health care, etc. ([42 USC 2000d-4a](#)). All of these would be required to show that they do not exclude the full range of treatments for the “condition” of pregnancy. Not only the federal government, but all states that receive federal funds for their health programs, would be required to fund elective abortions, reversing the longstanding policy of [two-thirds](#) of the states. The same changes to the definition of “sex” are made to Title II, on discrimination in places of “public accommodation,” and that title’s definition of a “public accommodation” is expanded to include “any establishment that provides a good, service, or program,” including any provider of “health care” (H.R. 5, Sec. 3 (a)(d)).

The stated purpose of groups advancing the Equality Act

In July 2019, dozens of “reproductive rights” organizations released a [document](#) declaring their agreed-upon public policy goals, the *Blueprint for Sexual and Reproductive Health, Rights, and Justice*. The document is based on five key principles, the first of which is: “Ensure Sexual and Reproductive Health Care is Accessible to All People.” Endorsing organizations include Planned Parenthood Federation of America, NARAL Pro-Choice America, American Civil Liberties Union, Center for Reproductive Rights, National Abortion Federation, National Women’s Law Center, and many other groups dedicated to maximizing “abortion rights.” These groups declare:

Every individual must have unimpeded access to abortion care – regardless of where they live, how much money they have, their insurance, their age, or if they decide to self-manage their abortion. Indeed, a right is merely theoretical when care is inaccessible or unaffordable. Federal lawmakers must enact policies that guarantee abortion access across the country. This includes passing legislation to ensure coverage for abortion in private and government funded insurance plans and programs and ending the Hyde Amendment, which withholds abortion coverage (except in the limited cases of rape, incest, and life endangerment) from those qualified and enrolled in Medicaid, as well as related restrictions on abortion coverage. Lawmakers must also reduce barriers to medication abortion and decriminalize self-managed abortions. (p. 5)

⁶ See *Russello v. United States*, 464 U.S. 16, 23 (1983), and cases cited therein. In this case, the new language on pregnancy-related discrimination that will govern multiple titles of the Civil Rights Act is nearly identical to the already existing language of Title VII, *except* that it does not exclude an abortion mandate and does not give deference to religious objections.

Their first specific demand regarding health care access is that “Congress must pass and the administration should properly and swiftly implement the Equality Act” (p. 56).

The *Blueprint* proceeds to call on a new Administration to interpret and enforce Section 1557, the non-discrimination provision in the Affordable Care Act ([42 USC 18116](#)), so it “prohibits discrimination in health care on the basis of sex—including pregnancy, termination of pregnancy, sex stereotypes, gender identity, and sexual orientation,” and does so “without exemptions or accommodations based on religious or personal beliefs” (p. 57). This section of the ACA states that individuals may not “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, *any health program or activity, any part of which is receiving Federal financial assistance*” (emphasis added). This abortion mandate will govern health care facilities that receive federal assistance as well as health benefits plans, such as those offered on the state “exchanges” under the Affordable Care Act.

Section 1557 has been [interpreted](#) by the Trump administration as *not* demanding gender transition or abortion services, and this is the subject of current federal litigation. However, Section 1557 says that laws such as Title VI of the Civil Rights Act (addressing nondiscrimination in federally assisted programs) will define the scope of prohibited discrimination in the Affordable Care Act as well. With passage of the Equality Act, then, Title VI will provide a clear statutory basis for regulations interpreting and enforcing Section 1557 against health care providers who decline involvement in elective abortion and against health benefits plans that decline coverage for it. Physicians, clinics, and hospitals in the United States, whether secular or religious, that receive any reimbursement under Medicaid, Medicare, or any other federal health program would be covered by this abortion mandate.

More generally the *Blueprint* repeatedly calls for the elimination of existing laws that respect the consciences of health care providers and others who object to abortion, referring to these as “refusal of care” laws that violate the rights of others (e.g., pp. 58-9, 62, 65). This campaign would attack numerous [federal](#) conscience laws as well as the laws of [45 states](#).

In Perspective: The Expanding Abortion Agenda

The demands set forth in this *Blueprint* reflect a newly extreme and coercive agenda on the part of pro-abortion organizations. These organizations have found that framing abortion as a matter of privacy and “freedom of choice” has left them unable to force others to accept and help provide abortion against their moral and religious convictions, because “choice” logically must include a choice *not* to be involved in abortion. Nor has the theme of “privacy” enabled them to demand that taxpayers subsidize *public* funding of abortion in every health program. Therefore, such groups have [abandoned](#) the “pro-choice” slogan, instead demanding a public commitment to abortion “access” as a basic part of health care.

In passing, it may be noted that this abortion agenda even seems to be in considerable tension with the Equality Act’s other focus on the LGBTQ agenda. The “equal protection” argument for abortion and abortion funding, that failure to support abortion is a form of discrimination on the basis of sex, is based on the claim that only women can become pregnant and face the burdens of pregnancy. But the other provisions of the Act demand that biological males who cannot become pregnant must be accepted as women, and that biological females who can become pregnant must be accepted as men, if they so identify. Further analyzing that apparent contradiction is beyond the scope of this paper.

The new abortion agenda reflected in the Equality Act will require a radical shift in longstanding government policy. The U.S. Supreme Court has upheld bans on government funding of abortion. In doing so, the court concluded that the “right” to be free from direct government interference in choosing an abortion does not include a right to demand support and assistance from others in implementing that choice. The court also rejected the argument that abortion must be included in federal health programs because it is simply another routine medical procedure to be treated like any other: “Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.” *Harris v. McRae*, 448 U.S. 297, 325 (1980). The court’s later decisions have referred more straightforwardly to a legitimate governmental interest in respecting “the life of the unborn.”⁷

Moreover, for decades, every Congress and every President -- of both major parties – has approved such public funding bans and has maintained federal laws protecting the conscience rights of pro-life health care providers. In 1993, Congress approved the Religious Freedom Restoration Act nearly unanimously, and President Bill Clinton enthusiastically [signed](#) it into law. In its 1992 testimony even the ACLU strongly [supported](#) this law, warning that failure to enact it would place at risk many longstanding practices such as “permitting religiously sponsored hospitals to decline to provide abortion or contraception services” (see p. 192 of linked hearing record). Now the ACLU is endorsing an Equality Act that would rescind this religious freedom law exactly where, by its own testimony, that law is needed.

It is notable that in 1992 the ACLU recognized a religious hospital’s right to decline involvement even in contraception. This is also a service related to pregnancy, so would presumably be required of religious hospitals under the Equality Act – as would removal of a woman’s healthy uterus, surgically sterilizing her, to facilitate her transition to a male gender

⁷ The court has said that by regulating abortion “the State . . . may express profound respect for the life of the unborn.” *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). In later upholding a federal ban on partial-birth abortion, the court said such a ban “expresses respect for the dignity of human life,” and it reaffirmed government’s “legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” *Gonzales v. Carhart*, 550 U.S. 124 at 157, 158 (2007). The Equality Act shows no recognition that life is involved here, much less that it has dignity or deserves any respect.

identity.⁸ As noted above, the Equality Act’s mandates and its elimination of any defense under the Religious Freedom Restoration Act would also reverse the outcome of Supreme Court cases on the Affordable Care Act, subjecting the Little Sisters of the Poor and other religious entities to a mandate for contraceptive and early abortifacient coverage.

Conclusion

The “abortion as health care” campaign advanced by the Equality Act effectively defines the unborn child out of existence. It treats the child as merely a “physical condition” of the mother that health professionals are called on to address through corrective treatment. In a sense the Act also defines Americans who object to such taking of innocent human life out of existence as well, treating them as bigots who must be forced to comply with anti-discrimination policies accepted by all fair-minded citizens. The Act does not promote equality, as it further demeans vulnerable human beings who already have few rights -- and denies the right of pro-life Americans, who make up [about half](#) the U.S. population, to live by their fundamental convictions. In no way should its enactment be the goal of a “[presidency](#) for all Americans.”

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⁸ Such a requirement is already being imposed on Catholic hospitals in California under a state law on transgender rights. See [In California, the Right to Gender ‘Transition’ Is Threatening Religious Liberty \(dailysignal.com\)](#).