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REPT. 110–406
Part 1

EMPLOYMENT NON-DISCRIMINATION ACT OF 2007

OCTOBER 22, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEORGE MILLER of California, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY AND DISSENTING VIEWS

[To accompany H.R. 3685]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3685) to prohibit employment discrimination on the basis of sexual orientation, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

Millions of gay, lesbian, bisexual, and heterosexual Americans can be fired from their jobs, refused work, paid less and otherwise subjected to employment discrimination because of their actual or perceived sexual orientation with no recourse under Federal law. Currently, it is legal in 30 states [1] to fire someone based on their sexual orientation.

Workplace discrimination based on sexual orientation, affecting heterosexual, as well as gay, lesbian and bisexual (GLB) Americans, has been widespread and well-documented over the years. The Employment Non-Discrimination Act (ENDA) protects all Americans who are or may be perceived to be gay, lesbian, or bisex-

[1] California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin have laws barring discrimination in employment (and other areas) based on sexual orientation. Oregon's law takes effect on January 1, 2008.

ual by making it illegal to fire, refuse to hire, refuse to promote employees based on notions of a person's sexual orientation. Furthermore, employers are prohibited from requiring GLB employees to work in a discriminatorily hostile or abusive environment.

Specifically, ENDA extends Federal employment protections to GLB workers similar to those protections provided to a person based on race, religion, sex, national origin, age or disability. The Act prohibits an employer from using an individual's sexual orientation as the basis for employment decisions, such as hiring, firing, promotion or compensation. ENDA also creates a cause of action for any individual—whether actually homosexual or heterosexual—who is discriminated against because that individual is "perceived" as homosexual due to the fact that the individual does not conform to the sex or gender stereotypes associated with that individual's sex. Furthermore, ENDA provides for the similar procedures, while giving somewhat more limited remedies as those under Title VII of the Civil Rights Act of 1964[2] ("Title VII") and the Americans with Disabilities Act ("ADA").[3] In addition, ENDA applies to Congress and the Federal government, as well as employees of state and local governments.

COMMITTEE ACTION INCLUDING LEGISLATIVE HISTORY AND VOTES

94th Congress

On January 14, 1975, Congresswoman Bella Abzug (D–NY) introduced the first bill to address sexual-orientation discrimination in the United States, H.R. 166, the Civil Rights Amendments. H.R. 166 would have amended the Civil Rights Act of 1964 to prohibit discrimination on the basis of affectional or sexual orientation, sex, or marital status in public accommodations, public education, equal employment opportunities, the sale, rental and financing of housing, and education programs which receive Federal financial assistance. It garnered four cosponsors and was referred to the Judiciary Committee. The Committee did not consider H.R. 166.

Representative Abzug on March 25, 1975 reintroduced the Civil Rights Amendments, as H.R. 5452 with 23 cosponsors. The Civil Rights Amendments was also introduced by Representative Richard Ottinger (D–NY) as H.R. 10389 on October 28, 1975 with no cosponsors. Both bills were referred to the Judiciary Committee and neither was considered by the Committee.

On February 4, 1975 Representative Donald Fraser (D–MN) introduced H.R. 2667, A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, which also sought to amend the Civil Rights Act of 1964. However, in addition to covering discrimination in all the venues provided in the Civil Rights Act of 1964, H.R. 2667 also banned discrimination in public facilities and federally assisted opportunities. The bill had no co-sponsors and was referred to the Judiciary Committee. The Committee did not consider H.R. 2667.

The Civil Rights Amendments were reintroduced by Representative Phillip Burton (D–CA) as H.R. 13019, on March 5, 1976 with no cosponsors. H.R. 13019 was substantively the same as H.R. 2667, A Bill to Prohibit Employment Discrimination on the Basis

[2] 42 U.S.C. §§ 2000e–2000e–17.
[3] 42 U.S.C. §§ 12101–12213.

of Sexual Orientation. Representative Abzug subsequently introduced the Civil Rights Amendments, H.R. 13928 on May 20, 1976 with 4 cosponsors. Both bills were referred to the House Judiciary Committee, where no further action was taken.

96th Congress

On February 8, 1979 the Civil Rights Amendments Act of 1979, H.R. 2074 was introduced by Representative Ted Weiss (D–NY). In addition to prohibiting discrimination on the basis of affectional or sexual orientation, it prescribed penalties for non-compliance and authorized the Attorney General to intervene. It garnered 56 cosponsors and was referred to the House Judiciary and House Education and Labor Committees. No further action was taken.

On December 5, 1979, Senator Paul Tsongas (D–MA) introduced the first bill in the Senate to address sexual-orientation discrimination, A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 2081. It had 3 cosponsors and was referred to the Senate Labor and Human Resources Committee. No further action was taken.

97th Congress

On January 28, 1981, Representative Ted Weiss (D–NY) introduced the Civil Rights Amendments Act of 1981, H.R. 1454. It garnered 59 cosponsors and was referred to the House Committees on Judiciary and Education and Labor. However, no further action was taken on the bill.

On May 1, 1981, Representative Phillip Burton (D–CA) introduced the Civil Rights Amendments Act of 1981, H.R. 3371, which had no cosponsors. It was referred to the House Judiciary Committee and the Committee on Education and Labor. It was subsequently referred to the Education and Labor Committee's Subcommittee on Employment Opportunities of the Committee on Education and Labor. No further action was taken in either Committee or in the Subcommittee.

On October 6, 1981, Senator Paul Tsongas (D–MA) introduced A Bill To Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 1708, which garnered 6 cosponsors. It was referred to the Senate Labor and Human Resources Committee, but no further action was taken.

98th Congress

On January 3, 1983, Representative Ted Weiss (D–NY) introduced the Civil Rights Amendments Act of 1983, H.R. 427. It garnered 38 cosponsors and was referred to the House Committees on Judiciary and Education and Labor. It was subsequently referred to the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee.

On February 3, 1983, Senator Paul Tsongas (D–MA) introduced A Bill To Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 430, which garnered 8 cosponsors. It was referred to the Senate Labor and Human Resources Committee. No further action was taken.

On April 19, 1983, Representative Ted Weiss (D–NY) reintroduced the Civil Rights Amendments Act of 1983, H.R. 2624. It garnered 75 cosponsors and was referred to the House Judiciary Com-

mittee and the Education and Labor Committee. H.R. 2624 was subsequently referred to the Subcommittee on Employment Opportunities of the Committee on Education and Labor. No further action was taken in either Committee or the Subcommittee.

99th Congress

On January 3, 1985, Representative Ted Weiss (D–NY) introduced the Civil Rights Amendments Act of 1985, H.R. 230. It garnered 72 cosponsors and was referred to the House Committees on Judiciary and Education and Labor. It was subsequently referred to the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee.

On July 15, 1985, Senator John Kerry (D–MA) introduced the Civil Rights Amendments Act of 1985, S. 1432, which garnered 5 cosponsors. It was referred to the Senate Judiciary Committee. No further action was taken.

100th Congress

On January 21, 1987, Representative Ted Weiss (D–NY) introduced the Civil Rights Amendments Act of 1987, H.R. 709. It garnered 73 cosponsors and was referred to the House Committees on Judiciary and Education and Labor. It was subsequently referred to the Subcommittee on Employment Opportunities of the Committee on Education and Labor, but no further action was taken.

On February 2, 1987, Senator Alan Cranston (D–CA) introduced the Civil Rights Amendments Act of 1987, S. 464, which garnered 9 cosponsors. It was referred to the Senate Judiciary Committee, and the Committee's Subcommittee on the Constitution. No further action was taken.

On February 29, 1988, Senator John Kerry (D–MA) introduced the Civil Rights Protection Act of 1988, S. 1432, which garnered 2 cosponsors. It was referred to the Senate Judiciary Committee, and the Committee's Subcommittee on the Constitution. Neither the Committee nor the Subcommittee considered the bill.

101st Congress

On January 24, 1989, Representative Ted Weiss (D–NY) introduced the Civil Rights Amendments Act of 1989, H.R. 655. It garnered 79 cosponsors and was referred to the House Judiciary Committee and the Education and Labor Committee. H.R. 655 was subsequently referred to the Judiciary Committee's Subcommittee on Civil and Constitutional Rights, but no further action was taken.

On January 25, 1989, Senator Alan Cranston (D–CA) introduced the Civil Rights Amendments Act of 1989, S. 47, which garnered 11 cosponsors. It was referred to the Senate Judiciary Committee and the Committee's Subcommittee on Constitution. No further action was taken.

102nd Congress

On March 6, 1991, Senator Alan Cranston (D–CA) introduced the Civil Rights Amendments Act of 1991, S. 47, which garnered 16 cosponsors. It was referred to the Senate Judiciary Committee and then to the Subcommittee on Constitution. No further action was taken.

On March 13, 1991, Representative Ted Weiss (D–NY) introduced the Civil Rights Amendments Act of 1991, H.R. 1430. It garnered 110 cosponsors and was referred to the House Judiciary Committee and Education and Labor Committee. H.R. 1430 was subsequently referred to the Judiciary Committee's Subcommittee on Civil and Constitutional Rights, but no further action was taken.

103rd Congress

On January 5, 1993, Representative Edolphus Towns (D–NY) introduced the Civil Rights Amendments Act of 1993, H.R. 423, which had no cosponsors. It was referred to the House Committees on Judiciary and Education and Labor. It was subsequently referred to the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee, but no further action was taken.

Also on January 5, 1993, Representative Henry Waxman (D–CA) introduced the Civil Rights Act of 1993, H.R. 431, which had garnered 76 cosponsors. It was referred to the House Committees on the Judiciary and Education and Labor. It was subsequently referred to the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee, but no further action was taken.

On June 23, 1994 Senator Edward Kennedy (D–MA) introduced the Employment Non-Discrimination Act of 1994 (ENDA), S. 2238. It was referred to the Senate Labor and Human Resources Committee, which held the first hearing on the issue entitled "Employment Non-Discrimination Act of 1994" on July 29, 1994.[4]

The hearing featured testimony from witnesses, including: The Honorable Claiborne Pell, U.S. Senator from the State of Rhode Island; The Honorable Jeff Bingaman, U.S. Senator from the State of New Mexico; Ms. Cheryl Summerville, Bremen, Georgia; Ernest Dillon, Detroit, Michigan; Mr. Justin Dart, Jr., Chairman, President Bush's Committee on Employment of People with Disabilities; Warren Phillips, former publisher, the Wall Street Journal, and former CEO and Chairman, Dow Jones & Company, Inc.; Steven Coulter, Vice-President, Pacific Bell; and Richard Womack, Director of Civil Rights, AFL–CIO; Mr. Joeseph E. Broadus, George Mason School of Law; Robert H. Knight, Family Research Council; and Chai Feldblum, Georgetown University Law Center, on behalf of Leadership Conference on Civil Rights.

Written statements were provided by: Mr. Philippe Kahn, President, Chairman, and CEO, Borland, International; Leadership Conference on Civil Rights, Washington, D.C.; Mr. Deval Patrick, Assistant Attorney General, Department of Justice; The Honorable John Chafee, U.S. Senator from the State of Rhode Island; The Honorable Barry Goldwater, U.S. Senator from the State of Arizona; Reverend Edmond Browning, Presiding Bishop, Episcopal Church; Mrs. Coretta Scott King, President, Martin Luther King Jr. Center for Non-Violent Social Change; Ms. Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights; and Mr. Anthony Carnevale, Chair, National Commission on Employment Policy.

On June 23, 1994, Representative Gerry Studds (D–MA) introduced the Employment Non-Discrimination Act, H.R. 1430, which garnered 110 cosponsors. It was referred to the House Committees

[4] S. Hrg. 103–703.

on the Judiciary and Education and Labor. It was subsequently referred to the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee, but no further action was taken.

104th Congress

On January 4, 1995, Representative Edolphus Towns (D–NY) introduced the Civil Rights Amendments Act of 1995, H.R. 382, which had 1 cosponsor. It was referred to the House Judiciary Committee, the Economic and Educational Opportunities Committee and subsequently referred to the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities. No further action was taken in either Committee or the Subcommittee.

On June 15, 1995, Representative Gerry Studds (D–MA) introduced the Employment Non-discrimination Act of 1995, H.R. 1863, which garnered 142 cosponsors. It was referred to the House Committees on Educational and Economic Opportunities, Oversight, Judiciary, and Government Reform and Oversight. It was subsequently referred to the Subcommittee on the Constitution of the Judiciary Committee, but no further action was taken.

On June 15, 1995, Senator James Jeffords (R–VT) introduced the Employment Non-Discrimination Act of 1995, S. 932, which garnered 30 cosponsors. It was referred to the Committee on Labor and Human Resources.

On September 5, 1995, Senator Edward Kennedy (D–MA) introduced the Employment Non-Discrimination Act of 1995, S. 2056, which garnered 3 cosponsors. It was brought before the Senate by unanimous consent. The Senate narrowly rejected S. 932 on September 10, 1996 by a 50–49 vote.[5] It marked the first time that the idea of a Federal non-discrimination clause protecting gays and lesbians in employment was voted on in the Congress.

105th Congress

On January 7, 1997, Representative Edolphus Towns (D–NY) introduced the Civil Rights Amendments Act of 1998, H.R. 365, which had no cosponsors. It was referred to the House Judiciary Committee, and Education and the Workforce Committee. H.R. 365 was subsequently referred to the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce, but no further action was taken.

On June 10, 1997, Senator James Jeffords (R–VT) introduced the Employment Non-Discrimination Act of 1997, S. 869, which garnered 34 cosponsors. It was referred to the Committee on Labor and Human Resources.

On October 23, 1997, a hearing was held by the Committee on Labor and Human Resources entitled "The Employment Non-discrimination Act of 1997".[6] The following persons and organizations presented testimony: Ms. Kendall Hamilton, Oklahoma City, Oklahoma; Mr. David N. Horowitz, Phoenix, Arizona; Raymond W. Smith, Chairman of the Board and CEO, Bell Atlantic Corporation, Arlington, Virginia; Mr. Thomas J. Grote, Chief Operating Officer, Donato's Pizza, Blacklick, Ohio; Mr. Herbert D. Valentine, Execu-

[5] Rollcall No. 281.
[6] S. Hrg. 105–279.

tive Presbyter, Baltimore Presbytery, Moderator of the 203rd General Assembly, the Presbyterian Church (USA); National Council of the Churches of Christ in the U.S. A.; Mr. Oliver Thomas, Special Counsel for Civil and Religious Liberties; Ms. Chai Feldblum, Associate Professor of Law, Georgetown University Law Center; American Civil Liberties Union; Ann McBride, President, Common Cause; America Psychological Association; Elizabeth Birch, Executive Director, Human Rights Campaign; Parents, Families, and Friends of Lesbians and Gays.

On June 10, 1997, Representative Chris Shays (R-CT) introduced the Employment Non-discrimination Act of 1997, H.R. 1858, which garnered 160 cosponsors. It was referred to the House Committees on Education and the Workforce, Oversight, Judiciary, and Government Reform and Oversight. It was subsequently referred to the Subcommittee on Employer-Employee Relations of the Education and the Workforce Committee, but no further action was taken.

106th Congress

On January 6, 1999, Representative Edolphus Towns (D–NY) introduced Civil Rights Amendments Act of 1999, H.R. 311, which had one cosponsor. It was referred to the House Committees on Judiciary, and Education and the Workforce. It was subsequently referred to the Subcommittee on the Constitution of the Committee on Judiciary, but no further action was taken.

On June 24, 1999, Senator James Jeffords (R–VT) introduced the Employment Non-Discrimination Act of 1999, S. 1276, which garnered 36 cosponsors. It was referred to the Committee on Health, Education, Labor, and Pensions (HELP). No further action was taken.

On June 24, 1999, Representative Chris Shays (R–CT) introduced the Employment Non-Discrimination Act of 1999, H.R. 2355, which garnered 173 cosponsors. It was referred to the Education and the Workforce Committee, House Administration Committee, Judiciary Committee, and Government Reform Committee. It was subsequently referred to the Subcommittee on Employer-Employee Relations of the Education and the Workforce Committee, but no further action was taken.

107th Congress

On January 3, 2001, Representative Edolphus Towns (D–NY) introduced Civil Rights Amendments Act of 2001, H.R. 217, which had no cosponsors. It was referred to the House Committees on Judiciary and Education and the Workforce. It was subsequently referred to the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce, but no further action was taken.

On July 31, 2001, Senator Edward Kennedy (D–MA) introduced the Employment Non-Discrimination Act of 2002, S. 1274, which garnered 44 cosponsors. It was referred to the HELP Committee.

The HELP Committee held a hearing on the legislation on February 27, 2002 entitled "The Employment Non-Discrimination Act."[7] The following persons presented testimony: Mr. Charles K. Gifford, President and CEO FleetBoston Financial, Boston, Massa-

[7] S. Hrg. 107–307.

chusetts; Lucy Billingsley, Partner, Billingsley Company, Carrollton, Texas; Robert L. Berman, Director of Human Resources and Vice President, Eastman Kodak Company, Rochester, New York; Richard Womack, Director, Department of Civil Rights, AFL–CIO, Washington, D.C.; Lawrence Lane, Long Island, New York; and Matthew Coles, Director, National Lesbian and Gay Rights Project, American Civil Liberties Union, New York, New York.

Written statements were provided by: The American Psychological Association; Kim Wisckol, Vice-President and Director of Human Resources of the Consumer Business Association, Hewlett-Packard Company; Elizabeth Birch, Executive Director, Human Rights Campaign; and the Honorable Patty Murray, U.S. Senator from the State of Washington. A letter was provided from the President of New Balance Athletic Shoe, Inc., James Davis, to Senators Kennedy and Gregg, dated April 18, 2002.

The bill was reported out of committee by voice vote [8] and placed on the legislative calendar. However, no vote was taken in the Senate.

On July 31, 2001, Representative Chris Shays (R–CT) introduced the Employment Non-discrimination Act of 2001, H.R. 2692, which garnered 193 cosponsors. It was referred to the House Committees on Education and the Workforce, Administration, Judiciary, and Government Reform. It was subsequently referred to the Subcommittee on Employer-Employee Relations of the Education and the Workforce Committee, but no further action was taken.

108th Congress

On October 2, 2003, Senator Edward Kennedy (D–MA) introduced the Employment Non-Discrimination Act of 2003, S. 1705, which garnered 43 cosponsors. It was referred to the HELP Committee however, no further action was taken.

On January 7, 2003, Representative Edolphus Towns (D–NY) introduced the Civil Rights Amendments Act of 2003, H.R. 214, which had no cosponsors. It was referred to the Judiciary Committee, and the Education and the Workforce Committee. H.R. 214 was subsequently referred to the Subcommittee on Constitution of the Committee on Judiciary, but no further action was taken.

On October 8, 2003, Representative Chris Shays (R–CT) introduced the Employment Non-discrimination Act of 2003, H.R. 3285, which garnered 180 cosponsors. It was referred to the House Committees on Education and the Workforce, House Administration, Judiciary, and Government Reform. It was subsequently referred to the Subcommittee on Employer-Employee Relations of the Education and the Workforce Committee, but no further action was taken.

109th Congress

On January 6, 2005, Representative Edolphus Towns (D–NY) introduced the Civil Rights Amendments Act of 2003, H.R. 214, which had no cosponsors. It was referred to the House Committees on Judiciary, and Education and the Workforce. It was subsequently referred to the Subcommittee on Constitution of the Committee on Judiciary, but no further action was taken.

[8] S. Rep. 107–341.

110th Congress

On March 24, 2007, Representative Barney Frank (D–MA) introduced the Employment Non-Discrimination Act of 2007, H.R. 2015, which currently has 165 cosponsors. It was referred to the House Committees on Education and Labor, Administration, Judiciary, and Oversight and Government Reform. It was subsequently referred to the Subcommittee on Health, Employment, Labor and Pensions (HELP) of the Education and Labor Committee.

On September 28, 2007, Representative Barney Frank (D–MA) and Deborah Pryce (R–OH) introduced H.R. 3685, the Employment Non-Discrimination Act of 2007. It was referred to House Committees on Education and Labor, Administration, Judiciary, and Oversight and Government Reform.

Subcommittee Hearing on H.R. 2015

On September 5, 2007, the Education and Labor Committee's HELP Subcommittee held a hearing on "The Employment Non-Discrimination Act of 2007 (H.R. 2015)." Witnesses testifying before the Committee included: Representative Barney Frank; Representative Tammy Baldwin; Representative Emmanuel Cleaver; Michael Carney of Springfield, MA; Brooke Waits of Dallas, TX; Mark Fahleson, Attorney at Rembolt Ludtke LLP; Lee Badgett, Research Director of Williams Institute at the UCLA School of Law; Helen Norton, Associate Professor of Law, University of Colorado School of Law; Nancy Kramer, Founder and CEO of Resource Interactive; Kelly Baker, Vice President of Diversity of General Mills; and Larry Lorber, Partner at Proskauer Rose LLP.

Full Committee Markup of H.R. 3685

On October 18, 2007, the Committee on Education and Labor met to mark up H.R. 3685, the Employee Non-Discrimination Act of 2007. The Committee reported the bill favorably by a vote of 27–21 to the House of Representatives.

Four amendments were offered and debated. None of the amendments were adopted.

Representative Souder (R–IN) offered three amendments. The first Souder amendment was defeated by a vote of 18–30. The amendment would have struck "perceived" from the protection against discrimination based on "actual or perceived sexual orientation." The term sexual orientation is expressly defined in H.R. 3685 as including only: "homosexuality, heterosexuality, or bisexuality." The Committee strongly believes that prohibiting discrimination based on "perceived" sexual orientation is necessary to protect the rights of employees. The Souder amendment would permit an employer who believes an employee may be gay, when in fact he or she is not, to lawfully fire that employee based on that perception. Furthermore, including protections based on an individual's perceived sexual orientation ensures that employers will not be able to defend its actions by alleging it did not know the "actual" sexual orientation of the employee but nevertheless discriminated against the employee on the basis of his/her perceived sexual orientation.

The second Souder amendment was defeated by a vote of 18–30. The amendment would have permitted employers to condition employment on being married or being eligible to marry. The "Actions

Conditioned on Marriage" provision is necessary to protect against an easy subterfuge for anti-gay discrimination. A marriage ability job requirement would be a deceptive way in which employers could intentionally discriminate against gay employees in states without same-sex marriage.

The third Souder amendment was defeated by a vote of 19–29. The third amendment offered by Congressman Souder would prohibit retaliation against an employee who refuses to sign an employer's anti-discrimination or anti-harassment policy or refused to participate in diversity training because such policy is against the individual's religious beliefs regarding sexual orientation.

The fourth amendment was offered by Representative Hoekstra (R–MI) and defeated by a vote of 21–27. The Hoekstra amendment would have expanded the religious exemption to include institutions that maintain a faith-based mission. H.R. 3685 adopts Title VII's definition of a religious organization and thereby imports long-standing existing law on who is or is not a religious organization. The scope of its religious exemption is to those organizations who are covered by Title VII's exemption, no more and no less.

SUMMARY

The Employment Non-Discrimination Act of 2007 prohibits employers of fifteen or more persons, including government employers, employment agencies and labor organizations, from discriminating in employment or employment opportunities on the basis of actual or perceived sexual orientation. Employment opportunities include: firing, hiring, compensation, terms, conditions and privileges of employment or union membership.

The Act prohibits the imposition of affirmative action and the adoption of quotas or granting preferential treatment to an individual based on their sexual orientation by an employer. H.R. 3685 does not require employers to provide benefits to their employees or their domestic partners. It prohibits the Equal Employment Opportunity Commission (EEOC) from collecting statistics and does not require the collection of statistics by employers. Religious organizations, including religious corporations, associations, societies, or educational institutions are exempted. In addition, H.R. 3685 does not apply to members of the Armed Forces.

The enforcement powers, procedures, and remedies that exist under current Federal employment discrimination law are included under the Act. This means a plaintiff must go through the administrative mechanism of the EEOC. A plaintiff may then file a lawsuit in Federal court and, if the plaintiff prevails, may receive injunctive relief such as reinstatement and/or back pay. A plaintiff may also receive compensatory and punitive damages, to the extent such damages are allowed under Title VII. Similar to Title VII, attorney's fees are also available. However, unlike the protections contained under Title VII, ENDA does not allow an individual to bring a traditional "disparate impact" claim, which is a claim that a facially neutral practice of the employer has a disproportionate adverse effect on persons of a protected class.

STATEMENT AND COMMITTEE VIEWS

The Committee on Education and Labor of the 110th Congress is committed to guaranteeing equality and opportunity in the work-

place and to ensuring that American workers have access to remedies if they are discriminated against. ENDA is a critical step toward ensuring that Americans are not discriminated against because of their sexual orientation. Despite the tremendous progress this country has made in securing the rights of Americans to be free from discrimination, GLB workers remain vulnerable to discrimination. Without any Federal protection, GLB workers can be fired simply for being gay. The Employment Non-Discrimination Act will ensure that in the same tradition of this country's civil rights laws, the fundamental principles of fairness and equality at work will be protected regardless of an individual's sexual orientation.

Title VII of the 1964 Civil Rights Act generally makes it unlawful for employers with 15 or more employees, employment agencies, and labor organizations to discriminate against employees or applicants on the basis of race, color, religion, sex, or national origin. While many forms of employment and pre-employment bias are forbidden under Title VII, discrimination based on sexual orientation is currently an unprotected class which represents millions of working Americans.

H.R. 3685 furthers the spirit of civil rights law by extending protections to GLB workers. In the same way that Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) prohibit other forms of employment discrimination, ENDA would prohibit intentional discrimination based on sexual orientation. The legislation would create no "special rights," but will guarantee equal rights. "Sexual orientation" is defined by the bill as "homosexuality, bisexuality, or heterosexuality."

In addition to prohibiting discrimination based on a person's actual sexual orientation, ENDA also prohibits discrimination based on a person's perceived sexual orientation. Both forms of discrimination—because of a person's actual sexual orientation and because of a person's perceived sexual orientation—are invidious. For this reason, ENDA creates a cause of action for an individual, for example, who is actually heterosexual, but who is discriminated against because that individual is perceived as homosexual.

By providing workplace protections and remedies to these workers who experience discrimination, ENDA will help to end the insidious and irrational job discrimination inflicted upon GLB workers each day.

Anti-Discrimination Protections Must Extend to Sexual Orientation

Historical overview of sexual orientation discrimination

In the majority of states, it is entirely legal for employers to openly discriminate on the grounds of sexual orientation. The existence of sexual orientation discrimination in American employment illustrates half a century's worth of severe anti-gay bias in both the state and private employment contexts.[9] A pattern of anti-gay discrimination began to emerge throughout the 1940's and 1950's, both in the public and private employment contexts. In many instances, such discrimination was a matter of policy in areas of Federal employment, as well as in many police forces, fire depart-

[9] S. Rep. 107–341.

ments, schools, and public agencies of our country. Even where no government policies mandated sexual orientation discrimination, unchecked private anti-gay biases cost the careers of thousands of GLB workers.[10]

On July 2, 1964 the Civil Rights Act of 1964 was signed into law, prohibiting discrimination based on race, sex, color, national origin, and religion. Despite a growing awareness that anti-discrimination law should include protections based on sexual orientation, Title VII did not extend such protection to GLB workers. However, the implementation of Title VII demonstrated the positive impact anti-discrimination laws can have,[11] while fueling a widening belief that sexual orientation discrimination should no longer be legally permissible. Events, particularly the Stonewall uprising of 1969[12] further highlighted the plight of GLB individuals and the need to protect them under Federal anti-discrimination law.

In 1975, Congresswoman Bella Abzug (D–NY) introduced the first Federal legislation[13] to address sexual orientation discrimination in America. This legislation was modeled after the succession of previous civil rights legislation that prohibited employment discrimination based on race and sex. Despite these early efforts, severe discrimination has continued throughout the years, with private anti-gay biases fortified by the lack of a Federal pronouncement on sexual orientation discrimination. Federal courts have been rendered virtually powerless to remedy the discrimination for want of a proper Federal cause of action.[14]

The Civil Service Reform Act of 1978[15] put into law regulatory changes and prohibited discrimination against Federal employees for "conduct which does not adversely affect" their job performance. This was interpreted to mean that sexual orientation discrimination is a prohibited personnel practice.[16]

Despite the reach of the Civil Service Reform Act, formal protections for GLB workers are still lacking. In response to the lack of recourse, the Clinton Administration encouraged individual Federal agencies to issue policies banning sexual orientation discrimination.[17] However agencies failed to adopt such policies or notify em-

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[10] Id. See generally Russell J. Davis, Refusal to Hire, or Dismissal From Employment, On Account of Plaintiff's Sexual Lifestyle or Sexual Preference as a Violation of Federal Constitution or Federal Civil Rights Statutes, 42 A.L.R. Fed. 189 (2002); Robin Cheryl Miller, Federal and State Constitutional Provisions As Prohibiting Discrimination in Employment on the Basis of Gay, Lesbian or Bisexual Orientation or Conduct, 96 A.L.R. 5th 391 (2002); The Human Rights Campaign, Documenting Discrimination (2001); William D. Rubenstein, Do Gay Rights Matter?: An Empirical Assessment, 75 S. Cal. L. Rev. 65 (2001).

[11] The Employment Non-Discrimination Act of 2007, hearing before the Subcommittee on Health, Employment, Labor and Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Representative Emanuel Cleaver II (D–MO)) [Hereinafter Cleaver testimony].

[12] On Friday evening, June 27, 1969, the New York City tactical police force raided a popular Greenwich Village gay bar, the Stonewall Inn. Raids were not unusual in 1969; in fact, they were conducted regularly without much resistance. However, that night the street erupted into violent protest as the crowds in the bar fought back. The backlash and several nights of protest that followed have come to be known as the Stonewall Riots. The Stonewall uprising marked the arrival of the modern mass movement for equality for lesbians, gay men, transgender and bisexual men and women.

[13] H.R. 166. Congresswoman Abzug introduced a bill of the same nature two additional times during the 94th Congress, H.R. 5452, H.R. 13928.

[14] S. Rep. 107–341.

[15] Pub. L. 95–454.

[16] The law did not affect the issuing of security clearances by agencies including the FBI and CIA because they denied clearances based on sexual orientation on the grounds that homosexuality might subject them to blackmail. See, Peter Freiberg, President's Order Protects Workers, the Wash. Blade (June 5, 1998).

[17] President Clinton did not initially issue an Executive Order requiring these policies because of a fear that Congress would overturn it.

ployees that non-discrimination policies were adopted. Consequently, in 1998 President Clinton issued Executive Order (E.O.) 13087, formally adding sexual orientation to an existing E.O.[18] which banned job discrimination against Federal workers based on race, color, religion, sex, national origin, disability and age.[19] While E.O. 13087 was a crucial step, Federal law applicable to non-federal employers was still needed.

President Clinton highlighted that the Order failed to create any new enforcement rights, such as the ability to bring bias complaints to the Equal Employment Opportunity Commission (EEOC). However Federal employees like Rob Sadler, an attorney with the Department of Commerce and president of the Federal GLOBE (gay, lesbian, or bisexual employees) stated the Order would bring major change to the workplace by telling "agencies to explicitly detail and distribute the complaint procedures for employees who believe they have been subject to anti-gay discrimination."

President Clinton urged Congress to pass ENDA to extend these basic employment protections to all GLB workers. He argued, "individuals should not be denied a job on the basis that has no relationship to their ability to perform work." [20]

Sexual orientation discrimination by State and local governments

In addition, the State and local governments throughout the United States have demonstrated a long and troubling history of unconstitutional discrimination against GLB workers who are employed by those government entities. Examples of discrimination by state or local government employers include:

- In 1973, Steven Childers was denied a job with the Dallas Police Department because of his sexual orientation, despite the fact that he earned the highest score of any candidate who took the civil service examination for that position.[21] During the relevant job interview, the police department official with sole authority for hiring for that particular opening asked Childers various questions intended to determine Childers' sexual orientation. At the conclusion of the interview, the interviewer told Childers, "I think you should know there are a lot of cops who like to bust fags." After he was denied the job, Childers filed suit against the local government employer in the U.S. District Court for the Northern District of Texas, but he was denied relief.
- In December 1974, Ms. Rowland was suspended from her position as a high school guidance counselor in the Mad River Local School District in Montgomery County, Ohio.[22] Rowland "was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason." [23] Indeed, the federal jury that heard her case ruled in her favor and awarded her damages, however, that ruling was later overturned by the U.S. Court of Appeals for the Sixth Circuit. Although the U.S. Supreme Court later declined to hear Rowland's appeal, Justice William Brennan offered a powerful opinion dissenting from the denial of

[18] Executive Order 11478.
[19] Peter Freiberg, President's Order Protects Workers, the Wash. Blade (June 5, 1998).
[20] Id.
[21] *Childers* v. *Dallas Police Dep't,* 513 F. Supp. 134 (N.D. Tex. 1981).
[22] *Rowland* v. *Mad River Local School Dist.,* 730 F.2d 444 (6th Cir. 1984).
[23] Id. at 454 (Edwards, J., dissenting).

certiorari, in which he explained why classifications based on sexual orientation are suspect and should be carefully scrutinized by the courts.[24]

• Joseph Acanfora III, a public junior high school science teacher in Montgomery County, Maryland, was transferred to a nonteaching position in 1972 when the school district learned he was gay. Acanfora filed a constitutional challenge and the U.S. District Court for the District of Maryland ruled in his favor, holding that the school officials wrongfully transferred him to a nonteaching position when they discovered that he was gay.[25] However, the U.S. Court of Appeals for the Fourth Circuit overturned this ruling without even considering the equal protection arguments presented in Acanfora's case. Instead, the Fourth Circuit oddly focused on the fact that Acanfora had not outed himself in his application for employment.[26]

• Richard Aumiller, a lecturer at the University of Delaware, served as the faculty advisor to the University's Gay Community group.[27] Aumiller's employment contract was not renewed in 1975 after he made positive statements in newspaper articles about homosexuality which the University, president, and officials found to be offensive. The U.S. District Court for the District of Delaware found that these statements in no way impeded Aumiller's ability to perform his daily duties, nor did they substantially disrupt the University or his working relationship with his superiors. Therefore, the Court held that the University's discriminatory actions violated Aumiller's constitutional rights.

• Vernon R. Jantz had regularly worked as a substitute teacher at the Wichita North High School in Wichita, Kansas, but he was denied fulltime employment as a social studies teacher in 1988 because the principal of that high school had perceived that Jantz might have "homosexual tendencies."[28] Jantz filed suit against the local government employer in the U.S. District Court for the District of Kansas, and he was initially successful as that court ruled in his favor. However, his victory was later overturned by the U.S. Court of Appeals for the Tenth Circuit.

• Robin Joy Shahar—a lawyer who was employed by the Georgia Attorney General's Office—was terminated from her job in 1991 when her State employer discovered that she was a lesbian and had held a private religious ceremony with her lesbian partner.[29] Attorney General Michael Bowers—who had previously achieved notoriety by promoting the discriminatory legal position in the now-discredited case of *Bowers* v. *Hardwick,* 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)—personally wrote to Shahar to inform her that he could not continue to employ her because—in his opinion—her life did not reflect appropriately on the Attorney General's Office. Shahar brought a constitutional challenge in the

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[24] 470 U.S. 1009, 105 S. Ct. 1373, 84 L.Ed.2d 392 (1985) (Brennan, J. and Marshall, J. dissenting from the denial of cert.).

[25] *Acanfora* v. *Board of Ed. of Montgomery County,* 359 F. Supp. 843 (D.Md. 1973).

[26] *Acanfora* v. *Board of Ed. of Montgomery County,* 491 F.2d 498 (4th Cir. 1974).

[27] *Aumiller* v. *the University of Delaware,* 434 F. Supp. 1273 (D.Del. 1977).

[28] *Jantz* v. *Muci*, 759 F.Supp. 1543 (D.Kan. 1991), reversed by, 976 F.2d 623 (10th Cir. 1992), cert. denied, 508 U.S. 952, 113 S. Ct. 2445, 124 L.Ed.2d 662 (1993).

[29] *Shahar* v. *Bowers,* 70 F.3d 1218 (11th Cir. 1995), vacated en banc, 114 F.3d 1097 (1997), writ of certiorari denied, 522 U.S. 1049, 118 S. Ct. 693, 139 L.Ed.2d 638 (1998).

federal courts, but was ultimately unsuccessful in getting reinstated by her State employer.

• Thomas Figenshu worked as an officer with the California Highway Patrol from 1983 to 1993.[30] After he was promoted to sergeant and transferred to West Los Angeles in 1988, co-workers began to harass him by taping anti-gay pornographic cartoons to his mailbox and leaving a ticket for "sex with dead animals" on his windshield. Figenshu also found urine on his clothes and his locker, and was commonly the object of anti-gay slurs. To remove himself from the hostile work environment, Figenshu resigned in 1993 and brought a successful claim pursuant to California law. However, he had no Federal remedy to address the discriminatory workplace environment created by his State employer.

• James Shermer worked as a building tradesman for the Illinois Department of Transportation.[31] Shermer's supervisor constantly made offensive homophobic remarks about Shermer at the workplace, thus creating a hostile work environment. In 1995, Shermer filed suit against his State employer pursuant to Title VII of the Civil Rights Act of 1964, however, the U.S. District Court for the Central District of Illinois and the U.S. Court of Appeals for the Seventh Circuit ruled against Shermer because the harassment was based on sexual orientation and not prohibited by Title VII.[32]

• Wendy Weaver was a teacher at Spanish Fork High School in Utah for 19 years, and served as the school's volleyball coach since 1979.[33] Weaver consistently received good to excellent evaluations, was never subject to any discipline and was considered an effective and capable teacher. After it was discovered in 1997 that Weaver was a lesbian, the school directed her to refrain from making comments to or answering questions from students, staff or parents about her "homosexual orientation or lifestyle," and she was removed from her position as volleyball coach. The U.S. District Court for the District of Utah held that because the school attempted to infringe upon Weaver's First Amendment rights, she was entitled to summary judgment. Weaver was reinstated to her coaching position and awarded damages.

After reviewing this long history of workplace discrimination by State and local government employers, Congress finds that the States do not possess even a rational basis—and certainly not a compelling reason—for discriminating against GLB workers merely because of their sexual orientation. Any such discrimination by State and local governments is completely irrational.

Discrimination based on sexual orientation continues

Employment discrimination based on actual or perceived sexual orientation continues in America's workplaces. Studies find that while a majority of GLB workers believe there is more acceptance of them in today's society compared to years previous, they also report an equally significant amount of prejudice and discrimina-

[30] See *Figenshu* v. *State,* 1999 Cal. LEXIS 4666, No. S079219 (Cal. Jul. 14, 1999).
[31] *Shermer* v. *Illinois DOT,* 937 F. Supp. 781 (C.D. Ill. 1996).
[32] Id.; *Shermer* v. *Illinois DOT,* 171 F.3d 475 (7th Cir. 1999).
[33] *Weaver* v. *Nebo School District,* 29 F. Supp. 2d 1279 (C.D. Ut. 1998).

tion.[34] Many well documented cases [35] illustrate the need to protect workers who experience discrimination with regard to unfair hiring and termination practices, inequitable benefits, and hostile and oppressive working conditions.[36]

Numerous studies [37] show that discrimination in the workplace based on sexual orientation is a national problem. Sexual orientation discrimination occurs in small and large companies, public agencies, schools, and municipalities across the nation. It impacts all levels of the workforce from minimum wage employees to corporate executives, affecting all races, ages, religions and skill levels of workers. Basic protections are long overdue, as homosexual and bisexual—as well as heterosexual [38]—workers have been vulnerable to unfair treatment through the years. The lack of basic rights leaves millions of hardworking tax-payers without Federal protection from discriminatory practices.

A considerable amount of evidence has been presented before both the House and Senate demonstrating that intentional employment discrimination on the basis of sexual orientation causes severe economic and psychological harm. Many employees who have experienced discrimination demonstrated an exemplary work ethic, received above-average evaluations and have made significant contributions to the workplace and their communities. However, a prejudice towards their sexual orientation ensues irrespective of job performance.[39] Consequently, GLB employees are put at an economic disadvantage as an entire class of workers. The lack of Federal protection fosters hostile work environments where GLB employees fear that their sexual orientation could be revealed to the detriment of their careers.

To learn more about this problem, the HELP Subcommittee heard testimony from police officer Michael Carney, a highly decorated police officer who was denied reinstatement to the Springfield, Massachusetts Police Department because he is gay. Despite his solid record as an officer, and despite the Police Chief's rec-

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[34] Inside Out: A Report on the Experience of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation, The Kaiser Family Foundation (2001).

[35] See generally, Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination; Badgett, Lau, Sears, Ho; The Williams Institute (2007) at Executive Summary [hereinafter Williams Institute Report]; Sexual Orientation-Based Employment Discrimination; GAO–02–878R [hereinafter GAO Report]; Inside-Out: A Report on the Experiences of Lesbians, Gays, and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation; The Kaiser Family Foundation (2001) [hereinafter Kaiser Report].

[36] Employment Non-Discrimination Act (H.R. 2015), Hearing before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Prof. Helen Norton). In this testimony, the witness cited cases where workers suffered oppressive conditions and discrimination due to their sexual orientation, but were denied legal recourse under 42 U.S. C. 2000e–2000e–17 (Title VII of the Civil Rights Act of 1964), citing *Vickers* v. *Fairfield Medical Center,* 453 F.3d 757, 759 (6th Cir. 2006) cert. denied, 127 S. Ct. 2910 (2007); *Simonton* v. *Runyon,* 232 F.3d 33, 34–35 (2 Cir. 2000); *Medina* v. *Income Support Div., New Mexico,* 413 F.3d 1131, 1135 (10th Cir. 2005) (rejecting heterosexual woman's Title VII claim challenging her lesbian supervisor's sexually explicit remarks and e-mail: "We construe Ms. Medina's argument as alleging that she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality."); *Bibby* v. *Philadelphia Coca-Cola Bottling Co.,* 260 F.3d 257, 265 (3rd Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.") (citations omitted).

[37] See generally, Williams Institute Report; GAO Report; Kaiser Report.

[38] Referring to documented cases where heterosexuals who are either perceived to be gay or simply befriend gay co-workers, resulting in workplace harassment and/or discrimination—as in the case of *Vickers* v. *Fairfield Medical Center,* 453 F.3d 757, 759 (6th Cir. 2006) cert. denied, 127 S. Ct. 2910 (2007).

[39] I.e. Denying promotions, paying GLB workers a lower wage than their heterosexual counterparts, and/or termination.

ommendations, Carney was denied reinstatement three times after informing the Police Commission that he was gay. Fortunately for Mr. Carney, Massachusetts has a law prohibiting such discrimination.[40] As a result, he filed a claim under state law. After an investigation, the Massachusetts Commission against Discrimination ruled probable cause existed that the police commission discriminated against Officer Carney on the basis of sexual orientation. A settlement was subsequently reached and Officer Carney was reinstated.[41] Mr. Carney's experience demonstrates that state and local government employers continue to discriminate against GLB workers, even though such discrimination is completely irrational and serves no conceivable government purpose.

The Subcommittee also heard from Brooke Waits, who was praised for her job performance at Cellular Sales in Texas, as an inventory control manager. She received a raise within several weeks after joining the company, and was lauded for her performance. However, when her supervisor discovered that she was a lesbian, Brooke was fired the very next day. Unfortunately Brooke had no recourse under Texas law, and thus could not assert a valid claim against her employer's discriminatory conduct.[42]

The Senate HELP Committee heard testimony from Larry Lane who worked as the regional manager for the New York region of Collins and Aikman Floor Coverings, Inc. For over two-years Larry's work was praised. In the only written evaluation he received, Larry's manager stated "Larry is doing an outstanding job. He is already having a positive impact on the New York zone."[43] However, when colleagues discovered Larry was gay they began a campaign to get rid of him. Without warning he was placed on probation. Shortly thereafter he admitted to colleagues that he was in fact gay and within weeks he was formally fired. Recounting his experience Larry testified, "one's success in the workplace should depend on performance and ability and not be subject to the ignorant views and lack of acceptance that many times still exists toward lesbians and gay men."[44]

Cases such as these are not isolated. Unfortunately, many GLB workers who have been discriminated against are frightened to speak up after the discriminatory act for fear that it could happen again by a subsequent employer. Studies show that up to 68 percent of GLB respondents have experienced some kind of workplace discrimination ranging from the denial of employment promotion, to termination without cause.[45] States that ban this type of discrimination, report that the number of sexual orientation discrimination suits is proportional to that of sex and race discrimination

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[40] Mass. Gen. Law Chpt. 151B.

[41] Employment Non-Discrimination Act (H.R. 2015) hearing before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Officer Michael Carney).

[42] Employment Non-Discrimination Act (H.R. 2015), hearing before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Brooke Waits).

[43] The Employment Non-Discrimination Act, hearing before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2nd Sess. (2002) (written testimony of Lawrence Lane, at 22) [hereinafter Lane Testimony].

[44] Lane Testimony at 23.

[45] Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination; Badgett, Lau, Sears, Ho; The Williams Institute; (2007) at Executive Summary [hereinafter Williams Institute].

complaints, pro rata.[46] Thus, there is a substantial need for Federal protection of these workers, particularly in the majority of states that do not already protect them.

The impact of sexual orientation discrimination

Economic impact on GLB workers

GLB workers experience significant wage disparities, higher unemployment rates, and inequitable public accommodations and benefits.[47] Economists and sociologists who study these patterns also conclude that due to discrimination based on sexual orientation, gay men earn less money than heterosexual men who have similar experience, education, and credentials.[48] Another study showed that when job applicants submitted applications or resumes that were coded with language suggesting the applicants' involvement in a gay rights organization, those applicants were consistently denied employment more often than applicants of equivalent quality that did not have any "gay code" in their applications.[49]

In addition to economic harms, GLB workers tend to experience substantially impaired ability to obtain affordable healthcare and employment related benefits.[50] Without stable employment, income, and access to jobs, the effects of discrimination are felt in almost every aspect of life, including one's own health and well-being.

Psychological impact

The discrimination and/or fear of discrimination that many GLB workers face can have far-reaching consequences. The American Psychological Association testified to the Senate HELP Committee that researchers have found that GLB workers suffer psychological distress because they are often persecuted and in a constant state of fear of being discovered.[51] The study reported "research has indicated that social stigma based upon sexual orientation may be a risk factor for psychological depression, and anxiety.[52] Brooke Waites testified that her co-workers frequently made jabs and other derogatory comments about GLB people. Fearing for her job and not wanting to "cause problems,"[53] Waites carefully avoided using pronouns when talking about her girlfriend. Although Waites was openly lesbian in every aspect of her life outside of her job, this work environment "kept [her] * * * from being [herself] with coworkers."[54] Despite her efforts, Waites was ultimately fired when her manager discovered that she was a lesbian. She testified "the experience has been difficult for me, as it has altered not only how I feel about the world but also, how I feel in the world. Work was more than work to me: it was a part of what I know about myself and how I feel about myself."[55]

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[46] Id.
[47] Id. at 12, 15, 18–20.
[48] Id. 13.
[49] Id.
[50] Human Rights Campaign at 15.
[51] The Employment Non-Discrimination Act, hearing before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2nd Sess. (2002) (testimony submitted by the American Psychological Association (APA), at 40) [hereinafter APA Testimony].
[52] Id.
[53] Waites Testimony at 1.
[54] Id.
[55] Id.

Researchers have found that the experience of Brooke Waites is not isolated. In fact GLB workers who place a high value on career advancement and success fear being 'outed' at work. Disclosure at work "may be related to the relative importance a [GLB] employee places on certain aspects of work and life domains." [56] A 2006 study found that "gay men who emphasized quality of work life and relationship quality were more likely to disclose at work than those who emphasized job security or career success.[57]

The American Psychological Association concludes that psychological research findings indicate that GLB individuals experience "significantly higher levels of discrimination based upon sexual orientation than do heterosexual individuals." [58] Stigmatization and discrimination can lead to increased vulnerability of negative mental health conditions.

The APA further states that "anti-discrimination policies in the workplace can * * * [positively] affect job satisfaction and productivity." [59] Researchers have found "a significant relationship between self-disclosure, anti-discrimination policies and top management support for equal rights and organizational commitment." [60] Enactment of ENDA would decrease the fear and stigmatization GLB workers feel and would promote the mental welfare of these individuals as well as the public good.

Existing Federal and State Laws Provide Inadequate Protections

Federal law

Federal law today provides the American worker with the necessary safeguards to protect them against workplace discrimination with regard to race, color, sex, national origin, religion, age and disability.[61] Courts have interpreted Title VII to prohibit associative discrimination in employment (i.e., discrimination against a person with whom the employee associates). Title VII and other Federal laws have been interpreted to prohibit discrimination based on the perceived characteristics of an employee or applicant for employment.[62]

Unfortunately, however, current Federal law fails to address discrimination on the basis of sexual orientation in the workplace. Federal case law is "replete with decisions where Federal judges have characterized egregious acts of discrimination targeted at GLB workers as morally reprehensible yet utterly beyond the law's

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[56] Shaun Pichler, "Heterosexism in the Workplace," Sloan Work and Family Research Network at 7 (Apr. 3, 2007). See also, Y.B. Chung, "Career Decision Making of Lesbian, Gay, and Bisexual Individuals," Career Development Quarterly at 44 (1995).

[57] R.N.C. Trau & C.E.J. Hartel, "Impact of career-life conflict on disclosure and attitudes towards organization among gay men" Sexual Orientation in the Workplace: Current Issues. Symposium Presented at the National Academy of Management Meeting, Atlanta, GA. See also, Shaun Pichler, "Heterosexism in the Workplace," Sloan Work and Family Research Network at 7 (Apr. 3, 2007).

[58] APA Testimony at 41.

[59] Id.

[60] Id.

[61] 42 U.S. C. §§ 2000e–2000e–17 (Title VII of the Civil Rights Act of 1964); 29 U.S. C. §§ 621–634 (Age Discrimination in Employment Act); 42 U.S. C. §§ 12101–12102, 12111–12117, 12201–12213 (Americans with Disabilities Act).

[62] Courtney Joslin. "Protection for Lesbians, Gay, Bisexual, and Transgender Employees Under Title VII of the 1964 Civil Rights Act." http://www.abanet.org/irr/hr/summer04/protectlgbt.html.

reach."[63] Furthermore, only 20 states, plus the District of Columbia, prohibit employment discrimination based on sexual orientation,[64] leaving millions of GLB Americans vulnerable to blatant employment discrimination.

Over the past several decades, some courts have held that dismissing an individual from Federal employment because of their sexual orientation without a rational connection between the employee's behavior and the efficiency of the government service is a violation of the constitutional guarantee of due process.[65] Conversely, other Federal courts have upheld Federal regulations that allowed for dismissal based on what those misguided courts have labeled as "immoral" sexuality.[66]

Many plaintiffs have attempted to bring sexual orientation claims pursuant to Title VII's sex discrimination provision however they have done so without success.[67] Federal courts have asserted that they do not have the legal authority to remedy workplace discrimination based on sexual orientation under Title VII. Although a few Federal courts have broadly applied Title VII's prohibition on sex discrimination, GLB workers were held not to be covered by civil rights law.[68]

The first Title VII cases filed for employment discrimination based on sexual orientation emerged in the 1970s. In 1979, the U.S. Court of Appeals for the Fifth Circuit ruled that "discharge for homosexuality is not prohibited by Title VII."[69] In the same year, the U.S. Court of Appeals for the Ninth Circuit issued a similar ruling in what is considered the most clearly established precedent, clarifying that sexual orientation discrimination was not actionable under Title VII.

In *DeSantis* v. *Pacific Telephone & Telegraph Co.,* the plaintiffs argued that Title VII should be interpreted to cover discrimination on the basis of sexual orientation and that Title VII should be interpreted to encompass discrimination directed at a male employee because he is perceived to be "effeminate."[70] Both arguments were rejected by the Ninth Circuit on the basis that that court believed Congress never intended to provide protection for persons discriminated against based on sexual orientation or perceived sexual ori-

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[63] The Employment Non-Discrimination Act of 2007 (H.R. 2015), hearing before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Professor Helen Louise Norton) [hereinafter Norton Testimony]. See, *Higgens* v. *New Balance Athletic Shoes, Inc.,* 194 F.3d 252, 258 (1st Cir. 1999) (The court held that harassment because of sexual orientation is a noxious practice but the court is called upon to construe a statute, not to make a moral judgment—Title VII does not proscribe harassment simply of sexual orientation); *Simonton* v. *Runyon*, 232 F.3d 33, 34–35 (2nd Cir. 2000) (The court stated the conduct allegedly engaged in by [Simonton's] co-workers is morally reprehensible * * * particularly in the modern workplace. However, the court held that Simonton had no cause of action under Title VII.

[64] California, Colorado, District of Columbia, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York and Wisconsin.

[65] Russell Davis, "Refusal to hire, or dismissal from employment, on account of plaintiff's sexual lifestyle or sexual preference as violation of Federal constitution or Federal civil rights statutes." 42 A.L.R. Fed.189. at 4.

[66] Id.

[67] *Bibby* v. *Philadelphia Coca-Cola Bottling Co.,* 260 F.3d 257, 265 (3rd Cir. 2001). ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.")

[68] Id.

[69] *Blum* v. *Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Circuit 1979).

[70] *DeSantis* v. *Pacific Telephone & Telegraph Co.,* 608 F.2d 327 (9th Cir. 1979).

entation.[71] Rather, the court held that Title VII was only intended to cover "traditional notions of [gender]."[72]

In 1989, the U.S. Court of Appeals for the Eighth Circuit Court of Appeals ruled in accordance with the previous courts' rulings on the matter by issuing an opinion which clearly stated: "Title VII does not prohibit discrimination against homosexuals."[73] And in 1997, the U.S. Court of Appeals for the Eleventh Circuit ruled in a similar manner when it held in *Fredette* v. *BVP Management Associates* that

> finally, we address concerns raised by the appellee regarding the implication of this case for the law regarding discrimination based on sexual orientation. BVP argues that to hold in favor of the appellant is, in effect, to protect against discrimination on the basis of sexual orientation. The short but complete answer to this argument is to make clear the narrowness of our holding today. We do not hold that discrimination based on sexual orientation is actionable * * * We note at the EEOC has also drawn a distinction between [what is] actionable as gender discrimination, and discrimination because of sexual orientation.[74]

While many U.S. District Courts and U.S. Courts of Appeals have made it clear that they do not have the legal authority to remedy workplace discrimination based on sexual orientation under Title VII of the Civil Rights Act of 1964, two decisions by the U.S. Supreme Court clearly display the Court's intent to protect against certain types of gender-role discrimination.

In *Price Waterhouse* v. *Hopkins*,[75] plaintiff Ann Hopkins claimed she had been denied partnership at the firm because she was not feminine enough. In order to increase her chances of making partner, Hopkins was told she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[76] While the employer argued that Title VII did not prohibit discrimination based on gender stereotypes, the Supreme Court disagreed and held that Title VII is not simply limited to discrimination based on the biological makeup of an individual but also includes discrimination based on gender stereotypes.[77]

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with Their group, for in forbidding employers to discriminate against individuals because of their sex Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.[78]

In addition, the Supreme Court's decision in *Oncale* v. *Sundowner* further expanded previous interpretations of Title

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[71] Id.
[72] Id.
[73] *Williamson* v. *A.G. Edwards and Sons, Inc.,* 876 F.2d 69, 70 (8th Circuit 1989).
[74] *Fredette* v. *BVP Management Associates,* 112 F.3d 1503, 1510 (11th Cir. 1997).
[75] 490 U.S. 228 (1989).
[76] *Joslin*, supra note 63 at 2.
[77] Id.
[78] Id.

VII.[79] In *Oncale*, the Supreme Court held that a plaintiff could state a Title VII claim where sexual harassment was perpetrated by a person of the same sex.[80]

These two important Supreme Court cases influenced contemporary courts to more vigorously scrutinize cases involving sexual orientation discrimination under a variety of state and Federal constitutional theories. For example, in 2002, the U.S. District Court for the District of Oregon denied the defendant-employer's motion for summary judgment in a Title VII suit brought by a lesbian who claimed her female supervisor made disparaging and harassing comments based on gender stereotypes.[81] The Ninth Circuit issued a similar ruling in the *Rene* v. *MGM Grand Hotel, Inc*.,[82] where a gay male plaintiff presented evidence that his former coworkers harassed and taunted him by calling him feminine names and saying he walked like a woman.[83]

Despite what may be seen as progress in the direction of protecting GLB Americans from employment discrimination, millions of workers still face the prospect of being fired because they are gay, lesbian, or bisexual. Therefore, Congress finds it important to protect GLB workers in all states in order to end the irrational practice of workplace discrimination based on sexual orientation.

State laws

The first jurisdiction to prohibit sexual orientation discrimination in employment was East Lansing, Michigan in 1972. Wisconsin enacted its gay-rights law in 1983, leading the way for states passing laws that ban sexual orientation discrimination in employment.[84] Since then, a significant number of cities and counties that have enacted similar laws, but as of today, only 20 states and the District of Columbia prohibit discrimination based on sexual orientation.

State laws that prohibit employment discrimination on the basis of sexual orientation can be divided into two groups. In some states, sexual orientation is deemed a protected class in a general anti-discrimination law. In other states, sexual orientation is protected under a provision separate from those protecting other categories such as race or sex.[85]

According to the General Accounting Office's (GAO) report on "Sexual Orientation—Based Employment Discrimination: States' Experience with Statutory Prohibitions," states that protect against employment discrimination based on sexual orientation have generally established the basis for the protection they provide. Most of these states define "sexual orientation" as heterosexuality, homosexuality, or bisexuality. Besides Vermont and the District of Columbia, all other state definitions include people who are perceived by others to be in, or are identified with, those three categories. These states have expanded their definition to not only prohibit discrimination against employees who actually are homosexual, but

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[79] 523 U.S. 75 (1998).
[80] Id.
[81] *Heller* v. *Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002).
[82] 305 F.3d 1061 (9th Cir. 2002).
[83] Id.
[84] William Rubenstein. "Do Gay Rights Laws Matter? An Empirical Assessment." (November 2001) at 3.
[85] *Joslin,* supra note 63 at 3.

also against employees whom the employer incorrectly believes are homosexual.[86]

California and Minnesota provide protections to its citizens that expressly prohibit associational discrimination. Specifically, California's statute prohibits unlawful employment practices on the basis of sexual orientation including instances where "the [employee] is associated with a person who has, or is perceived to have 'any of the characteristics on which basis it is illegal to discriminate,' such as sexual orientation." Minnesota deems it an unfair discriminatory practice for an individual who participated in alleged discrimination to intentionally engage in a reprisal against any person because that person associated with a person or group of persons who are of a different sexual orientation.[87]

Under the state laws the size of the employer's business is a factor in determining coverage.[88] GAO found that in the states they reviewed with laws prohibiting discrimination on the basis of sexual orientation, six included all employers regardless of business size. In seven other states, the minimum number of employees that trigger coverage ranges from as few as three (Connecticut) to as many as fifteen (Maryland and Nevada).[89]

The nature of an employer's business or activity is another factor states have used to determine whether nondiscrimination protections apply. In particular, all states have found it necessary to provide an exemption for religious organizations. Though the religious exemption language varies from state to state, most states have exemptions that are broad in scope. Under these broad exemptions, religious organizations are permitted to give preference to individuals of the same religion or to those people whose employment is in accordance with the tenets of their particular religion. However, Minnesota has an exemption that does not apply to secular business activities engaged in by religious associations.[90]

ENDA Is the Necessary Remedy

Congress has the responsibility to pass ENDA to ensure that all GLB individuals, regardless of where they live or work, are protected from sexual orientation discrimination. The lack of Federal protection leaves GLB workers reliant on a patchwork of local and state laws that have failed to protect them. While certain states, municipalities and businesses should be commended for adopting anti-discrimination policies, their efforts do not extend far enough to negate the need for federal intervention.

In addition to state and local support for fair and equal treatment of GLB individuals, business leaders have widely adopted workplace anti-discrimination policies protecting GLB rights. According to a recent survey, over 2000 companies, colleges, universities, state and local governments and Federal agencies have nondiscrimination policies encompassing sexual orientation of their employees.[91]

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[86] The Government Accounting Office (GAO). "Sexual Orientation "Based Employment Discrimination: States' Experience with Statutory Prohibitions," (July 2002) at 1.
[87] Id at 4–5.
[88] This is also the case under existing Federal laws and ENDA.
[89] GAO, supra note 86 at 5.
[90] Id. at 5.
[91] S. Rpt. 107–341.

Despite some progress to secure the rights of GLB workers, millions of Americans remain vulnerable to workplace discrimination. In her testimony before the HELP Subcommittee's September 5, 2007 hearing, Professor Helen Norton stated that the patchwork of state and local laws leaves a wide range of injuries and injustices unaddressed and that ENDA would "fill these gaps" by extending a "national commitment to equal employment opportunity" for these workers.[92] Opponents of this legislation have argued that GLB anti-discrimination policies should be left to the states and/or individual businesses. However, as Richard Womack, Director of the AFL–CIO Department on Civil and Human Rights testified to the Senate HELP Committee in reflection of the debate over the Civil Rights Act in the 1960's where there was disagreement over bill, "if we had waited for the states to say this was the right thing to do, we would not have had a civil rights bill [at all]."[93]

Moreover, the gaps in the state and municipal protections leave the majority of GLB workers defenseless against discrimination. This reality was directly evidenced by the experience with discrimination described by Officer Michael Carney and Brooke Waites before the HELP Subcommittee. While both were discriminated against for being gay, the outcomes of their experiences are dramatically different. As previously discussed, Michael Carney—a Springfield, Massachusetts police officer—was denied reinstatement to the police force because he was gay. However, because Officer Carney was protected under a Massachusetts anti-discrimination law, he was reinstated. Unfortunately, Brook Waites of Dallas, Texas, had no right to fight for her job because Texas does not have an anti-discrimination statute to protect the rights of GLB workers. Ms. Waites testified that while ENDA may not change people's minds, Congress has the power to help stop the devastating effects of discrimination. She explained no one "should be exposed to a workplace where they have to worry that simply and honestly being who they are could cost them their livelihood."[94] ENDA will close the loopholes that currently exist in anti-discrimination laws so that people like Brooke Waites have the right to fight an employer's discrimination regardless of the state in which she lives.

The Act will not only extend fair employment practices, it will also foster workplaces where creativity, knowledge and life experiences are exchanged freely. This type of environment unquestionably benefits employers and employees. Nancy Kramer, Founder and CEO of Resource Interactive, testified that in her twenty-six years running a small business, she "ha[s] learned that an inclusive workplace, which judges people on their merits, not on unre-

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[92] The Employment Non-Discrimination Act of 2007, hearing before the Subcommittee on Health, Employment, Labor and Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Helen Norton, Associate Professor, University of Colorado School of Law, at 3) [Hereinafter Norton Testimony].

[93] The Employment Non-Discrimination Act, hearing before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2nd Sess. (2002) (written testimony of Richard Womack, Director of the AFL–CIO Department on Civil and Human Rights Charles at 22) [hereinafter Womack Testimony].

[94] The Employment Non Discrimination Act of 2007, hearing before the Subcommittee on Health, Employment, Labor and Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Brooke Waits, at 2) [Hereinafter Waites Testimony].

lated matters like sexual orientation * * * is the key to success in a competitive, ever-changing marketplace." [95]

In addition, business leaders like Lucy Billingsley believe that failing to enact ENDA would be more costly to business than having businesses comply with its non-discrimination requirements.[96] Discrimination in the workplace burdens companies and gives rise to costly grievances and lawsuits.[97] A Federal law banning sexual orientation discrimination will actually give businesses the right focus. Ms. Billingsley testified: "By directing attention to only factors of performance and productivity * * * all of America's businesses will perform better." [98] Accordingly, Congress finds that employment discrimination against GLB workers—whether in the private or public sector—is completely irrational.

Broad Support for Federal Protection

Business leaders support equality in the workplace

A significant number of large and small businesses support the goals of ENDA, and many have already adopted their own corporate non-discrimination policies.[99] Employers promote equality not only because it is the right and moral thing to do, but also because it makes good business sense. Today, nearly 90 percent of the Fortune 500 ranked corporations include workplace protections based on sexual orientation.[100] Charles Gifford, Chairman and CEO of FleetBoston Financial, testified before the Senate that the trend among businesses indicates that corporate leaders view anti-discrimination policies to protect GLB workers as good for business noting "the closer a company is to the top of the Fortune list, the more likely it is to include sexual orientation in its non-discrimination policy." [101]

In an effort to attract and retain GLB workers and fair minded employees and consumers, companies acknowledge that such internal and public policies are necessary to preserve a stable and developing economy. More than half of the nation's employers in 2007 assert that one of their primary business goals is to retain employees.[102] Hayward Bell, Chief Diversity Officer of Raytheon (73,000 employees) stated that "over the next 10 years we're going to need anywhere from 30,000 to 40,000 new employees. We can't afford to turn our back on anyone in the talent pool." [103]

Maintaining a satisfied and productive workforce within any company is critical to a business' success, and forward-thinking employers are taking crucial steps to ensure as much productivity in

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[95] The Employment Non Discrimination Act of 2007, hearing before the Subcommittee on Health, Employment, Labor and Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Nancy Kramer, Founder and CEO, Resource Interactive, at 1) [Hereinafter Kramer Testimony].

[96] Id.

[97] Id.

[98] The Employment Non-Discrimination Act, hearing Before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2nd Sess. (2002) (written testimony of Lucy Billingsley, founder and partner of Billingsley Company, at 32) [hereinafter Billingsley Testimony].

[99] The State of the Workplace 2006–2007, The Human Rights Campaign (2007) at 7. [hereinafter Human Rights Campaign Report]

[100] Human Rights Campaign Report.

[101] The Employment Non-Discrimination Act, hearing Before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2 Sess. (2002) (written testimony of Charles Gifford, Chairman and CEO, FleetBoston Corporation, at 30) [hereinafter Gifford Testimony].

[102] Human Rights Campaign at 13.

[103] Id.

this area as possible. General Mills, Inc., with over 28,500 employees worldwide, voluntarily holds as its policy that GLB inclusion in the workplace "only makes good business sense to create a work environment where every employee is respected, valued, challenged, and rewarded for their individual contribution and performance. Because when you do this, good things happen." [104]

Testifying before the Senate HELP Committee hearing, Charles Gifford, Chairman and CEO of FleetBoston Financial stated that members of his company's gay and lesbian community "remind [him] of how tiring it can be to stay 'in the closet' and how much energy is wasted and how focus is diverted from their job when they feel they must conceal so much of who they are." [105] Robert Berman, senior Vice President of Eastman Kodak, testified that one key reason for Kodak's success has been the company's work environment "in which [our] employees can perform to their full potential. In the same way [we] value each and every one of [our customers], we also value each and every one of [our] employees." [106] Berman testified that while it was unusual for companies to support legislation that would invite further Federal regulation, "the protection against discrimination because of one's sexual orientation is a basic civil right. [The] issue is so fundamental to core principles of fairness that [we] believe the value of Federal leadership outweighs [any] concerns." [107]

Smaller employers also testified to the positive impact of implementing acceptance policies, stating that such policy represents the "importance of creating a workplace that welcomes the best and the brightest, from all walks of life." [108] Lucy Billingsley, founder and partner of Billingsley Company in Dallas Texas testified to the Senate HELP Committee that her "workplace is a collaborative environment where employees can work hard together to beat the competition, regardless of sexual orientation. As a small business [we] can afford nothing less." [109]

Businesses such as IBM Corp., Eastman Kodak Co., American Express and Microsoft also provide comprehensive health benefits specific to GLB needs.[110]

All of the evidence above provides persuasive evidence—which Congress credits—that from the perspective of business efficiency, discrimination based on irrelevant characteristics such as sexual orientation is completely irrational.

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[104] Employment Non-Discrimination Act (H.R. 2015), Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Kelly Baker, Vice President of Diversity, General Mills, Inc.) [hereinafter Baker Testimony]

[105] Gifford Testimony at 31.

[106] The Employment Non-Discrimination Act, hearing Before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2 Sess. (2002) (written testimony of Robert Berman, Senior Vice President, Eastman Kodak, at 32) [hereinafter Berman Testimony].

[107] Id.

[108] Employment Non-Discrimination Act (H.R. 2015), Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Nancy Kramer, Founder & CEO, Resource Interactive (200 employees), at 1) [hearinafter Kramer Testimony]

[109] Billingsley Testimony at 31.

[110] Id.

Civil rights & religious leaders support a federal non-discrimination law

ENDA has been endorsed by over 180 civil rights, religious, labor, and women's rights organizations.[111] These communities have articulated their support on moral and economic grounds. As a moral issue, extending workplace protections to GLB workers will further the goals of equality and fairness in the workplace to all people. Many faith organizations of various denominations have taken part in a strong movement against discrimination: including the Episcopal Church, the Union for Reform Judaism; the United Church of Christ; the United Methodist Church; the American Friends Service Committee as well as many individual Quaker institutions; the Unitarian Universalists; the Universal Fellowship of Metropolitan Community Churches; and the Interfaith Alliance.

Representative Emanuel Cleaver, an ordained minister in the United Methodist Church, spoke candidly about the legislation during the HELP Subcommittee hearing, stating "[as a minister], no one has yet explained to me how keeping someone from gaining equal consideration based on their individual skill set to obtain lawful employment pleases God."[112] He and others in the civil rights and religious community agree that ENDA seeks simply to "further extend the rights of individuals who have been marginalized and discriminated against and denied legal Federal protection for an equal playing field when they seek employment."[113]

Constitutional Authority

Congress has the authority to enact ENDA through the Commerce Clause and the Fourteenth Amendment of the United States Constitution. In addition, the Act's authorization of individual suits against state governmental employers is derived from Congress' enforcement power under Section 5 of the Fourteenth Amendment as well as Congress' Spending Power under Article 1.

Commerce clause and fourteenth amendment authority for ENDA

The Supreme Court has acknowledged that Congress has considerable discretion to determine what activities affect interstate commerce, to the extent that the Court has held events of purely local commerce (such as local working conditions) might, because of market forces, negatively affect interstate commerce, and thus could be regulated.[114] Protecting the employment rights of GLB workers is a valid exercise of Congress' authority to regulate commerce pursuant to Article 1, Section 8 of the Constitution.

Congress has a long-history of enacting civil rights legislation based on its Constitutional authority granted in the Commerce Clause of Article 1, Section 8. This power is the same power exercised when enacting Title VII of the Civil Rights of 1964, the ADA,

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[111] As represented by the Leadership Conference on Civil Rights (Coalition).

[112] The Employment Non-Discrimination Act, hearing Before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2nd Sess. (2002) (written testimony of Rep. Emanuel Cleaver, II).

[113] Id.

[114] *U.S.* v. *Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as applied to a local employer); *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (upholding federal limits on farm production as applied to a local farmer who grew wheat for family consumption).

and the ADEA. The costs of sexual orientation discrimination in the workplace are significant and have regional and national economic impacts for which the federal government must be responsive. Sexual orientation discrimination is a detriment to American commerce because it impedes employers' productivity, and has significant psychological and economic costs on GLB workers in the form of lost and lower wages, and unfair terms and conditions of employment to sustain themselves and their families.

The Fourteenth Amendment of the United States Constitution entitles all persons to equal protection under the law. Congress possesses the authority to enforce the substantive provisions of the Fourteenth Amendment through Section 5 of the Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress.[115] The Supreme Court has ruled that Congress' authority to legislate under the Fourteenth Amendment is broader than the Amendment's language, holding that Congress has the ability to deter and remedy conduct which is not by itself forbidden under the Fourteenth Amendment.[116]

Protecting and ensuring civil rights in this country has long been recognized as an essential element to national citizenship and the Federal government has sought to enforce and guarantee those rights through the Fourteenth Amendment. Similar to discrimination based on race, sex, national origin, religion, age, or disability, sexual orientation discrimination stands wholly contrary to the fundamental principles of equal protection. The Fourteenth Amendment's Equal Protection Clause prohibits a State government from engaging in intentional discrimination—even when that basis is sexual orientation—absent some rational basis for doing so.[117] The Supreme Court has recognized that "irrational prejudice" does not create a rational basis to support a state action against an equal protection challenge. Sexual orientation discrimination predominately reflects prejudices and stereotypes, not actual differences.[118] Consequently, it is well within Congress' power to properly address the unfairness and irrationality of workplace discrimination through the enforcement powers granted to it pursuant to this Amendment.

Fourteenth Amendment and spending clause authority for abrogating the State's sovereign immunity

Section 5 of the Fourteenth Amendment clearly provides Congress with the power to enforce ENDA against state and local governments. Congress possesses the authority to remedy sexual orientation discrimination in state government employment by abrogating the states' sovereign immunity in private suits for damages under ENDA. This action is congruent and proportional to the problem addressed by ENDA. Indeed, Congress' action specifically targets the pattern of irrational and unconstitutional discriminatory conduct—discussed earlier in this Report—on the part of State

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[115] *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).
[116] *Kimel* v. *Florida Bd. of Regents,* 528 U.S. 62 (2000).
[117] *Weaver,* supra note 34 at 1287.
[118] Janet E. Halley, "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915, 937 (1989). See also, Erwin Chemerinsky, Constitutional Law: Principles and Policies, Aspen Publ. (2002).

and local government employers. Congress finds that the states do not possess even a rational basis—and certainly not a compelling reason—for discriminating against GLB workers merely because of their sexual orientation. Any such discrimination by state and local governments is completely irrational.

Sexual orientation discrimination has been held unconstitutional in many cases when perpetrated through State action.[119] The outcome of these cases is not surprising given that GLB Americans are a discrete and insular minority that has been subjected to a history of purposeful unequal treatment based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in, and contribute to, society. Thus, in the absence of Congressional action, invidious and irrational discrimination on the part of state employers would continue to deprive hard-working GLB Americans of the fundamental fairness to which all American workers are entitled: the right to be judged on one's merits, not upon irrelevant factors such as sexual orientation.

As the Supreme Court noted in *Garret*,[120] [Congress] has the power "both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] * * *. Furthermore, "legislation reaching beyond the scope of Section 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" [121] Unlike *Garret* where the Court held that the Americans with Disabilities Act exceeds Congress' authority because a State may have a rational reason to not provide a reasonable accommodation (i.e. saving money), as cruel as that decision might be,[122] employment discrimination against gays, lesbians and bisexuals is entirely irrational. Thirty states legally permit state-sponsored discrimination by allowing state employers to refuse to hire, fire or harass GLB workers because of their sexual orientation. The evidence presented before Congress demonstrates that state conduct in the area of sexual orientation discrimination is marked by pervasive unequal treatment of GLB workers who have no legal protections.

The Supreme Court continues to assert its respect for Congress' determinations concerning what is necessary to guarantee Fourteenth Amendment rights.[123] However, the Court places the onus on Congress to limit legislation so as to correspond to the constitutional violations that it seeks to address. ENDA is narrowly tailored. The Act exempts certain categories of employers from liability to ensure that the bill does not reach beyond Congress' authority. ENDA has no application to the military; it exempts businesses with fewer than 15 employees; and it exempts religious organizations. ENDA also prohibits the imposition of affirmative action and the adoption of quotas or granting preferential treatment to an individual based on their sexual orientation. Moreover, ENDA is further limited because it does not allow GLB plaintiffs to bring disparate impact claims. In sum, these limitations demonstrate the Act's concern for targeting conduct which is in need of redress and

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[119] See, e.g., *Lawrence* v. *Texas,* 539 U.S. 558, 123 S. Ct. 2472, 156 L.Ed. 2d 508 (2003); *Romer* v. *Evans,* 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed. 2d 855 (1996).

[120] *Board of Trustees of the University of Alabama* v. *Garrett,* 121 S. Ct. 955 (2001).

[121] Id.

[122] Id. at 964.

[123] *Kimel,* 528 U.S. at 81; *City of Bourne,* 521 U.S. at 518.

which serves no possible rational purpose.[124] Consequently, ENDA is a congruent and proportional response to the problem of workplace discrimination based on sexual orientation.

In addition to its authority under Section 5 of the Fourteenth Amendment, Congress has the power to apply ENDA to the states and localities under its Spending Power authority. States that wish to obtain Federal funds for their programs or activities must comply with reasonable, constitutional conditions placed on the receipt of such funds.[125] Through this power, Congress has the authority to provide a private cause of action for damages against states to those state employees who are affected by discrimination based on their sexual orientation. The Supreme Court has recognized that "Congress may, in the exercise of its spending power, condition its grant of funds to the states upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.[126]

The Supreme Court has identified five limitations on Congressional power to condition funds, including: (1) conditions placed on funds may not be "so coercive as to pass the point at which pressure turns into compulsion[127]; (2) the plain language of the Spending Clause indicates the use of the spending power must be aimed at the "public welfare" of the country, and thus have "a general public purpose"[128]; (3) the receipt of funds must be "unambiguous" in the statute so that a state may make an informed choice as to whether to adhere to conditions upon which the receipt of funds are contingent[129]; (4) conditions must be reasonably related to the purpose for which the funds are expended[130]; and (5) the conditional grant of funds should not be barred by any provision of the Constitution.[131] Congress intends, consistent with the guidelines set forth, to use its spending power to condition the receipt of Federal funding in State programs and activities upon the availability of a private cause of action for damages against the state under ENDA to state employees.

ENDA constitutes historic civil rights legislation that will provide critical workplace protections to millions of Americans who have lived in fear of being fired, not being hired, or otherwise being discriminated against because of their sexual orientation. This Act ensures equal opportunity for gay, lesbian, and bisexual Americans and thus enshrines a fundamental American principle. Its passage by the Congress and its enactment are long overdue.

SECTION-BY-SECTION ANALYSIS

Section 1: This section of the bill designates it as the "Employment Non-Discrimination Act of 2007."

Section 2: Defines the purposes of the Act, namely: to provide a comprehensive Federal prohibition on employment discrimination on the basis of sexual orientation; to provide meaningful remedies

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[124] William D. Araiza, ENDA Before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees under the Proposed Employment Non-Discrimination Act," 22 B.C. Third World L.J. 1 (2002).
[125] 42 U.S.C. 2000d–4a (2002).
[126] *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Say. Bank*, 527 U.S. 627, 686 (1999).
[127] *South Dakota* v. *Dole,* 483 U.S. 203, 211 (1987).
[128] Id. at 207.
[129] Id. at 207.
[130] Id. at 213.
[131] Id. at 208.

against such discrimination; and to invoke congressional powers, including the enforcement clause of the Fourteenth Amendment to the Constitution, the Commerce Clause and the Spending Clause.

Section 3: Provides definitions of key terms used in the Act, most of which come directly from existing Federal civil rights laws, primarily Title VII of the Civil Rights Act of 1964 ("Title VII"). The Act defines "sexual orientation" as "homosexuality, heterosexuality, or bisexuality." The term employer includes a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person. The definitions of "employee" and "employer" exclude volunteers and private membership clubs from the coverage of the Act. The term religious organization means a religious corporation, association or society; or a school, college, university or other educational institution or institution if the institution is in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association or society; or the curriculum of the institution is directed toward the propagation of a particular religion. This definition of a religious organization is taken directly from Title VIPs descriptions of religious organizations exempt from that law's religious discrimination prohibitions. If an organization qualifies for Title VII's religious exemption from religious discrimination claims, it would qualify for ENDA's religious organization exemption as well.

Section 4: Prohibits employers, employment agencies, labor organizations, and joint labor-management committees from discriminating in employment or employment opportunities on the basis of actual or perceived sexual orientation. With respect to the latter, ENDA creates a cause of action for any individual—whether actually homosexual or heterosexual—who is discriminated against because that individual is "perceived" as homosexual due to the fact that the individual does not conform to the sex or gender stereotypes associated with that individual's sex. Employment opportunities include hiring, firing, compensation, and other terms, conditions, or privileges of employment or union membership. In accordance with Title VII, the phrase "terms, conditions, or privileges of employment" includes requiring GLB people to work in a discriminatorily hostile or abusive environment. In other words, ENDA creates an actionable discrimination claim based on hostile work environment when, for example, the workplace is permeated with discriminatory intimidation, ridicule, or insult that is 33 sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[132]

Modeled after a provision of the Americans with Disabilities Act ("ADA") and case law under Title VII, Section 4 also prohibits discrimination based on the actual or perceived sexual orientation of someone with whom an employee associates. Section 4 sets forth the Act's prohibition on quotas and preferential treatment based on sexual orientation. ENDA does not require employers to justify neutral practices that may result in a disparate impact against people of a particular sexual orientation. As a result, the disparate

[132] See *Harris* v. *Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993).

impact claim available under Title VII is not available under this Act.

Section 5: Prohibits retaliation against individuals because they oppose any practice prohibited by the Act or participate in an investigation or other proceeding authorized by the Act. This section is modeled on Title VII's retaliation prohibition, and retaliation claims under the act will be treated like similar claims under Title VII, including providing protection from retaliation where a person reasonably believes the practice in question is an unlawful employment practice.[133]

Section 6: This section provides that the Act shall not apply to religious organizations. Religious organizations, defined in Section 2 above, are identical to religious organizations described in Title VII. In other words, insofar as a religious organization is exempt from Title VII religious discrimination claims, it is exempt from sexual orientation discrimination claims under ENDA.

Section 7: Explicitly provides that the Act does not apply to uniformed members of the Armed Forces. The Act does not affect current law on gay men, lesbians, and bisexuals in the military. Similar to Title VII, section 7 further provides that the act does not repeal or modify any other law that gives special preferences to veterans.

Section 8: Defines how the Act would apply to employer workplace rules and policies and employee benefits. Section 8 clarifies that the Act does not affect an employer's authority to regulate employee conduct (including, explicitly, sexual harassment) to same the extent currently allowed under law, so long as that regulation does not intentionally circumvent the purposes of the Act and is neutral with regard to sexual orientation in both design and implementation. The term "intentionally" here carries no further import than the intentionality required to make a disparate treatment claim, as opposed to a disparate impact claim. This section clarifies that it is unlawful to condition a term or condition of employment either on being married or being eligible to marry in states where same-sex marriage is not permitted, as such a condition would constitute a subterfuge for disparate treatment against GLB workers. This section also makes clear that nothing in the Act shall be construed to require that an employer treat a couple who are not married, including a same-sex couple, in the same manner as an employer treats a married couple for purposes of employee benefits.

Section 9: Expressly prohibits the EEOC from collecting statistics on sexual orientation or requiring employers to collect such statistics.

Section 10: Authorizes the same enforcement powers, procedures, and remedies that currently exist in Federal employment law. All individual relief that is available under Title VII is available under ENDA, although disparate impact claims are not permitted.

Section 11: Waives the states' Eleventh Amendment immunity from suit for discrimination based on sexual orientation. This section is based on Congress' enforcement powers pursuant to Section 5 of the Fourteenth Amendment to the U.S. Constitution, as well as Congress' spending power under Article I. If the Federal government or the states violate this Act, they are subject to the same

[133] See *Clark County School District* v. *Breeden,* 532 U.S. 268 (2001).

action and remedies as other employers, except that punitive damages are not available.

Section 12: Provides that a successful party, other than the EEOC or the United States, is entitled to attorneys' fees and litigation expenses.

Section 13: Sets forth a covered entity's duty to post notices describing the requirements of the law.

Section 14: Authorizes, but does not require, the issuance of regulations to enforce the Act.

Section 15: Preserves provisions in other Federal, state, or local laws that currently provide protection from discrimination. For example, Congress does not intend to overrule, displace, or in any other way affect any U.S. Supreme Court or other federal court opinion that has interpreted Title VII in such a way that protects individuals who are discriminated against because they do not conform to sex or gender stereotypes. See, e.g., *Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989) (female plaintiff brought successful Title VII claim after she was denied partnership in an accounting firm because she did not conform to female sex stereotype); *Nichols* v. *Azteca Rest. Enters.,* 256 F.3d 864 (9th Cir. 2001) (male plaintiff brought successful Title VII claim after he was subjected to a hostile work environment because he failed to conform to a male stereotype).

Section 16: Ensures that if one or more provisions of the Act are held invalid by a court, the balance of the Act will remain in effect.

Section 17: Provides that ENDA will take effect sixty days after its enactment and will not apply retroactively.

EXPLANATION OF AMENDMENTS

No amendments to the legislation were adopted.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of this bill to the legislative branch. H.R. 3685 includes in its definition of employer any employing office as defined in section 101 of the Congressional Accountability Act of 1995, as well as entities covered by Section 717(a) of the Civil Rights Act of 1964, which include the Library of Congress.

REGULATORY IMPACT STATEMENT

As H.R. 3685 merely adds "actual or perceived sexual orientation" to the categories of discrimination already prohibited by federal employment law, does not create any new enforcement structures but merely utilizes those already in existence, and authorizes, but does not require, further regulation by the appropriate agencies to carry out the Act, the Committee has determined that H.R. 3685 will have minimal impact on the regulatory burden.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the

provisions of the reported bill include unfunded mandates. (The CBO letter will address this issue.)

EARMARK STATEMENT

H.R. 3685 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.

ROLLCALL

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 1 BILL: H.R. 3685 DATE: 10/18/2007
AMENDMENT NUMBER: 1 DEFEATED: 18 AYES / 30 NOES
SPONSOR/AMENDMENT: SOUDER / TO STRIKE "PERCEIVED"

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE		X		
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUÑO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
Mr. HELLER				X
TOTALS	**18**	**30**		**1**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 2 BILL: H.R. 3685 DATE: 10/18/2007
AMENDMENT NUMBER: 2 DEFEATED: 18 AYES / 30 NOES
SPONSOR/AMENDMENT: SOUDER / MARRIAGE

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE		X		
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUÑO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
Mr. HELLER				X
TOTALS	**18**	**30**		**1**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 3 BILL: H.R. 3685 DATE: 10/18/2007
AMENDMENT NUMBER: 3 DEFEATED: 19 AYES / 29 NOES
SPONSOR/AMENDMENT: SOUDER / OPPOSITION

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUÑO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
Mr. HELLER				X
TOTALS	**19**	**29**		**1**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 4 BILL: H.R. 3685 DATE: 10/18/2007
AMENDMENT NUMBER: 4 DEFEATED: 21 AYES / 27 NOES
SPONSOR/AMENDMENT: HOEKSTRA / RELIGIOUS AMENDMENT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUÑO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
Mr. HELLER				X
TOTALS	**21**	**27**		**1**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 5 BILL: H.R. 3685 DATE: 10/18/2007
AMENDMENT NUMBER ADOPTED: 27 AYES / 21 NOES
SPONSOR/AMENDMENT: ANDREWS / FAVORABLY REPORTING THE BILL

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KUCINICH		X		
Mr. WU	X			
Mr. HOLT		X		
Mrs. SUSAN DAVIS	X			
Mr. DANNY DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Ms. SANCHEZ		X		
Mr. SARBANES	X			
Mr. SESTAK	X			
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE	X			
Mr. YARMUTH	X			
Mr. HARE	X			
Ms. CLARKE		X		
Mr. COURTNEY	X			
Ms. SHEA-PORTER	X			
Mr. McKEON		X		
Mr. PETRI		X		
Mr. HOEKSTRA		X		
Mr. CASTLE	X			
Mr. SOUDER		X		
Mr. EHLERS		X		
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. KELLER		X		
Mr. WILSON		X		
Mr. KLINE		X		
Mrs. McMORRIS RODGERS		X		
Mr. MARCHANT		X		
Mr. PRICE		X		
Mr. FORTUÑO		X		
Mr. BOUSTANY		X		
Mrs. FOXX		X		
Mr. KUHL	X			
Mr. ROB BISHOP		X		
Mr. DAVID DAVIS		X		
Mr. WALBERG		X		
Mr. HELLER				X
TOTALS	**27**	**21**		**1**

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of Clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 3685 from the Director of the Congressional Budget Office:

OCTOBER 22, 2007.

Hon. GEORGE MILLER,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3685, the Employment Non-Discrimination Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 3685—Employment Non-Discrimination Act of 2007

Summary: H.R. 3685 would prohibit employment discrimination based on sexual orientation. Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 3685 would cost $28 million over the 2008–2012 period for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases. The bill could affect direct spending, but we estimate that any such effects would be less than $500,000 annually. H.R. 3685 would not affect revenues.

H.R. 3685 would prohibit state, local, and tribal governments from discriminating against employees and applicants for employment based on sexual orientation, and it would require those governments to post notices regarding such prohibitions. Those requirements would be intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). However, CBO estimates that the costs of complying with those mandates would not be significant and would not exceed the thresholds established in UMRA ($66 million in 2007, adjusted annually for inflation).

The bill also would impose a number of mandates on private-sector employers, employment agencies, and labor organizations. CBO estimates that the direct cost of those requirements would not exceed the annual threshold specified in UMRA ($131 million in 2007, adjusted annually for inflation) in any of the first five years the mandates would be effective.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3685 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—				
	2008	2009	2010	2011	2012
SPENDING SUBJECT TO APPROPRIATION [1]					
EEOC Spending Under Current Law:					
Estimated Authorization Level [2]	339	351	362	375	387
Estimated Outlays	338	350	361	374	386
Proposed Changes:					
Estimated Authorization Level	4	6	6	6	6
Estimated Outlays	4	6	6	6	6
EEOC Spending Under H.R. 3685:					
Estimated Authorization Level [2]	343	357	368	381	393
Estimated Outlays	342	356	367	380	392

[1] In addition to the bill's discretionary cost, H.R. 3685 could affect direct spending, but CBO estimates that any such effects would be less than $500,000 annually.

[2] The estimated authorization levels for 2008 through 2012 are CBO baseline estimates. A full-year appropriation for 2008 for EEOC has not yet been enacted, so we adjusted the amount appropriated for the agency in 2007 for anticipated inflation.

Basis of estimate: CBO estimates that implementing H.R. 3685 would cost $28 million over the 2008–2012 period, assuming appropriation of the necessary amounts. For this estimate, CBO assumes that the necessary amounts will be appropriated near the start of each fiscal year and that outlays will follow the historical spending pattern of those activities. The bill could affect direct spending, but we estimate that any such effects would be less than $500,000 annually.

Spending subject to appropriation

The EEOC expects that implementing H.R. 3685 would increase its annual caseload (currently about 90,000 cases) by about 5 percent and would require an additional 60 to 80 staff. CBO estimates that the costs to hire an additional 70 employees would reach $6 million annually by fiscal year 2009, subject to the appropriation of the necessary amounts. We expect that enacting H.R. 3685 also would increase the workload for a few other agencies, such as the Merit Systems Protection Board, but any increase in costs for those agencies would not be significant because of the small number of additional cases.

The additional cases resulting from H.R. 3685 also would increase the workload of the Department of Justice's Civil Rights Division and the federal judiciary. However, CBO estimates that increased costs for those agencies would also not be significant because of the relatively small number of cases referred to them.

Direct spending

Enacting H.R. 3685 could increase payments from the Treasury's Judgment Fund for settlements against federal agencies in discrimination cases based on sexual orientation. However, CBO estimates that any increases in direct spending would be less than $500,000 annually.

Estimated impact on state, local, and tribal governments: H.R. 3685 would prohibit state, local, and tribal governments from discriminating against employees and applicants for employment based on sexual orientation, and it would require those govern-

ments to post notices regarding such prohibitions. Those requirements would be intergovernmental mandates as defined in UMRA. The costs of the mandates would include the costs of posting notices and modifying employment procedures to avoid discriminatory practices. CBO assumes that the costs of notices would likely be relatively minor and would be made in the course of other routine updates. Similarly, changes to employment procedures likely would build on such things as ongoing training and updates to personnel manuals. Thus, CBO estimates that compliance costs would not be significant and would not exceed the thresholds established in UMRA ($66 million in 2007, adjusted annually for inflation).

Under H.R. 3685, by accepting any federal financial assistance, states would waive their sovereign immunity under the 11th Amendment and would be subject to suit for discriminatory practices. Because UMRA excludes conditions of federal assistance from the definition of an intergovernmental mandate, any costs resulting from potential suits would not be the result of complying with an intergovernmental mandate as defined in UMRA. In any event, the number of such cases likely would be very small, and states would not be subject to punitive damages.

Estimated impact on the private sector: The bill would impose a number of mandates on many private-sector employers, employment agencies, and labor organizations. It would prohibit employers from discriminating against any worker on the basis of sexual orientation in hiring, firing, pay, and other aspects of employment. The bill would also require employers to modify the notices they are required to post regarding federal laws that protect employees from discrimination and set minimum wages. CBO estimates that the direct costs of complying with those mandates would not exceed the annual threshold specified in UMRA ($131 million in 2007, adjusted annually for inflation) in any of the first five years the mandates would be effective.

Estimate prepared by: Federal Costs: Mark Grabowicz; Impact on State, local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Nabeel Alsalam.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c) of House rule XIII, the goal of H.R. 3685 is to prohibit employment discrimination on the basis of sexual orientation.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 3685. Congress has the authority to enact ENDA through the Commerce Clause, the Fourteenth Amendment of the United States Constitution. The Act's authorization of individual suits against state governmental employers is derived from Congress' enforcement power under Section 5 of the Fourteenth Amendment as well as Congress' Spending Power under Article 1.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3685. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

COMMITTEE CORRESPONDENCE

None.

DISSENTING VIEWS

We dissent from H.R. 3685, a narrow version of the Employment Non-Discrimination Act (ENDA) that excludes protections based on gender identity. We are co-sponsors of H.R. 2015, the original version of ENDA introduced earlier this year, that would prohibit workplace discrimination based on sexual orientation and gender identity. While we agree with H.R. 3685's objective of prohibiting workplace discrimination on the basis of sexual orientation, we do not support the decision to remove gender identity from the bill because it leaves this legislation woefully incomplete. H.R. 3685 fails to expressly protect transgender people, who are among the most at risk for discrimination. The decision to strip gender identity from the bill was not based on substantive concerns about the bill's language but rather on a perception that protecting this vulnerable group might jeopardize the bill's chances for clean passage on the House floor. We cannot support this rationale, which reinforces the very bias and discrimination that ENDA seeks to prohibit.

Transgender individuals and their families aspire to the same basic rights as other Americans, including equal access to gainful employment and fair housing in safe communities. Yet across this country, transgender people face extremely high rates of unemployment, poverty, and homelessness. Studies across the country reveal that transgender people suffer a 35% unemployment rate, with 60% earning less than $15,300 a year. As a result of this disparity in income and employment levels, a disproportionate number of transgender people cannot support themselves or their families, and many are literally forced onto the streets. Every American has the right to be free from discrimination in employment and to be judged solely on one's performance in the workplace—not on irrelevant characteristics such as sexual orientation and gender identity. We are eager to support legislation that addresses such discrimination, and we wish that we would have had an opportunity to do so in Committee.

We believe that Congress should pursue the path that state legislatures have uniformly followed for the past several years, which is to pass measures that include both sexual orientation and gender identity. Such inclusive laws have passed on the local and state level in jurisdictions in every region of the country. Nationally, 37% of the U.S. population lives in jurisdictions that prohibit gender identity discrimination. Currently, there are inclusive laws in twelve states and over 90 local jurisdictions, including Iowa, New Jersey, Colorado, and Oregon, which passed inclusive laws just this year. Congress should be reinforcing these efforts instead of undermining advancement on the state and local level.

We have heard overwhelmingly from constituents and civil rights organizations that passage of this non-inclusive bill will undermine the ultimate attainment of full employment protections for all

LGBT individuals. We are not aware of a single gay or LGBT organization that has endorsed this bill. In contrast, over 300 organizations have formally opposed H.R. 3685 because it omits gender identity protections. These include national groups such as the National Gay and Lesbian Task Force, National Center for Lesbian Rights, Equality Federation, National Black Justice Coalition, National Association of LGBT Community Centers, Pride At Work (AFL–CIO), PFLAG (Parents, Families and Friends of Lesbians and Gays), and the National Center for Transgender Equality. Also in opposition is nearly every single statewide organization that represents the LGBT community in their state, including Equality Alabama, Equality California, Equality Illinois, Equality Maryland, Equality Advocates Pennsylvania, Garden State Equality, Empire State Pride Agenda, Equality Florida, Equality Maine, Equality Ohio, Equal Rights Washington, and Equality Texas.

For the reasons set forth herein, we respectfully dissent from H.R. 3685.

RUSH HOLT.
YVETTE D. CLARKE.
LINDA T. SÁNCHEZ.
DENNIS J. KUCINICH.

MINORITY VIEWS

INTRODUCTION

At the federal level, numerous civil rights statutes exist to protect individuals from discrimination. Although these laws share similar features, each statute differs based upon the type of discrimination that it prohibits and the circumstances under which it operates. Arguably the most prominent among these various laws is the Civil Rights Act ("CRA") of 1964, which expanded civil rights protections to many different settings and served as a model for subsequent anti-discrimination laws. Among the provisions of the CRA, Title VII specifically prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex.[1] Title VII applies to employers with 15 or more employees, including the federal government and state and local governments.

For more than two decades, a number of bills have been introduced in Congress that sought to protect individuals from workplace discrimination on the basis of sexual orientation, Very recently, in the 110th Congress, Rep. Barney Frank (D–MA) introduced H.R. 2015, The Employment Non-Discrimination Act of 2007 ("H.R. 2015"). This bill, introduced on April 24, 2007, purports to protect against discrimination on the basis of sexual orientation and, for the first time, gender identity. On September 5, 2007, the Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions held a hearing on H.R. 2015. On September 27, 2007, because of questions raised at that hearing and questionable support for H.R. 2015, Rep. Frank introduced two new bills, H.R. 3685 and H.R. 3686, which split the protections for sexual orientation and gender identity, respectively. On October 18, 2007, the full Committee on Education and Labor proceeded to markup H.R. 3685, which provides protections on the basis of sexual orientation only. Subsequently, the Committee on Education and Labor ordered reported H.R. 3685.

The Minority Members of this Committee have consistently stated their opposition to intentional workplace discrimination. However, H.R. 3685 as reported out of Committee raises many legitimate concerns that remain unresolved. For example, the bill's religious exemption fails to adequately protect certain religious employers from liability. Also, the bill provides unprecedented protection against discrimination based on "perceived" sexual orientation. For these reasons and others detailed later in this document, the majority of Committee Republicans reject this legislation, and urge its defeat on the House Floor. Further, the House should reject any attempt to amend this bill to add protections for gender identity.

[1] 42 U.S.C. § 2000e.

FEDERAL LEGISLATIVE HISTORY

A variety of federal proposals have been introduced over the last two decades that sought to protect against workplace discrimination on the basis of sexual orientation. Included in these efforts were relatively simple proposals to amend Title VII of the CRA to add the term "sexual orientation" to existing categories afforded protection, such as race.[2] Since it was first introduced in the House and the Senate in the 103rd Congress, the Employment Non-Discrimination Act (ENDA) has been the primary legislative vehicle for extending federal employment discrimination protections to employees on the basis of their sexual orientation. While many Democrats and some Republicans have supported ENDA legislation, the bill has not garnered the support necessary to move through Congress. In September 1996, the Senate voted on a prior version of ENDA, but the bill was defeated by a vote of 50–49 (Roll Call Vote No. 281). The last major action on this issue took place in the Senate during the 107th Congress, when the Senate Health, Education, Labor, and Pensions (HELP) Committee under Chairman Kennedy held a hearing, marked up a bill, and reported it favorably out of Committee. Despite reporting the bill favorably, Senate HELP Committee Republicans, who did not support the legislation, voiced concerns and claimed that "* * * the legislation remains overly broad and unclear in many respects, specifically, with regard to its effect on individual, constitutional, and States' rights."[3] That bill was placed on the Senate Legislative Calendar under General Orders, but did not move any further.

In the 108th Congress, an ENDA bill (H.R. 3285) was introduced by Rep. Christopher Shays (R–CT), but there was no action taken on that bill. Subsequently, legislation was not introduced during the 109th Congress. In the 110th Congress, Rep. Frank introduced three separate ENDA bills that included protection against discrimination on the basis of gender identity (defined below), as well as sexual orientation. Given the considerable policy and political questions raised by this legislation, a discussion of these three ENDA bills is appropriate to illustrate its progression.

H.R. 2015, the Employment Non-Discrimination Act of 2007

Rather than amend existing civil rights laws, H.R. 2015 was drafted as a stand-alone anti-discrimination law, but generally has the same enforcement scheme and remedies as Title VII of the CRA (Title VII) and the Americans with Disabilities Act (ADA). Central to its purpose, the bill, at Section 3(a)(9), defines "sexual orientation" as "homosexuality, heterosexuality, or bisexuality." Also, Section 3(a)(6) defines gender identity as "the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

H.R. 2015 would address employment discrimination in four areas. First, the legislation would make it unlawful to fire, refuse to hire or take any other action that would adversely affect a per-

[2] See, CRS Report RL31863, Sexual Orientation Discrimination in Employment: Legal Analysis of Title VII of S. 16, the Employment Nondiscrimination Act of 2003.
[3] "Minority Views", S. Report 107–341, p. 39 (2001).

son's status as an employee based on his or her actual or perceived sexual orientation or gender identity.[4] With language borrowed from the ADA, the legislation also prohibits "association discrimination" as a result of the actual or perceived sexual orientation or gender identity of someone with whom an employee associates. Second, H.R. 2015 would prohibit discrimination against an individual who has opposed or spoken out against an unlawful employment practice. Third, the bill would not permit the creation or use of preferential treatment or employent quotas based on perceived sexual orientation or gender identity. Finally, H.R. 2015 requires that employers must have policies in place to address dress standards and gender-segregated facilities (such as changing areas) in the workplace.

Similar to current requirements under Title VII, H.R. 2015 would apply to private employers with 15 or more employees, labor unions, employment agencies, and federal, state, and local governments. The bill contains a number of exemptions, including those for members of the armed forces, private employers with less than 15 employees, and religious and religious-affiliated entities. Also, H.R. 2015 would grant the Equal Employment Opportunity Commission (EEOC) and other appropriate agencies the power to enforce the Act. If an employee's complaint is not resolved by the EEOC, the legislation would allow an individual to file suit seeking punitive and compensatory damages up to a cap of $300,000 and attorney's fees.

Notably, H.R. 2015 differs in several significant respects from prior versions of ENDA. H.R. 2015 adds, for the first time, gender identity as a protected classification which would prohibit workplace discrimination against transgendered individuals.[5] Section 4(b) of the bill makes it an unlawful employment practice to discriminate against an individual because of "the actual or perceived sexual orientation or gender identity" of the individual. The inclusion of protection based on "perceived" gender identity would likely raise issues as to how employers could accommodate individuals who perceive themselves to be of the opposite gender, and therefore comply with the legislation.

In addition, although the bill retains language from previous bills that would not require domestic partner benefits, H.R. 2015 would exempt any state and local rules from preemption under the Employee Retirement and Income Security Act (ERISA). This exemption would be contrary to longstanding precedent that prevents state and local mandates on employer-provided benefits.

Further, H.R. 2015 contains insufficient exemptions for religious organizations and actions based on religious beliefs, and actually narrowed the single broad exemption for religious-affiliated organizations contained in the ENDA legislation introduced in the 108th Congress (H.R. 3285). First, under H.R. 2015, all houses of worship, missions or schools that have the purpose of religious worship or teaching of religious doctrine would be completely exempt. Second, in religiously-affiliated entities, employees who teach or

[4] Employer actions that aversely affect a person's status as an employee relate to compensation, benefits, training programs and opportunities, and union membership.

[5] Transgendered individuals are individuals of one sex who, by surgery or other means, change their gender to the opposite sex.

spread religion, take part in religious governance or supervise those who teach or spread religion are completely exempt. Third, a religiously-affiliated entity can require all or some employees to conform to religious tenets as set forth by the organization regardless of sexual orientation or gender identity.[6] Although seemingly intended to cover a wide range of religious organizations and activities, the H.R. 2015 religious exemption is far more prescriptive than earlier versions and the existing exemption contained in Title VII of the CRA, and it therefore results in a far narrower religious exemption. Although a broader religious exemption had been proposed in a prior Congress, those who previously sponsored and supported H.R. 2015 chose, inexplicably, to narrow the exemption.

In addition to the Committee on Education and Labor, H.R. 2015 was referred to three other committees of jurisdiction: the Committee on House Administration, the Committee on the Judiciary, and the Committee on Oversight and Government Reform. To date, none of the other committees of jurisdiction have taken any official action on H.R. 2015.

On September 5, 2007, a legislative hearing on H.R. 2015 took place before the Committee on Education and Labor, Subcommittee on Health, Education, Labor, and Pensions. Witness testimony at that hearing raised several substantive concerns about ENDA legislation in the 110th Congress, many of which have yet to be addressed by the Majority.

H.R. 3685, the Employment Non-Discrimination Act of 2007

On September 27, 2007, in apparent recognition of the fundamental policy flaws contained in H.R. 2015 and diminishing support for that bill as a result of those flaws, Representative Barney Frank introduced two bills, H.R. 3685 and H.R. 3686 which, respectively, split the protections against discrimination based on sexual orientation and gender identity into two separate bills.

Although H.R. 3685 attempts to address certain concerns, many of its provisions are similar to those contained in H.R. 2015 and therefore continue to raise significant policy questions. H.R. 3685 removes "gender identity" as a protected classification, and conforms the retaliation provision to existing law under Title VII. However, H.R. 3685 revises the religious exemption, ostensibly to conform to the exemption under Title VII. The new provision, however, still fails to protect many religious organizations that would qualify for an exemption under Title VII. Further, H.R. 3685 retains vague and unworkable references to the "perceived" sexual orientation of individuals. The bill would still make it unlawful to condition employment, in a state in which a person cannot marry a person of the same sex, either on being married or being eligible to marry.

H.R. 3686, to prohibit employment discrimination based on gender identity

On September 27, 2007, Representative Frank also introduced H.R. 3686, legislation which is intended to complement the so-

[6] Since these exemption provisions are narrower than the religious exemptions contained in Title VII, this proposed exemption has raised significant concern among religious employers (detailed below).

called "improved" version of ENDA embodied in H.R. 3685. The stated purpose of H.R. 3686 is to prohibit employment discrimination based on gender identity.

Again, many of the provisions of H.R. 3686 are similar to those contained in H.R. 2015; but the legislative language of H.R. 3686 contains fatal flaws and raises significant concerns that undermine the fundamental policy promoted by this bill. Like H.R. 3685, the revision to the religious exemption in effect fails to protect many religious organizations that would qualify for an exemption under Title VII. H.R. 3685 also retains the vague and unworkable reference to the "perceived" gender identity of individuals. This is arguably even more problematic than use of the term as applied to sexual orientation, since perception of one's gender could be inherently more difficult to ascertain from day to day. Further, H.R. 3686 contains language governing employer rules and policies with respect to certain shared facilities and dress and grooming standards, provisions that were initially included in H.R. 2015. Although the Majority attempts to address concerns regarding certain shared shower or dressing facilities by stating "nothing in this Act shall be construed to require the construction of new or additional facilities," significant questions still remain regarding what constitutes reasonable access to such facilities, which will result in great uncertainty and litigation.

LEGISLATIVE ACTIVITY

Legislative hearing on H.R. 2015

The only hearing on ENDA legislation during the 110th Congress occurred on September 5, 2007, before the Committee on Education and Labor, Subcommittee on Health, Education, Labor, and Pensions. The subject of the legislative hearing was H.R. 2015. Notably, the full Committee on Education and Labor failed to hold a legislative hearing on that bill, or any other ENDA legislation, thereby depriving most Committee Members of the opportunity to hear testimony on the merits and/or flaws of the bills prior to their consideration.

At the September 5, 2007 hearing, testimony was received from Representatives Barney Frank, Tammy Baldwin, and Emanuel Cleaver, II, along with two alleged victims of discrimination, two representatives from academic institutions, and two company representatives. Additional witnesses included Lawrence Lorber, Esq., an experienced labor and employment lawyer, and Mark Fahleson, Esq., a labor and employment lawyer who counsels small and medium-sized businesses, including religious colleges and universities. Although purported to be a legislative hearing on the provisions of H.R. 2015, most of the testimony from the Majority's witnesses focused on personal experiences and opinions concerning discrimination. By contrast, most of the discussion of substantive problems and concerns with the actual legislative language was provided by the Republican witnesses, Mr. Lorber and Mr. Fahleson.

The two witnesses who testified on behalf of private business, Ms. Kelly Baker from General Mills and Ms. Nancy Kramer, owner of an Ohio marketing services company, stated that promoting a diverse work environment, that respects individuals' sexual orienta-

tion, helps their businesses improve productivity and compete more effectively.[7] This testimony raises the question of whether a federal directive applied to the free market is necessary in light of voluntary (and apparently successful) private-sector efforts to promote diversity and improve business performance.

Mr. Lorber and Mr. Fahleson focused their written testimony and verbal comments on substantive concerns with H.R. 2015. Mr. Lorber initially noted that the "[g]reatest single area of growth in federal civil litigation involves employment and labor law. Therefore the Congress should be cautious in adding to this growing and complex list of laws, and thereby the potential for increased litigation."[8] He then went on to highlight concerns with various provisions of the bill, including the need to appropriately define the term "disparate impact" and clarify that only intentional circumvention of the Act is implicated in order to avoid attacks on neutral employer rules and policies. Also, Mr. Lorber raised multiple technical concerns resulting from inclusion of gender identity as a new protected class, and the need to conform the bill's prohibition against retaliation with existing Title VII language.

Mr. Fahleson began his testimony by raising a threshold question as to whether there was a need for a federal remedy at this time. In his own words:

> I believe it is appropriate to ask the question: is a broad, new federal remedy for sexual orientation and gender identity employment discrimination such as that embodied in H.R. 2015 necessary at this time? As the Committee is aware, a significant number of employers have voluntarily adopted policies barring discrimination on the basis of sexual orientation and transgender status. In addition, several states and municipalities have enacted local regulatory schemes addressing sexual orientation and/or transgender discrimination in the workplace. For the last 32 years legislation has been introduced in Congress seeking to prohibit sexual orientation discrimination in employment. Meanwhile, it appears that the free market and local regulators are already addressing the issues raised by this legislation.[9]

Mr. Fahleson also raised concerns regarding the cost of this legislation, especially the potential impact on smaller employers that have less ability to absorb financial costs associated with this regulation. Further, he expressed concerns that the exemption for religious organizations was far narrower than the current exemption under Title VII, and raised a number of hypothetical situations in which eligibility for the exemption was questionable. Mr. Fahleson opined that "[t]he blanket exemption for religious organizations

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[7] See generally, Testimony of Nancy Kramer, Founder and Chief Executive Officer, Resource Interactive, and Testimony of Kelly Baker, General Mills, Inc., Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007).

[8] Testimony of Lawrence Z. Lorber, Esq., Proskauer Rose LLP, Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007), at 2.

[9] Testimony of Mark A. Fahleson, Esq., testifying individually, Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007), at 1.

found in prior versions of ENDA provides greater certainty and is less problematic for religious and faith-based employers, as well as the judiciary." [10]

Committee Republicans share the concerns expressed by Mr. Lorber and Mr. Fahleson that H.R. 2015 creates significant policy questions on the issue of extending federal protections based on sexual orientation and gender identity. Left unanswered, these questions could result in severe burdens being placed on employees and employers. Such questions must be addressed before extending new federal protections and requirements in this area.

Committee legislative action

Despite the fact that a legislative hearing was held on H.R. 2015, the Committee did not further consider H.R. 2015.

Instead, on Thursday, October 18, 2007, the Committee on Education and Labor met to consider H.R. 3685, without the benefit of any legislative hearing on the bill or the ways in which it differs from H.R. 2015, the bill that did receive some limited scrutiny from the Committee. Republican Members offered four (4) amendments designed to: (1) broaden the exemption for religious schools not covered under H.R. 3685; (2) strike the term "perceived" sexual orientation, which is vague and will create uncertainty in the workplace; (3) prohibit retaliation against employees who may not agree with employer policies relating to the Act on the basis of sincerely held beliefs; and (4) remove the provision making it unlawful to condition employment, in a state in which a person cannot marry a person of the same sex, either on being married or being eligible to marry. These amendments were rejected by the Committee. The Committee favorably reported H.R. 3685 on a roll call vote of 27 to 21.

REPUBLICAN VIEWS, H.R. 3685

Committee Republicans are generally committed to the principle that discrimination in the workplace is unacceptable. It is for that reason that we support the current-law protections provided under Title VII of the Civil Rights Act. However, we also believe that before imposing any new federal mandates in this area, even those cloaked in the honorable moniker of "non-discrimination," the Committee and Congress must thoroughly and thoughtfully examine the need for such mandates and must evaluate the substantive implications of the legislative proposals. In this regard, the Committee has fallen short. Not only has the Majority provided little compelling evidence as to the need for this legislation, but they have also failed to fully address the substantive concerns it raises.

Remarkably, although absent from the bill reported by the Committee, the issue of providing discrimination protections on the basis of gender identity remains clearly on the Majority's agenda for future consideration. Indeed, at the conclusion of the Committee's consideration of H.R. 3685, several Committee Democrats voiced their intent to amend the bill during its consideration by the full House of Representatives by inserting additional protections for gender identity. While we do not question the right of our Demo-

[10] Id., at 4.

crat colleagues to offer such amendments, we do believe their expressed intention to do so begs an important question: Why was an amendment to include protections from discrimination on the basis gender identity not offered by these Members during the Committee's consideration of the bill? Indeed, why were gender identity protections—expressly provided in H.R. 2015—dropped from the bill that was brought before the Committee? The answer, of course, is rooted in the fact that extending non-discrimination protections to gender identity not only raises substantive and policy-related questions that the Majority cannot answer, it is also politically untenable. That Committee Democrats would forgo the opportunity to include such protections during the Committee's consideration of the bill merely underscores this fact.

Finally, we are troubled by the fact this legislation is proceeding to the House floor without adequately resolving outstanding issues and urge that the House of Representatives reject it, along with any amendments that seek to include protections based on gender identity.

The bill fails to protect the hiring prerogatives of religious schools

H.R. 3685 attempts to provide an exemption for religious organizations, including religious educational institutions. However, the bill's definition of "religious organizations" contains a two-part test used to determine if an educational institution qualifies for an exemption. This test, found in Section 3(a)(8) of the bill, requires that the school be "controlled, managed, owned, or supported by a *particular* religion"; or, have its curriculum "directed toward the propagation of a *particular* religion." (emphasis added). Although this exemption is broader than that contained in H.R. 2015, it still does not provide the broad protections that exist under current law. Moreover, it fails to cover non-denominational religious schools and invites the federal government to investigate the religious nature of schools' curricula, effects we find unacceptable.

Despite assertions by the Majority that the exemption in H.R. 3685 is the same as the exemption found in Title VII, a plain reading of both reveals the Majority's assertion is incorrect. Current law, under Title VII, as amended, broadly exempts religious corporations, associations, societies, and educational institutions.[11] Title VII also contains a provision, the so-called "bona fide occupational qualification" (BFOQ), which provides further protections applicable to educational institutions in certain rare circumstances.[12] The BFOQ provision is rarely utilized in practice, because of the initially broad protections for educational institutions contained in Title VII. However, H.R. 3685 changes the nature of the exemption under Title VII with respect to educational institutions because, rather than simply providing a broad exemption for "educational institutions," it qualifies the exemption for such institutions by using the BFOA provision exclusively. This creates several unresolved problems.

For example, a non-denominational, independent faith-based school that is not controlled or supported by a "particular" religion,

[11] See, 42 U.S.C. Section 2000e–1.
[12] See, 42 U.S.C. Section 2000e–2(e)(2).

or whose curriculum is not directed toward propagation of a "particular" religion, may not be exempt from this legislation, even though religion forms the foundation of its mission. Unfortunately, there are many schools that may be penalized by this provision. One such institution, Wheaton College in Wheaton, Illinois, expressed serious concerns about the religious exemption in H.R. 3685. In a letter dated October 3, 2007 to Congressman Tim Walberg, the President of Wheaton College, Duane Litfin, stated as follows:

> On behalf of Wheaton College I want to register our concern about a bill that has been introduced in the U.S. House titled "To prohibit employment discrimination on the basis of sexual orientation or gender identity," and referred to as the Employment Non-Discrimination Act or ENDA (HR 3685), Appropriately, the Act provides a religious exemption consistent with the Civil Rights Act as Amended in 1972. However, the categorical religious exemption is undermined in Section 3(a)(8) of the Act by a problematic definition of religious organization that casts doubt on whether Wheaton College would be exempt. As I understand the definition language, educational institutions that are themselves religious but that are not controlled by some other religious organization, such as a church or a denomination, may not be covered by the religious exemption.
>
> Wheaton College has a clearly defined religious identity, dating back to its founding in 1860, including a Statement of Faith to which all of our employees give assent, and a Community Covenant to which all of the members of our community adhere, Nevertheless, Wheaton College is not controlled by a religious corporation, but rather by a self-perpetuating Board of Trustees.
>
> Surely a religious college such as Wheaton should be permitted the same protection of its religiously motivated hiring rights as those colleges that are controlled by churches or other religious organizations.
>
> Since 1972 when the Civil Rights Act was amended to forthrightly protect the mission-critical hiring rights of religious organizations, including religious higher education, we have been able to grow and expand our service to our communities with a robust religious mission and distinctive approach because we have had the ability to select all of our staff on a religious, mission-critical basis. Our continued existence as a distinctively religious institution, and with it, a diverse and thriving higher education sector, is threatened because the proposed ENDA, with its limiting and non-categorical religious exemption, does not clearly and fully ensure our religious, mission-critical staffing freedom.
>
> I urge you to remove the problematic religious definition language currently in ENDA and ensure that the Act categorically exempts religious organizations as in Section 702(a) of Title VII of the Civil Rights Act of 1964, as amended.

The concerns expressed by Mr. Litfin are not unique to Wheaton College. Indeed, the impact of the insufficient religious exemption has engendered comments from numerous organizations, who expressed serious reservations similar to those expressed by Wheaton College. Those commentators included:

The Council for Christian Colleges & Universities
Agudath Israel of America
The American Association of Christian Colleges & Seminaries, Inc.
The American Association of Christian Schools
The Family Research Council
The Ethics & Religious Liberty Commission of the Southern Baptist Convention
The Traditional Values Coalition
The American Center for Law and Justice

This is by no means a comprehensive list of concerned parties, but reflects the concern of many impacted institutions and organizations who find the current exemption to be wholly insufficient.

Additional concerns regarding the so-called religious exemption are also worthy of mention. For example, if the current exemption were to be enacted, religious schools would likely be subjected to a "denominational" test. Such a test would inevitably "entangle" the federal government in the practice of religion, since it invites courts to examine the beliefs and practices of religious schools to determine if they are "religious enough." In addition, H.R. 3685 would vest the EEOC with regulatory, enforcement, and investigatory powers. This would require the EEOC to investigate and determine whether institutions are associated with "particular" religions or whether the curriculum of an institution is directed toward the propagation of a "particular" religion. In doing so, the provisions would entangle a Federal agency in complex questions involving religious missions and doctrine and would require promulgation of Federal rules governing this area of inquiry. This intrusive federal inquiry into the religious beliefs of schools arguably violates the constitutional separation of church and state. Religious schools and faith-based institutions should be free to exercise their religious beliefs without government intrusion.

Also, in an effort to qualify for the exemption, religious schools may be forced to alter their curricula in an attempt to focus it on the "propagation of a particular religion." Forcing schools to choose between adopting a "particular religion" or relinquishing hiring prerogatives would be antithetical to, and in conflict with, the mission of many of these faith-based schools.

Uncertainties associated with the new exemption would result in lengthy and expensive litigation to uphold religious freedoms and the separation of church and state. Litigants would use this loophole to bring suits against the schools, forcing them to hire individuals whose lifestyles might violate the schools' core principles.

In an effort to address the insufficient religious exemption, Republican Members overwhelmingly supported an amendment by Rep. Hoekstra at the full Committee markup that would appropriately expand the exemption to include religious and faith-based schools. More specifically, the amendment would have stricken the requirement to associate with a "particular" religion, and would have provided an exemption for institutions that maintain a faith-based mission. Unfortunately, the Majority refused to address the

legitimate concerns regarding the religious exemption, and the amendment failed.

The bill provides vague prohibitions based on "perceived" sexual orientation

H.R. 3685 prohibits—as did its predecessor, H.R. 2015—employers from discriminating against an individual because of an individual's actual or "perceived" sexual orientation. The bill also makes it unlawful to discriminate against an individual based on the actual or "perceived" sexual orientation of a person with whom the individual associates or has associated. Despite its significance to the bill's underlying policy, the term "perceived" is not defined anywhere in H.R. 3685. Its inclusion raises a number of practical and legal concerns that remain unaddressed.

At the Subcommittee hearing on H.R. 2015, one of the witnesses, Mr. Lorber, expressed general concern regarding legal protections based on perception, which would be applicable to perception as applied to both sexual orientation and gender identity. In his own words, Mr. Lorber states:

> Section 4(e) is modeled after the ADA, 42 U.S.C. sect. 12112(b)(4) and is understandable when applied to defined characteristics. It is less than clear, however, when applied to non-inherent characteristics which may be self-perceived by the individual but not apparent to the employer. This will seem to create the potential for difficult enforcement and even more potentially difficult litigation since the underlying issue may be ephemeral or not readily apparent to the employer. Again, understanding the law makes compliance with the law an acceptable undertaking.[13]

The issue raised by Mr. Lorber highlights the fact that a perception of an individual being homosexual or bisexual is a highly subjective determination. An individual may "perceive" themselves to be homosexual, but this may not be apparent to others. Yet, notwithstanding the lack of clarity, this could still provide the basis for a discrimination claim. In the litigation context, determinations would have to be made involving consideration of evidence that is highly subjective, circumstantial, or contradictory. This would make it virtually impossible to make factual determinations with a high degree of certainty and confidence.

The potential impact on employers is profound. Even though employers would have difficulty in identifying non-inherent characteristics of a person, they would still be subjected to claims and potential liability. Even though an employer may not be capable of perceiving a person to be homosexual, if they have fifteen or more employees and are otherwise subject to this bill, they would have to defend themselves in lawsuits by having to prove a negative; that they did not "perceive" the person to be part of a protected class. Difficulty in enforcing this provision will undoubtedly lead to costly litigation. Or, in the alternative, employers—especially small em-

[13] Testimony of Lawrence Z. Lorber, Esq., Proskauer Rose LLP, Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007), at 3.

ployers with limited resources—may simply choose to settle these cases regardless of the merits, in order to avoid lengthy and costly litigation.

It is worth noting that the term "perceived" does not appear in any other civil rights legislation, including Title VII, which protects race, color, religion, sex, and national origin. As such, there is simply no reason to provide more statutory protection for one protected class over other protected classes. Although the Majority may claim that the ADA protects persons "regarded as" having a disability, that term is different from "perceived" and is applied to protect situations that are different from those to be addressed by this bill. Their analogy to the ADA is off the mark. For example, an employer may more easily be able to identify an apparent condition, for example the fact that a worker suffered a treatable heart attack, and "regard" that employee as being disabled. A person's sexual orientation may not be so readily apparent to an employer, and thus protection against discrimination based on "perceived" sexual orientation is not appropriate.

The Majority denies these valid concerns, by simply stating that the inclusion of this term is necessary to protect the rights of employees, and that employers could use the absence of this term to defend against lawsuits by claiming they did not know the "actual" sexual orientation of the individual. However, this explanation evades and ignores the expansion of statutory rights based on sexual orientation, beyond the current statutory protections for race, color, sex, religion and national origin.

At markup, Rep. Souder offered an amendment to strike the term "perceived" from the bill. This amendment was rejected. Inclusion of the statutory extension of protection on the basis of "perceived" sexual orientation is justification to reject this bill.[14]

Policies conditioning employment on marriage

Under the bill it is unlawful to condition employment, in a state in which a person cannot marry a person of the same sex, either on being married or being eligible to marry.[15] The Majority claims that this provision purports to protect against instances where an employer would use marriage as a pretext for discrimination. On its face, the inclusion of such a provision would suggest that employers routinely engage in such pretext, and that they regularly condition employment with their companies for the sole purpose of engaging in discrimination. Yet, the Committee heard no testimony, nor is there any history of case law, to suggest that employers use such a pretext in order to discriminate on this basis. As such, the provision is unnecessary, in the first instance.

Beyond the apparent lack of need for the provision, its practical implications are significant. Current law permits employers to adopt policies on the basis of behavior expectations, if such policies are applied equally to all employees. In some work environments—or for some specific jobs—it may be entirely appropriate to condi-

[14] If protection based on "perceived" gender identity were added to this bill, it would raise similar significant, and perhaps even greater, concerns regarding its application in the workplace. For example, questions regarding employee privacy and reasonable accommodation of transgendered individuals and coworkers would arise. Such an extension of the law, if attempted, is wholly inappropriate and should be rejected.

[15] H.R. 3685, Section 8(a)(3).

tion employment on marital status. Take, for instance, certain groups, such as Boys and Girls Ranch organizations, which provide residential treatment programs designed to help at-risk children and families. If this provision of the bill were enacted, these organizations could be precluded from using married couples for "house parent" positions. In short, the provision could prevent employers from hiring people they believe to be best-suited to the job.

In addition, employers could be precluded from implementing codes of ethics with respect to employees' behavior. One such example would be a policy that discourages any form of extra-marital conduct, both homosexual and heterosexual. Such codes are reasonable and legal under current law. The provision would limit the ability of employers from instituting such policies or others they believe to be in the best interest of their companies and their workers.

Finally, the provision undermines the ability of states to define, preserve and protect the institution of marriage. Only one state, Massachusetts, permits same-sex marriage. The other 49 states currently have chosen to prohibit same-sex marriage. This provision directly challenges and circumvents independent state determinations to define and protect their definitions of marriage. At least one commentator, the American Center for Law and Justice (ACLJ), in an October 1, 2007 memorandum to the Chairman and Ranking Member of the Committee's HELP Subcommittee, highlighted this concern.[16]

In order to maintain the current legal right of employers to maintain codes of conduct, and to preserve 49 independent state determinations regarding the definition of marriage, Republican Rep. Souder offered an amendment to strike the provision at markup. Unfortunately, this amendment was rejected by the Majority.

Protection from retaliation

The bill makes it unlawful to discriminate or retaliate against an individual because the individual opposed any practice made unlawful by the bill, or participated in a proceeding relating to the bill. However, the bill fails to protect those who may not agree with employer policies relating to this Act, because of sincerely held beliefs regarding sexual orientation. This creates an imbalance with respect to protections from retaliation by excluding certain individuals from those protections.

This is not some theoretical concern, proffered merely to provide yet another reason to oppose this bill. In fact, Members were provided with substantial anecdotal evidence of instances where employees were disciplined, or even terminated, for failing to embrace their employers' policies, irrespective of whether those policies conflicted with the employee's sincerely held religious beliefs.

It is simply unfair to provide legal protections relating to sexual orientation, without also protecting the rights of individuals to be free from retaliation for disagreeing or refusing to consent to employer policies on this issue. Certain people, because of sincerely held beliefs, may have great difficulty consenting to employer rules,

[16] See, Comments of the ACLJ on the Employment Non-Discrimination Act of 2007, addressed to the Hon. Robert Andrews, Chairman, Hon. John Kline, Ranking Member (October 1, 2007).

policies—such as diversity training programs—related to treatment of sexual orientation in the workplace. It is unfair to leave these employees open to punishment or retaliation, while at the same time providing new protections to another class of workers. Further, freedom of speech and free exercise of religious beliefs may be at issue. The failure to provide protections against retaliation would place a severe, unjustified, and wholly unnecessary burden on an individual.

In an effort to restore this balance of protections, Rep. Souder offered an amendment that would have clearly and unambiguously extended protection against retaliation to employees who, because of burdens on sincerely held beliefs, may choose not to provide consent to employer policies on this issue. Unfortunately, the Souder amendment was rejected by the Committee.

Protection against discrimination based on gender identity

Although absent from the bill under consideration, H.R. 3685, the issue of extending non-discrimination protections based on gender identity is clearly on the agenda for future consideration by the House. In fact, several Members at markup expressed the intent to offer an amendment to this bill to extent such protection prior to or during a House Floor vote on this bill. Accordingly, it is appropriate to raise concerns regarding this issue at this time.

Evidence presented for the record at the September 5, 2007 HELP Subcommittee hearing on H.R. 2015 raised numerous concerns associated with gender identity. The problems associated with providing protection based on "perceived" status are more compounded in the case of gender identity. The question of providing reasonable accommodation for such employees is extremely problematic. Employee privacy issues are significant, Litigation concerns abound.

Simply put, it is premature to consider extending protections based on gender identity, a fact grudgingly acknowledged by the bill's own sponsor. This becomes more apparent in light of the sparse legislative history and consideration of this issue. Any attempt to amend this bill to add protections based on gender identity should be rejected by the House.

CONCLUSION

As noted repeatedly throughout these Views, Committee Republican Members strongly oppose intentional discrimination in the workplace. We also believe the protections found in Title VII of the Civil Rights Act to be, on balance, sufficient for guarding against such discrimination. We therefore find H.R. 3685, the Employment Non-Discrimination Act, to be unnecessary in the first instance. Moreover, we find many of the bill's provisions, and the policy questions they raise, to be troubling. Among its more obvious flaws, the bill fails to provide an adequate exemption for religious organizations, including many faith-based educational institutions. It also includes questionable protections based on "perceived" sexual orientation, which will result in great uncertainty as to the meaning and application of this term, leading to costly and unnecessary litigation. The bill also precludes employers from regulating workplace conduct, despite the lack of evidence supporting the need for such

a provision and the adverse impact on employers' ability to institute policies for the benefit of companies and their workers. Finally, the bill fails to provide a proper balance with respect to retaliation, unfairly according protections to one class of employees but not others. In every instance, Republican Members offered viable and entirely reasonable proposals to address these concerns. Unfortunately, those proposals were rejected by the Majority. The result of these legislative machinations is a bill that, however well-intended, favors a certain protected class of individual over other classes already protected under current civil rights law, and over individuals with sincerely-held moral and religious beliefs. It is for these reasons that Republicans opposed the bill during its consideration by the Committee on Education and Labor, and why we urge its defeat when considered by the full House of Representatives.

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