



Secretariat of Pro-Life Activities

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194

202-541-3070 • FAX 202-541-3054 • EMAIL PROLIFE@USCCB.ORG • WEB WWW.USCCB.ORG/PROLIFE

The Equality Act: Its Impact on Government Funding of Abortion

The Equality Act could have an adverse impact on existing provisions that prohibit the use of federal funds for abortion.

Below we review relevant provisions of the bill. We then consider the potential consequences for current restrictions on federal funding of abortion.

I. Text of the Equality Act

The following bill provisions are relevant.

1. Public accommodations. The Equality Act (H.R. 5) forbids discrimination based on “sex,” including “sexual orientation and gender identity,” in places of “public accommodation.” H.R. 5, § 3(a)(1). The bill defines “public accommodation” to include “any establishment that provides ... health care ... services.” *Id.* § 3(a)(4). The term “establishment” is not limited to physical facilities and places. *Id.* § 3(c). The term “sex” includes “pregnancy, childbirth, or a related medical condition.” *Id.* § 9(2). The bill also states that “pregnancy, childbirth, or a related medical condition shall not receive less favorable treatment than other physical conditions.” *Id.*

2. Federally-funded programs and activities. The bill also forbids discrimination based on “sex,” including “sexual orientation and gender identity,” in any program or activity receiving federal financial assistance. *Id.* § 6. The term “sex” is again defined to include “pregnancy, childbirth, or a related medical condition,” and the listed items “shall not receive less favorable treatment than other physical conditions.” *Id.* § 9(2).

II. Consequences for Federal Funding of Abortion

These changes in federal law could undercut existing prohibitions on the use of government funds for abortion.

For years it has been an accepted predicate in federal bill drafting that laws forbidding discrimination based on “sex” must have abortion-neutral language to blunt any inference that non-discrimination requires the provision or coverage of abortion. Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, are illustrative. Both titles forbid discrimination based on sex, and both titles have abortion neutral amendments to mitigate or foreclose the claim that this prohibition requires a covered entity to provide or cover abortion.¹ The fact that abortion-neutral language appears in Title VII and Title IX shows that Congress knows how to exclude abortion when it wants to. The failure to include an abortion-neutral amendment in the Equality Act therefore suggests a legislative intent to require the provision of abortion; otherwise, the Act, like Titles VII and IX, would have included such language. This conclusion is reinforced by (a) the bill’s definition of sex to include “pregnancy, childbirth, or a *related medical condition*,” (b) agency and judicial interpretations construing

¹ 42 U.S.C. § 2000e(k) (“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”); 20 U.S.C. § 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.”).

this language,² and (c) the added qualification that pregnancy and “related medical condition[s] shall not receive less favorable treatment than any other physical conditions.”

The same reasoning—and the same conclusion—applies to the bill’s non-discrimination provisions as applicable to federally-funded programs and activities. Indeed, abortion advocates themselves are currently reading the federal funding provisions of the bill to permit women to successfully challenge the denial of abortion.³

Existing prohibitions on the use of government funds for abortion can be undercut in three ways.

First, federal and state governments are *themselves* providers of health care. Therefore, they would themselves be subject to the constraints that the Equality Act places on all health care providers and, as such, might be required to provide abortions. This conclusion is reinforced by the bill’s expansive definition of “establishment,” which is not limited to physical facilities and places.

Second, it would seem anomalous to, on the one hand, *mandate* that recipients of federal funds provide abortions, as the Equality Act can be read to do, but, on the other hand, *prohibit* use of such funds for abortions. It can (and likely will) be argued that these newly-enacted provisions repeal by implication previously-enacted legislation *forbidding* the use of those very same funds for abortion.

Third, even if the bill were not construed to require the *federal* government to fund abortions, it could still be construed to require *states* that receive federal funding to do so with their own funds, which would be a departure from the longstanding principle that the federal government not require government funding of abortion even on the part of state governments.

The possibility that the Equality Act may be used to undercut the Hyde principle against government funding of abortion has been noted even by those endorsing the bill. Katelyn Burns, *New Congress Opens Door for Renewed Push for LGBTQ Equality Act* (Dec. 5, 2018), <https://rewire.news/article/2018/12/05/new-congress-opens-door-lgbtq-equality-act/>. But instead of denying that this problem exists, or (even better) urging an amendment to avoid it, one supporter of the bill has suggested that the issue simply “has to be navigated super carefully.” *Id.* In other words, there *is* a problem and the suggested “fix” is simply to keep it from becoming politically visible.

If the intent were otherwise, then proponents of the bill would (and should) say so in the actual text of the bill.⁴

February 2021

² Similar language in Title VII has been construed to include abortion. E.g., 29 C.F.R. pt. 1604 App. (concluding that the phrase “pregnancy, childbirth, or related medical conditions” in Title VII protects a woman from “being fired ... merely because she ... has had an abortion”); 29 C.F.R. § 1604.10 (treating abortion as a “related medical condition” for purposes of Title VII); *Doe v. C.A.R.S. Protection Plus*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that “the term ‘related medical conditions’ [as used in Title VII] includes an abortion”).

³ National Partnership for Women and Families, *The Equality Act (H.R. 5/S. 788): Providing Critical Protection Against Discrimination for LGBTQ People and Women* (April 2019) (“Women would ... be able to challenge denials of reproductive health care where a federally-funded entity otherwise provides comparable or comprehensive health care”), <http://www.nationalpartnership.org/our-work/resources/general/the-equality-act.pdf>.

⁴ This is not to imply that government funding of abortion is the *only* problem (or even the only abortion problem) with the bill.