

State of the Union: An Annual Review of Sexual Orientation and Gender Identity Legislation

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KEY TAKEAWAYS

Concerned Members of Congress have stalled major efforts to anchor gender ideology in federal law through bills like the Equality Act and Build Back Better Act.

In the next year, Members and states can expect laws and regulations that try to codify gender ideology in law, education, and medicine.

State laws should defend parents' rights, require school transparency, guard sports and private spaces for girls and women, and protect minors from bad medicine.

From its first day in office, the Biden Administration has worked with its allies in Congress to promote gender ideology, which replaces biological sex with a subjective notion of “gender identity.” On Inauguration Day, President Biden issued an executive order that directed agencies to interpret sex discrimination to include “sexual orientation” and “gender identity” (SOGI).¹ House Speaker Nancy Pelosi (D-CA) drafted rules for the House of Representatives that changed “pronouns and familial relationships...to be gender neutral.”² A month later, Senate Majority Leader Charles Schumer (D-NY) applauded the House’s passage of the Equality Act,³ a major SOGI policy, and vowed that he and his colleagues would “fight tooth and nail” for its passage in the Senate.⁴

The majority leadership has committed itself to a radical gender ideology. That ideology is alien to the

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views of most Americans, whatever their religion, and threatens their fundamental liberties.⁵ Many minority-party Members of Congress became alert to these threats and stalled the most sweeping SOGI policies, but the fight is far from over. With less than a year before the 117th Congress adjourns, Members must resist the SOGI agenda and seize every chance to protect Americans from this destructive dogma.

Victories

Federal

As noted, the White House and its congressional allies are committed to the SOGI policy agenda, but Members of the minority in Congress have managed to slow their efforts to make gender ideology a state-sanctioned orthodoxy.

The Equality Act. The Equality Act was introduced in the House of Representatives in February 2021. Ironically, this sweeping overhaul of the 1964 Civil Rights Act and the 1968 Fair Housing Act, if enacted, would threaten Americans' liberty, equality, privacy, and safety.⁶ It would add "sexual orientation" and "gender identity" to nondiscrimination clauses throughout these civil rights codes. Such amendments, however, are not needed: The civil rights code already protects everyone, whatever their status. These SOGI clauses also would allow the federal government to weaponize civil rights laws against those who dissent from same-sex marriage and gender ideology.

The House passed the Equality Act in February 2021 along party lines. Only three Republican Members supported it.⁷ This is five fewer House GOP votes than an earlier version received in 2019.⁸ Despite having a hearing in the Senate, the bill also lacked the 60 Senate votes needed to become law.

Fairness for All Act. The Fairness for All Act⁹ is a supposedly kinder and gentler alternative to the Equality Act. Its sponsors touted the bill as a "compromise" solution that would protect religious liberty. Despite its name, however, the bill embodies the same error found in the Equality Act: It adds the subjective categories of "sexual orientation" and "gender identity" to the civil rights code. In its balancing act between gender ideology and religious liberty, the religious would suffer for living out their beliefs in the public square.

Fairness for All has not gained much traction in this session of Congress. In fact, as of February 2022, the bill had lost three House cosponsors since its introduction in February 2021. This shrinking support is due largely to the work of Members and witnesses who highlighted how it would harm women, girls, children, and parents' rights.

Budget Reconciliation and Build Back Better. However, gender ideologues do not give up easily. Short of passing explicit SOGI provisions, some have taken a less obvious route.

Consider the Build Back Better budget reconciliation package debated in the fall of 2021.¹⁰ Policymakers avoided explicit “sexual orientation” and “gender identity” provisions. Instead, they redefined biological sex by omission.¹¹ For instance, in sections appropriating funds for “Maternal Mortality” research programs and education on women’s health, the terms “women” and “mothers” were notably absent. In their place were repeated references to “pregnant, lactating, and postpartum individuals.” Such language signals a backdoor attempt to inject gender ideology into medicine and education.

Despite its stealthy language, the reconciliation package stalled. In its place, Members passed a continuing resolution that carried over Trump-era spending levels.

State

The Biden Administration and its congressional allies have done nothing to protect women, children, and parents from the threats of gender ideology. Many states, however, have stepped into the breach.

Fairness in Women’s Sports. In 2021, 37 states introduced bills that protect fairness in women’s and girls’ sports by reserving them for women and girls and not for men or boys who “identify” as women. Nine of those states enacted these policies into law. Already this year, South Dakota has done so as well.

Protecting Children. In March 2021, Arkansas became the first state to pass a law prohibiting sterilizing chemical and surgical “transition” interventions for minors struggling with gender dysphoria.¹² These include puberty blockers, cross-sex hormones, and surgeries that remove healthy genitalia. Tennessee has also passed one, and bills to protect children from the irreversible damages of these controversial “treatments” have been introduced in 21 other states. Most recently, Texas Attorney General Ken Paxton launched an investigation to determine whether the promotion practices of puberty blocking drug manufacturers have misrepresented risks to children.¹³

Empowering Parents. Most recently, the Florida legislature passed a bill to require transparency in teaching materials and parents’ permission for any health care that children receive at school. The bill also protects young children from exposure to sexual and age-inappropriate content.¹⁴ Laws like these empower parents and protect children.

In 47 states, parents lack the right to review curriculum in advance of teaching. In 12 states, parents are denied any role in the teaching of sex education.

In addition, 11 states have ensured that courts treat parents' rights strictly. This means that when the government burdens parents' rights to direct the upbringing, education, and care of their children, it must show that its efforts are narrowly tailored and the least restrictive means by which to achieve its compelling interest. Like the state-level Religious Freedom Restoration Acts, these laws do not dictate the outcomes when parents' rights conflict. But they do ensure that policies that burden parents' rights must meet a high bar.

Challenges

Executive Branch

The Biden Administration is assiduously promoting SOGI policies despite the public aversion to them. In step with its first-day executive order, the White House finished 2021 by releasing its *National Strategy on Gender Equity and Equality*¹⁵ and an updated timeline for rulemaking proposals.¹⁶ Future regulations are expected to follow shortly.

Department of Health and Human Services. In January of this year, the Department of Health and Human Services issued a notice of proposed rulemaking that seeks to make "gender-affirming" treatments essential health benefits under qualified health plans within small group and individual market plans.¹⁷ In effect, the rule is a work-around to avoid complying with the permanent injunction issued against the Obama-era "transgender mandate."¹⁸ It would force insurers and medical professionals to provide services that cosmetically and chemically alter a patient's body to conform to his or her declared "gender identity."

The proposed rule reflects the Administration's earlier actions. In October 2021, the Centers for Medicare and Medicaid Services approved Colorado's request to provide "gender-affirming care" as part of Colorado's essential health benefit (EHB) benchmark. Colorado's new EHB-benchmark plan covers "gender-affirming" surgical procedures, including breast reduction and augmentation, laser hair removal, nose jobs, facial bone remodeling, and more.¹⁹ In November, the White House also revoked waivers granted under the Trump Administration that created exemptions from nondiscrimination requirements based on religious objections.²⁰

The Administration's Fall 2021 Unified Agenda reveals a forthcoming proposal from HHS on "Nondiscrimination in Health Programs and Activities."²¹ According to the agenda, the rule will aim to ensure "equity" for "historically marginalized communities" including LGBT persons. To judge based on the White House's past actions, the rule will likely target religious liberty and/or impose "gender-affirming care" as standard practice.

Department of Education. On December 10, 2021, the White House announced a timeline for proposed Title IX rules, according to which it plans to release a notice of proposed rulemaking in April 2022.²² These rules will seek to amend Title IX regulations to conform to the Biden Administration's priorities as spelled out in Executive Order 13988. The proposed rule is expected to require schools receiving funding for women's and girls' sports to permit men and boys to compete in female-only sports and use female-only spaces.

Congress

Even though some major proposals languished in Congress last year, many of these bills could still be brought to the floor at any time.

Equality Act. The Equality Act stalled in the Senate last year, but the Senate leadership could reintroduce the bill during the remainder of this Congress. Aware that the sweeping Equality Act faces high hurdles, supporters may parcel out sections for stand-alone bills or push for compromise solutions. The Customer Non-Discrimination Act, for example, is a stand-alone piece of the Equality Act. It would amend nondiscrimination provisions in public accommodations under Title II of the Civil Rights Act of 1964.²³

As noted, Fairness for All has also been reintroduced in this Congress. Though less sweeping than the Equality Act, such "compromise" solutions are still a threat.

Reauthorizations of Federal Programs. Barring amendments to the civil rights code, Members can expect an ongoing push to lace other, less sweeping legislation with SOGI language. Federal reauthorization bills that help the battered and abused are easy targets for gender activists.

The Violence Against Women Reauthorization Act of 2021 (VAWA) is a good example.²⁴ Last reauthorized in 2013 under President Barack Obama, the VAWA was passed by the House on March 17, 2021, largely along party lines. Despite a "bipartisan" update in the Senate,²⁵ the text of the bill contradicts its title and threatens the safety and privacy of the abused women it is putatively designed to protect.²⁶

Sections in the VAWA invoke “gender identity” language already codified in federal code. Section 101(a)(2)(A)(ii) of Title I requires “certification of compliance with the grand conditions under section 40002(b) of the Violence Against Women Act of 1994 (34 U.S.C. 12291(b)), as applicable.” The referenced section (40002(b)), added by the 2013 VAWA reauthorization, includes a nondiscrimination clause that already contains “gender identity” and “sexual orientation.” Moreover, “gender identity” is defined according to 18 USC 249(c)(4) as “actual or perceived gender-related characteristics.”

Although it stalled last year, the VAWA was added to the Consolidated Appropriations Act, 2022.²⁷ The bill, passed with the help of 18 Republican Senators and 29 Republican Representatives,²⁸ marks the greatest expansion of SOGI language in federal law.

Two similar bills have been passed with bipartisan support in the House: the Stronger Child Abuse Prevention and Treatment Act (CAPTA) and the Family Violence and Prevention Services Improvement Act (FVPSIA).²⁹ Like the VAWA, these bills contain SOGI language that would harm the very people these programs seek to help.

The drafters of CAPTA’s latest version opted for a stealthier approach. They changed the funding requirements to ensure that states receiving federal support for the prevention of abuse work with groups that boost the participation of “sexual and gender minority” children. Such language could be used to pressure states to make “gender-affirming care” the standard—for medicine, for counseling, for foster care and adoption, and for parents. This would both harm vulnerable children and embolden the state to violate parent’s rights.

FVPSIA proposes to amend sex nondiscrimination provisions to include SOGI. The section amended, however, cites Title IX of the Education Amendments Act of 1972 and Title VI of the Civil Rights Act of 1964. If passed, the bill would establish in federal code a basis for interpreting sex discrimination prohibited under these titles to include SOGI.

Foreign Policy. Activists have left no stone unturned, both at home and abroad. In January 2022, the House passed the Global Respect Act. This bill would impose sanctions on foreigners, including private citizens, who are deemed to be responsible for human rights violations against lesbian, gay, bisexual, transgender, or intersex individuals.³⁰ Like the reauthorization bills mentioned above, the Global Respect Act includes SOGI language under an anodyne title. Despite its name, the bill’s vague language marks the latest attempt to advance SOGI ideology at the cost of religious freedom and free speech.

Other Threats. When activists fail to add explicit SOGI language to federal laws and regulations, they opt for more devious methods. Federal and state legislators and their staffs should search bills and proposed rules for gender-neutral language like “birthing persons” and “pregnant, postpartum, or lactating individuals” or vague phrases like “sexual minority,” “gender minority,” “women in all their diversity,” or “underserved populations.” If codified, these euphemisms would create footholds for SOGI ideology in public education, single-sex sports, medicine, and society at large.

Opportunities

Even if Members of the current Congress fail to pass laws that protect Americans from gender ideology, they can work to thwart its spread. For their part, many states have the power and the leadership to do far more.

Federal

- **Lead opposition in public comments during rulemaking.** Given the expected administrative actions this year, one of the best ways for Members of Congress to protect freedom of speech and religion is to lead the opposition in public comments for SOGI-based rulemaking. Submitting public comments slows down the rulemaking process, and valid concerns raised in comments that an agency ignores or dismisses can be used as grounds for future litigation against the rulemaking agency.
- **Stop taxpayer funding of controversial “transition” interventions.** Members should take a page from the pro-life playbook and craft Hyde-like appropriations riders that keep taxpayer dollars from controversial “gender transition” procedures or “gender-affirming care,” which cause irreversible physical and mental harm to those who receive them. At the least, federal support should be barred from funding sterilizing “gender-affirming care” for minors, either at home or abroad. In addition, Members should consider other riders that prevent taxpayer funding of gender experiments.³¹
- **Protect children from the dangers of gender ideology and sexual content online.** There is a known link between the use of social media and gender dysphoria.³² According to one study, 65 percent of transitioners received encouragement through social media and online

communities.³³ There is bipartisan interest in policies that can protect children from these dangers. Members should therefore craft policies that empower parents and protect children from exposure to lewd and obscene sexual content as well as gender ideology.³⁴

- **Promote the Promise to America’s Children through good policy.** The Promise to America’s Children provides a powerful framework for good policy. It seeks to protect children’s minds from gender ideology, their bodies from bad medicine, and their relationships with their parents, who are best equipped to love and care for them.³⁵ Policies that align with the Promise include the Protection of Women and Girls in Sports Act of 2021, introduced by Senator Mike Lee (R–UT); the Protecting Children from Experimentation Act of 2021, introduced by Representative Doug LaMalfa (R–CA); and the Parents’ Bill of Rights Act of 2021, introduced by Senator Josh Hawley (R–MO).³⁶

State

As the Biden Administration seeks to impose SOGI ideology from the federal level, states can create a bulwark against these efforts. They can fight back against unwise administrative actions and federal legislation by passing their own laws like those mentioned earlier. They should focus their efforts on:

- **Protecting** fairness in women’s and girls’ sports,
- **Requiring** transparency from public schools,
- **Guarding** minors against irreversible “transition” treatments, and
- **Ensuring** that parents’ rights enjoy the strictest level of legal scrutiny alongside other fundamental rights.

In addition, state attorneys general should be prepared to bring lawsuits against federal SOGI legislation and regulations.

Conclusion

Concerned Members of Congress have managed to block some efforts by the leadership to insert gender ideology into provisions of federal law. But more work remains to be done, and now is not the time to waver. Members

must protect Americans' fundamental liberties against a gender ideology that, if enshrined in law, would redefine what it means to be human in our laws and institutions.

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