

Ranking Member Grassley
Hearing Questions for Mary Hasson

1. Some maintain that the Equality Act does not impact Americans' First Amendment rights or otherwise infringe on various religious liberty provisions in existing law. What is your response to this argument?

A: The Equality Act would have immediate and serious consequences for religious believers. It would brand as "bigots" those who believe in the significance of sexual difference (biological differences between males and females). It would paint faith-inspired actions, that merely sought to protect privacy, modesty, morality, and safety by respecting differences between the sexes, as "discrimination." It would portray the moral codes of religious institutions (such as schools or universities) that respect sexual difference and the biblical teaching on marriage as discriminatory and harmful. And it could potentially jeopardize the tax-exempt status of religious schools that fail to embrace the ideology imposed by the Equality Act. Most significantly, the Equality Act would send a message that religious believers would not be welcome to live out their faith in the public square; they could believe whatever they chose in the privacy of their homes, but they could not exercise their faith in public for fear of a discrimination complaint.

2. Why might existing religious liberty provisions be inadequate to protect religious liberty if the Equality Act is enacted?

A: The Equality Act renders existing religious liberty protections afforded by the Religious Freedom Restoration Act unavailable--either as a claim or as a defense under the Equality Act. The Act's language is unambiguous: RFRA is off-limits, useless, in the face of sexual orientation or gender identity discrimination claims. Some proponents of the Act have argued that religious freedom protections remain intact because the Act does not "repeal" RFRA. This argument is a red herring, because the Act expressly renders RFRA unavailable for claims brought under the Act.

The Act also attempts to foreclose the possibility of a First Amendment religious liberty claim, by including specific language that asserts that the Act furthers the government's "compelling state interest" in eradicating sexual orientation and gender identity discrimination and is narrowly tailored to accomplish that purpose. This language attempts to foreclose further scrutiny by the courts and attempts to prevent the courts from balancing the interests of religious believers and claims brought under the Equality Act. The Equality Act picks winners and losers in the constitutional arena: religious believers who do not subscribe to gender ideology will always lose.

3. Some have argued that the Equality Act would likely result in an end to federal security relief and disaster relief for thousands of religious schools. They also say it will result in years of unnecessarily protracted litigation for houses of worship and other faith-based entities. And they say it would compel an end to federal partnerships with thousands of

faith-based programs that serve the most vulnerable people in the United States. Are they correct?

A: Yes.

Q: Why or why not?

A: Under the Act, any organization that receives federal funds or participates in federal grants or programs is subject to the anti-discrimination provisions of the Act. This means that religious organizations that, for example, have been eligible for federal disaster relief until now, would be precluded from receiving those funds--unless they are willing to comply with the Equality Act, even if that means violating their religious beliefs. Similarly, an urban Catholic school that enrolls students who participate in the federally subsidized school lunch program would face an untenable choice: comply with the Equality Act in violation of its beliefs or be unable to serve those who rely on federal funds to attend their school. Receipt of government benefits should not be conditioned on a requirement that the recipient forego free expression of religious beliefs—but this is exactly what the Equality Act would require.

4. Are there other ways in which the Equality Act could damage faith-based organizations and the people they serve? Please explain.

A: The Equality Act opens the door to discrimination claims against faith-based organization for simply carrying out charitable activities while adhering to their beliefs. Many of these valuable religious organizations would be forced to close their doors or risk endless litigation. In addition, the vital work that these groups do would be tarnished by the implication that adhering to their biblical beliefs about sexual difference and marriage is the modern equivalent to racial bigotry.

The prospect that religious organizations that are critical to the fabric of our communities and which provide much needed services to the most vulnerable could be forced by legal harassment and the threat of litigation to close their doors should be troubling to people of all faiths and of no faith.

5. Can you cite any concrete instances where the Religious Freedom Restoration Act has been abused or otherwise invoked to hurt the LGBTQ population?

A: No. RFRA provides for a balancing of interests—a fair way to ensure that the concerns and rights of all are taken into account by the courts. It recognizes and protects the fundamental right to religious freedom by requiring (upon a showing that government action has substantially burdened religious belief) that the government justify the burden. The government must demonstrate that the burden is necessary to further a compelling state interest and that the action in question is narrowly tailored to achieve that interest.

Q: If not, is there a need for a total exemption from the Religious Freedom Restoration Act, as proposed by the Equality Act?

A: No. In fact, by denying religious believers and organizations any recourse to RFRA for claims or defenses raised under the Equality Act, the Act itself tips the scales of justice against religious believers—in every case. The Act would preclude precisely the kind of balancing and weighing of interests that characterizes fairness in a pluralistic society. Instead, the Act would effectively prevent religious believers and organizations from living out their faith in the public square.

6. The Department of Health and Human Services has long recognized that the practice of medicine and biomedical research routinely involves decisions and diagnoses that legitimately make sex-based distinctions. Under the Equality Act's approach, however, it might not be possible to do that. To illustrate: consider what happens if a transgender patient self-identifies as male in the medical intake process, yet an examining doctor has reason to believe the patient is biologically female. In this case, the doctor could reasonably assume that the law prevents changes to the person's chart to reflect female sex, because that would not be treating the person "consistent with" her stated gender identity. What else can you tell us about the importance of sex as a biological difference in health care and medicine?

A:

The human person is either male or female. Biologists Emma Hilton and Colin Wright offer a clear, compelling explanation of the undeniable, immutable reality of sex: "In humans, as in most animals or plants, an organism's biological sex corresponds to one of two distinct types of reproductive anatomy that develop for the production of small or large sex cells—sperm and eggs, respectively—and associated biological functions in sexual reproduction...In humans, reproductive anatomy is unambiguously male or female at birth more than 99.98% of the time...The evolutionary function of these two anatomies is to aid in reproduction via the fusion of sperm and ova...No third type of sex cell exists in humans, and therefore there is no sex 'spectrum' or additional sexes beyond male and female...Sex is binary." (Hilton and Wright, "The Dangerous Denial of Sex," *The Wall Street Journal*, February 13, 2020.)

The NIH requires that clinical researchers specify the biological sex (not gender identity) of clinical subjects, because it recognizes that sex is a "biological variable." The National Institutes of Health describes sex as "a biological variable defined by characteristics encoded in DNA, such as reproductive organs and other physiological and functional characteristics" ("Consideration of Sex as a Biological Variable in NIH-funded Research," National Institutes of Health 2015). Acknowledging sexual difference is critical to the practice of medicine and to medical research. One of the great advances in medicine over the past several decades has been the inclusion of females as subjects in clinical trials—and the resulting discoveries about the significant ways that male and female bodies differ. Females benefit greatly from sex-differentiated medicine, because the

female body—while largely the same as the male body—is different in important respects, beyond reproductive capacity. Biological sex matters. It matters when physicians assess a patient’s symptoms, consider the likely course of a disease, or the body’s likely response to medical interventions—because male and female bodies do not always manifest the same symptoms or respond to treatments in the same way. Many females owe their lives to the fact that medicine now knows and recognizes that heart attack symptoms, for example, differ in females compared to males. The practice of medicine requires acknowledging the person’s sex because sex affects the whole body and the overall health of the person. An inventory of organs, as some propose should be substituted for asking the person’s sex, does not accomplish the same benefit to the patient – nor does it allow the physician to draw upon his or her knowledge of sexual differentiation and its impact on medical treatments.

7. Could the Equality Act compel doctors to make decisions that are inconsistent with their best professional judgment in certain cases?

A: Yes. The “transgender mandate” [cases](#) addressed that concern. The 2016 HHS mandate required physicians to provide patient-requested medical interventions for gender transitions, regardless of the physician’s independent judgment or conscientious objections. Although several courts have enjoined the “transgender mandate,” the Equality Act would revive the very same conflict for physicians. Even though there is no long-term evidence of medical benefit from gender confirmation procedures, under the Equality Act, a physician would be forced to comply with the demands of a transgender-identified patient for particular medical interventions or risk a discrimination lawsuit. The Act would effectively turn physicians into medical vending machines, forced to provide patient-requested, gender identity-related interventions—regardless of the physician’s best medical judgment, or conscience objections to participating in or providing gender-related interventions.

In addition, the Act redefines “sex” to include pregnancy and related conditions. It does not include necessary language that would clarify that the Act does not require the provision of abortion services. As it stands, the Act is likely to be interpreted to require physicians to perform abortion services, or face discrimination claims.

8. What can you tell us about the challenges facing State, local, or foreign jurisdictions in which legislation or policies similar to the Equality Act have been adopted? Is it true that such State policies or laws have had virtually no negative impact on faith-based entities and the exercise of religious freedom by individuals, as some suggested at our March 17th hearing? Are those laws and policies truly similar to the Equality Act?

A: It is not true that sexual orientation and gender identity anti-discrimination provisions have had no impact on religious organizations or religious believers. Litigation has occurred and is ongoing in many states, involving fact patterns similar to those which would occur under the Equality Act. The major difference at the state and local level,

however, is that RFRA, and in some cases the First Amendment more broadly, has been available as a defense to those claims. Religious organizations and individuals facing litigation have included (or include) [Catholic hospitals](#) (facing claims over refusal to provide transgender surgeries), women's [shelter](#) (denying sleeping accommodations to males who identify as women), [bakers](#) and florists (conscience-based objections to participating in the celebration of same-sex weddings or gender transitions), [professors](#) (faith-based and free speech objections to compelled use of pronouns), [parents](#) (objecting to public school's promotion of gender ideology and facilitating child's "transition" without parental permission), and more. Gender identity and sexual orientation anti-discrimination laws likely have also had a "chilling" effect on the speech and religious practices of believers—an effect that, unlike pending or past litigation, is more difficult to quantify but is every bit as harmful.

9. Are there implications of The Equality Act for parental rights? Please explain?

Yes. Parents who believe in the immutability of biological sex will have their beliefs branded as bigoted and discriminatory and may face the prospect of losing the right to make medical decisions for a child who is experiencing identity issues. Physicians, counselors, and teachers who embrace gender ideology increasingly advocate for those positions – regardless of parental beliefs. Medical and counseling professionals are likely to feel pressured under the Equality Act to present parents only with gender-affirming interventions, and to discourage parents from pursuing counseling that aims to help a child integrate her identity with her body. The Equality Act itself cites "conversion therapy" as an example of discriminatory harm, even though the term is vague, over-inclusive, and fails to acknowledge parents' rights to make decisions in the best interests of their child—which, for many religious parents, includes supportive talk therapy to help a child integrate her identity with her body instead of pursuing life-altering, fertility-destroying interventions. In at least [one case](#) already, parents who objected to a teen's desire to begin a gender transition lost custody of their child.

10. How would the Equality Act affect the school environment in both public and private K-12 schools? Would the impact on private schools be different than that for public schools, and if so, how? How would students who believe in a binary view of sex and marriage between one man and one woman be impacted?

A: The Equality Act, if passed, will have a significant impact on education—both for public schools and for private schools that receive federal funds, even indirectly. Because the Equality Act enshrines sexual orientation and gender identity as protected characteristics (under the definition of "sex"), every public school will be required to promote gender ideology as if it were fact. Gender identity will be promoted as the most significant aspect of a person's identity, overriding the significance of biological sex.

All children will be taught about gender identity and encouraged to explore and determine for themselves "who" they are, regardless of sex. The scientific fact that sex is binary—and that every person is either male or female – will be treated as a

discriminatory belief. Instead of learning the biological facts about their female or male bodies, children will be introduced to novel concepts such as “gender inclusive [puberty](#) education.” Children exposed to this gender-inclusive education will hear explanations like this:

“Some of the ways that I will be talking about bodies in this unit might sound a little strange to you at first. For the most part when I talk about bodies I’ll talk about bodies with a penis and testicles or bodies with a vulva and ovaries. You might wonder why I’m doing this instead of just saying male bodies or female bodies. As we’ve discussed, there aren’t just two kinds of bodies. I also want everyone to get used to using accurate language for body parts and functions without assuming that there are only two sexes and that everyone within a particular sex is the same. It’s important to be able to communicate about our bodies in accurate ways.”

([Gender Spectrum](#), Principles of Gender-Inclusive Puberty and Health Education, 2019).

In some public schools already, children are allowed—even encouraged—to self-define a gender identity and the school will facilitate a social transition without parental permission. In Montgomery County, Maryland, for example, the public school district will not involve parents in the decision of a child (of any age) to pursue a [gender transition](#) at school, unless the child gives permission and the school deems the parents to be supportive. (See Montgomery County Public Schools Intake [Form](#): Supporting Student Gender Identity, MCPS Form 560-80, November 2019). If the Equality Act passes, this will be the reality for every public school. They will be forced to incorporate gender ideology into instructional materials and to support gender transitions, no matter what parents believe. In addition, as was well-covered in Senate testimony by Abigail Shrier, schools will be required to allow males who identify as females to access girls’ restrooms, locker rooms, and sports’ teams. The Equality Act specifically requires access to be granted according to gender identity, regardless of biological sex.

Senator Josh Hawley
Questions for the Record

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- 1. What are the implications for Americans’ religious liberties of the Equality Act’s prefatory statement that the Equality Act furthers the government’s compelling interest in the least restrictive way?**

The Equality Act declares that the Act “furthers the compelling governmental interest” in prohibiting and redressing discrimination on the basis of sexual orientation and gender identity, and that the “Act furthers the government’s compelling interest in the least restrictive way.” [Sec.2(a)(22)-(23)]. This language mirrors the legal test that courts apply when deciding whether government actions that restrict constitutional rights can be justified; as such, it appears to be a shameless attempt to usurp judicial power. The “compelling interest” language effectively tries to stack the deck against the religious liberty claims of Americans who cannot, in good conscience, comply with the provisions of the Act. Further, the Act strips away any pretense of neutrality and betrays instead a troubling hostility towards the conscience rights of many Americans whose sincere, faith-based beliefs about sexual difference, marriage, and sexual morality do not permit them to affirm notions of gender identity or support same-sex wedding celebrations. This language instead displays an unprecedented antagonism towards those whose beliefs about the human person and human relationships conflict with those advanced by the Equality Act.

2. How is this language complementary to the Equality Act’s direct assault on Americans’ statutorily guaranteed religious liberties under the Religious Freedom Restoration Act (RFRA)?

By including the “compelling interest” language and specifically excluding claims or defenses based on RFRA (Sec 1107), the Act attempts to strip religious believers of their religious freedom “to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”

Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015). Taken together, the attempt to thwart First Amendment claims through “compelling interest” language, along with the specific exclusion of RFRA claims or defenses, turns a deaf ear to the Supreme Court’s expressed concerns in the *Bostock* decision. Even as it broadened the interpretation of Title VII sex discrimination claims to include discrimination based on sexual orientation and gender identity, the Court stated: “We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.”

Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020). The Equality Act expressly repudiates the Court’s concerns—and the Constitutional protections relied on by religious believers.

3. What other laws, if any, seek to define themselves as withstanding strict scrutiny under the First Amendment?

No other laws, to my knowledge, include similar language that is clearly designed to tie the hands of future courts and prevent the appropriate level of review of government actions when fundamental First Amendment rights are at stake. It is quite literally unprecedented.

4. What other laws, if any, deliberately exempt themselves from RFRA's reach?

No other laws, to my knowledge, include similar language that is clearly designed to tip the scales against the rights of religious believers in every case that presents a conflict between the Equality Act's protections for sexual orientation or gender identity and the religious liberty rights of countless believers and religious institutions.

5. Is it sufficient for Americans to trust that "the courts" will eventually strike a reasonable balance between religious liberty as guaranteed by the Constitution and the Equality Act's antidiscrimination requirements?

Hoping that a future court will somewhere, someday, somehow restore the rights of religious believers to seek protection of their conscience rights and religious liberty is both naïve and unjust. Religious believers should not be punished for their beliefs nor banished from the public square for attempting to live by those beliefs – not for an hour, a day, or for any length of time – because Congress is unwilling to address the serious flaws in the Equality Act.

6. What are the broader implications for American public life of the Equality Act's sweeping expansion of the definition of "public accommodations"?

The Equality Act's unprecedented expansion of the meaning of "public accommodations" under civil rights laws creates new, unknowable liability risks for religious believers and institutions. While previous civil rights law defined public accommodations with specificity, providing clear notice of legal expectations and liability, the Equality Act's redefinition creates liability on terms yet undefined and poorly understood—for example, it covers a "place of or establishment that provides... public gathering, or public display." Nearly any activity of a religious house of worship could potentially fall within this description, subjecting these religious organizations to crippling harassment,

lawsuits, regulatory fines and regulations. Further, the Act includes “any establishment that provides a good, service, or program, including a store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency, or funeral parlor, or establishment that provides health care, accounting, or legal services.” This language arguably covers most types of charitable outreaches undertaken by religious organizations, including services that provide vital assistance to the most marginalized members of society. In addition, the inclusion of health care establishments as public accommodations, with no religious exemption or recourse to RFRA protections, makes Catholic health care facilities an immediate and foreseeable litigation target. Catholic healthcare services operate according to a faith-based mission, which includes ethical and moral constraints expressed in the current version of the “Ethical and Religious Directives for Catholic Health Care Services.” The Equality Act would endanger the viability of faith-based healthcare services, as these organizations would face lawsuits aiming to compel their complicity in medical interventions (such as sterilization, abortion, “gender-affirming” surgeries and hormonal treatments, etc) that contravene their faith-based missions and underlying religious beliefs.