THE EMPLOYMENT NON-DISCRIMINATION ACT OF 2007 (H.R. 2015)

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

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THE EMPLOYMENT NON–DISCRIMINATION ACT OF 2007 (H.R. 2015)

Wednesday, September 5, 2007
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 10:33 a.m., in Room 2175, Rayburn House Office Building, Hon. Robert Andrews [chairman of the subcommittee] presiding.

Present: Representatives Andrews, Kildee, McCarthy, Tierney, Wu, Holt, Sanchez, Loebsack, Hare, Clarke, Courtney, Kline, Davis of Tennessee, Price, and Walberg.

Also present: Representative Neal.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jody Calemine, Labor Policy Deputy Director; Michael Gaffin, Staff Assistant, Labor; Jeffrey Hancuff, Staff Assistant, Labor; Brian Kennedy, General Counsel; Thomas Kiley, Communications Director; Megan O'Reilly, Labor Policy Advisor; Michele Varnhagen, Labor Policy Director; Robert Borden, Minority General Counsel; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Legislative Assistant; Victor Klatt, Minority Staff Director; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Ken Serafin, Minority Professional Staff Member; and Loren Sweatt, Minority Professional Staff Member.

Chairman ANDREWS [presiding]. Good morning. The subcommittee will come to order. I would ask everyone to please take their seats.

Good morning. This morning we would like to welcome our witnesses, especially our colleagues that either are with us or will be with us shortly. And we would like to thank the members of the public who are present. I notice the presence of our friend and colleague from Massachusetts, Mr. Neal, who has an outstanding constituent who is going to testify on the second panel, as I understand it.

It is a part of our law—and, I think, more importantly, a part of our national principles—if a person goes to apply for a job as a bank teller or a computer programmer or a bus driver, the employer can't say, "You can't have this job because you are a Catholic." Or "I won't hire you because you are Italian." Or "We only hire men for this job, not men and women."

Why should it be any different if the person applying for that job is a person who has faced discrimination based on gender identity or a person who has faced discrimination based upon sexual orientation? Why should it be any different? That is really the purpose of this hearing this morning.

I think the answer is resounding; it should be no different at all. Whether you are Italian or Catholic or female or gay or lesbian has nothing to do with how well you will do the job. And whether you get the job and whether you are promoted and how you do in the job should depend upon your qualifications and your performance and your work ethic, none of those other extraneous, irrelevant factors.

Now, the sad reality is that if you live in 31 states with respect to sexual orientation discrimination, and 39 states with respect to gender identity discrimination, the law doesn't protect you. If you apply for that bank teller job and you are gay or lesbian, in 31 states the employer can say, "I am sorry, but we don't hire gay people—gay men or lesbian women—to be bank tellers or computer programmers or bus drivers." And it is legal.

I think it shouldn't be. And that is why I am one of the cosponsors of the bill that is before us today that our colleagues are going to speak about.

Now, we will hear arguments, I think, to the following effect: We will hear arguments that no one is in favor of discrimination. And in my heart I think that is true of my colleagues—almost all my colleagues on both sides of the aisle. I think this is an institution where people do not want to practice or live discrimination.

But, you know, the test is not our intentions, it is our results. And, again, we have to start from the reality that in 31 states, for people faced with sexual orientation discrimination, there is no legal protection. In 39 states, for people faced with gender identity discrimination, there is no legal protection.

Significant numbers of people report having experienced prejudice in the process of seeking a job or going after a promotion. The studies are compelling in this regard.

And I think what is most important is the question of what this says about our country; not what it says about the employer who is denying someone a job because of their sexual orientation or other irrelevant characteristic. Or not even what it does to the person who feels the pain of that discrimination, terrible as that is.

What does it say about our country that we are a place that knows that this discrimination is going on but chooses to look the other way? It is not flattering. It is not what we want said about our country.

Now, beyond the obvious moral issue—the dehumanizing effect of treating someone as a category rather than as a person, of saying to that person who wants to be a bank teller or bus driver or computer programmer that what matters is not how smart you are or how well you do this job, but whom you love and how you organize your family—beyond the dehumanizing effect of that, there is another strong argument for the adoption of this bill. And it is the fact that in the global economic competition, this country cannot afford to leave any of its talented people out of the process of working.

In a country that is in an increasingly acute global competition in virtually every industry, virtually every field, how can we afford to say that some of our best and brightest and most productive and industrious people will be left out because of whom they love and because of how they choose to organize their families?

I think this bill is a moral imperative, but I think it is more than just a moral imperative. I think it is an economic necessity.

I think a country like ours that is in this increasingly acute global competition cannot afford to shut the door on anybody who is ready and willing and talented and able to contribute to an enterprise or an institution or a profession or a business or to this country's economy. That is what I believe this is about.

So we want to see the day come when you hand in your job application for a bank teller or a computer programmer or a bus driver, and the question is, "How well can you drive the bus? How much do you know about the software you are going to program?" Not, "Who are you in terms of your personal and private life?"

There was a vigorous debate in this country just over 40 years ago about whether employers should be able to say to someone, "We won't hire you because you are Catholic." "We won't hire you because you are Italian." "We won't hire you because you are female." And that debate ended, and a strong law was enacted in the middle of the 1960s.

It is time that that law expanded its reach to other people whose characteristics have equally little to do with their ability to drive a bus or program a computer or work in a bank. It is time that that law reached out and humanized and included all people who are willing and able to work. And that is what this morning's hearing is about.

I am going to proceed now to ask my friend, the ranking member of the subcommittee, Mr. Kline, from Minnesota, for his statement.

We will then invite the first of our colleagues, Ms. Baldwin, to testify. I know she is going to be joined by two of our other colleagues, and we will proceed.

Mr. Kline, welcome back from your well-deserved break.

Prepared Statement of Hon. Robert E. Andrews, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning and welcome to the Health, Employment, Labor and Pensions Subcommittee hearing on H.R. 1015, the Employment Non-Discrimination Act.

Today marks a historic moment in the committee's history. Despite being the primary committee of jurisdiction, this is the first time our committee has considered this important piece of legislation that would extend federal employment discrimination protections to workers based on sexual orientation and gender identity, in addition to protection that already exists for race, gender religion, national origin, age and disability.

The legislation we will consider today, also known as ENDA, is a bill about fairness and access to equal opportunity for employment to gays, lesbians, bisexual, transgender and heterosexuals. ENDA would prohibit an employer from discriminating against an employee based on their sexual orientation or gender identity. Although the bill provides basic protections for everyone, it focuses on protecting gays, lesbians, bisexuals and transgender people from employment discrimination.

Today, we will hear firsthand from individuals who have experienced employment discrimination based on their sexual orientation. We will also hear from an academic researcher who has conducted an extensive analysis of several surveys about employment sexual orientation discrimination.

The problem of discrimination based on sexual orientation is real and it is our goal today to examine a solution.

I would like to take this opportunity to thank the sponsors of ENDA for testifying before us today. Congressman Barney Frank and Congresswoman Tammy Baldwin have vigorously worked to bring this legislation before us today and I admire them for their courage and steadfast determination.

The late Coretta Scott King said, "Americans who believe in freedom, tolerance and human rights have a responsibility to oppose bigotry and prejudice based on sexual orientation." We intend to carry out that vision today.

I would like to thank all the witnesses for their testimony today and look forward to hearing from them. Thank you.

Mr. KLINE. Thank you, Mr. Chairman. Good to see you, as well.

Good morning, all. I would like to start by thanking our witnesses. We have two great panels. And I certainly want to thank our colleagues, some of whom are here and some of whom will be joining us shortly.

You know, this is a legislative hearing. And I am delighted that we are having one. Too many times in the past several months I have felt we have not had enough hearings, and hearings that haven't been focused on specific legislation. So I am glad that we are having this.

A hearing such as this is a tool that allows us to give a really thorough, thoughtful consideration to proposals that will impact the American people. These hearings allow us to understand a bill's intent. But, as the chairman said, it is not enough to understand the intent. We need to explore potential consequences, both intended and unintended, that may result if such a law is enacted.

The legislation we are here to consider, the Employment Non-Discrimination Act of 2007, has, as its core, a principle to which I believe we are all—or almost all—committed: That no employee should be subject to discrimination. So the intent, I think, is not the issue here. We really need to explore the consequences, intended and unintended.

More specifically, this bill aims to prohibit organizations from discriminating in their employment practices against individuals on the basis of their sexual orientation or gender identity. The bill before us today is broader in its scope than versions of the legislation introduced in previous Congresses, a fact that makes today's hearing all the more important.

As with any new federal mandate, I believe we must begin consideration of this legislation by determining whether it is necessary. Is there evidence that this type of discrimination is occurring? Are current laws and employer policies insufficient to protect the rights of employees?

We must then ask what the practical impact of the legislation would be.

Would it have the intended effect of preventing discrimination? Would it create unnecessary burdens on employers and employees, or open the door to frivolous litigation? Would it interfere with an employee's right to privacy? Is it consistent with other state and federal antidiscrimination laws, or would it establish a new framework that could be confusing or contradictory?

These are questions that must be answered before legislation is enacted.

Numerous laws have already been enacted at the state and federal level to prevent discriminatory employment practices. It is my

view that the role of this subcommittee, followed by the full Education and Labor Committee and the Congress, is to build upon those laws, where needed. It is also our role to determine when new laws are not needed and to avoid legislating for its own sake.

I appreciate the opportunity to consider these questions as we take a closer look at this act.

Today's hearing is an important first step. And I look forward to the testimony that will be offered by our witnesses on both panels. I am pleased that we will hear multiple perspectives on this important topic, and that among them will be a discussion of the real-world impact that such a mandate will have on an organization's employment practices and prerogatives.

The legislation, as currently drafted, raises a number of concerns. And I am pleased that several of them will be addressed today.

For example, I understand that previous versions of this bill included a blanket exemption for religious organizations, but the bill before us includes much more narrowly-crafted exemptions.

The bill also includes a new protected class for actual or perceived gender identity, yet it provides a definition that is vague and could result in significant uncertainty.

The requirements for shower and dressing facilities, for example, could prove problematic as well, raising potential privacy concerns for employees, as well as other challenges.

I would also like to address the inclusion of an exemption from ERISA preemption in the bill before us. It is my understanding that Representative Frank, who will be joining us shortly to sponsor the legislation, has made it clear that his intent is to remove this provision when the bill is considered. And I certainly hope that is the case. I appreciate Mr. Frank's recognition of the unprecedented policy shift that exempting state and local rules from preemption under ERISA would entail.

I look forward to a continued dialogue with Chairman Andrews and Mr. Frank on how best to achieve our shared goal of ensuring that employees are not subject to discrimination. At the same time, I hope we will give due consideration to the laws currently on the books to protect the rights of employees and ensure that a well-intentioned effort does not result in harmful, unintended consequences.

With that, Mr. Chairman, I yield back the balance of my time.

Prepared Statement of Hon. John Kline, Senior Republican Member, Subcommittee on Health, Employment, Labor, and Pensions

Good morning. I'd like to begin by thanking the witnesses for being here and expressing my appreciation to Chairman Andrews for convening this hearing. A legislative hearing is an important tool that allows us to give thorough, thoughtful consideration to proposals that would impact the American people. These hearings allow us to understand a bill's intent, and explore potential consequences, both intended and unintended, that may result if such a law was enacted.

The legislation we are here to consider, the Employment Non-Discrimination Act of 2007, has at its core a principle to which I believe we are all committed: that no employee should be subject to discrimination.

More specifically, the bill aims to prohibit organizations from discriminating in their employment practices against individuals on the basis of their sexual orientation or gender identity. The bill before us today is broader in its scope than versions of the legislation introduced in previous Congresses, a fact that makes today's hearing all the more important.

As with any new federal mandate, I believe we must begin consideration of this legislation by determining whether it is necessary. Is there evidence that this type of discrimination is occurring? Are current laws and employer policies insufficient to protect the rights of employees?

We must then ask what the practical impact of the legislation would be. Would it have the intended effect of preventing discrimination? Would it create unnecessary burdens on employers and employees or open the door to frivolous litigation? Would it interfere with employees' right to privacy? Is it consistent with other state and federal anti-discrimination laws, or would it establish a new framework that could be confusing or contradictory? These are questions that must be answered before legislation is enacted.

Numerous laws have already been enacted at the state and federal level to prevent discriminatory employment practices. It is my view that the role of this subcommittee, followed by the full Education and Labor Committee and the Congress, is to build upon those laws where needed. It is also our role to determine when new laws are not needed, and to avoid legislating for its own sake. I appreciate the opportunity to consider these questions as we take a closer look at the Employment Non-Discrimination Act of 2007.

Today's hearing is an important first step, and I look forward to the testimony that will be offered by our witnesses. I am pleased that we will hear multiple perspectives on this important topic, and that among them will be a discussion of the "real world" impact that such a mandate will have on organizations' employment practices and prerogatives.

The legislation as currently drafted raises a number of concerns, and I am pleased that several of them will be addressed today. For example, I understand that previous versions of this bill included a blanket exemption for religious organizations, but the bill before us includes much more narrowly crafted exemptions. The bill also includes a new protected class for actual or perceived "gender identity," yet it provides a definition that is vague and could result in significant uncertainty. The requirements for shower and dressing facilities could prove problematic as well, raising potential privacy concerns for employees as well as other challenges.

I'd also like to address the inclusion of an exemption from ERISA preemption in the bill before us. It is my understanding that Representative Frank, the sponsor of the legislation, has made clear his intent that this provision be removed if and when the bill may be considered. I certainly hope that is the case, and I appreciate Mr. Frank's recognition of the unprecedented policy shift that exempting state and local rules from preemption under ERISA would entail.

I look forward to a continued dialogue with Chairman Andrews and Mr. Frank on how best to achieve our shared goal of ensuring that employees are not subject to discrimination.

At the same time, I hope we will give due consideration to the laws currently on the books to protect the rights of employees, and ensure that a well-intentioned effort does not result in harmful unintended consequences.

With that, I yield back the balance of my time.

Chairman ANDREWS. Thank you.

By unanimous consent, the opening statements of all other members of the committee will be inserted into the record, without objection.

Prepared Statement of Hon. Linda T. Sánchez, a Representative in Congress From the State of California

Thank you, Chairman Andrews. As an original co-sponsor and strong supporter of the Employment Non-Discrimination Act, I appreciate your work to put together this hearing so that we can learn more, and the American people can learn more, about the employment discrimination that takes place here in America—legally—every day. More importantly, this hearing gives us an opportunity to do something about it.

Ending employment discrimination against gay, lesbian, bisexual, and transgender people by enacting ENDA is such a common sense solution, and consistent with the American principles of freedom, justice, and equality that it's amazing to me that in 2007, we still haven't passed this bill.

ENDA is the most important civil rights bill that we will have the opportunity to pass during the current Congressional cycle.

Americans believe that if you work hard and do your job, you should be rewarded. And, Americans believe that this basic principle should apply across the board.

Poll after poll reveals that an overwhelming majority of Americans agree someone shouldn't lose a job or be denied a promotion simply for being gay or lesbian.

Americans also believe that it is already illegal to do so. Unfortunately, in many states, it isn't. That's why today's hearing is so important.

Passing ENDA is consistent with the other work we are doing in this Committee, and throughout the House, to protect America's workers. We have acted to increase the minimum wage, to make college more affordable, and to strengthen Title VII so that companies cannot hide gender discrimination behind secretive wage policies.

We have acted to ensure that employers provide mental health care as part of their health benefits and to promote wage parity between men and women. Now, we are acting to protect gay, lesbian, bisexual, and transgender workers from on-the-job discrimination. It's been a long time coming.

It is NOT OK to deny someone a job, a raise, or a promotion because of his or her real or perceived sexual orientation or gender identity. And now is the time for Congress to say so. After more than thirty years of struggle, we have a chance to give this important issue the attention it deserves.

The American people are counting on us to make the law consistent with our values. I am proud that, as a member of this Committee, I can help make that happen.

Again, thank you Mr. Chairman.

Chairman ANDREWS. I am pleased to welcome three of our colleagues to come testify about this bill this morning.

Tammy Baldwin represents the 2nd Congressional District of Wisconsin. She has quickly developed a reputation as a member who is accessible to people of all different ideologies and all different points of view. She is respected throughout the House.

She served as an attorney before she came to the Congress, represented clients who have dealt with many of the situations that are the subject of this bill.

She has excelled in work ranging from agriculture to energy issues. And we are very, very pleased that she serves also, I believe, on the Energy and Commerce Committee. Is that correct? A committee almost as important as this one. [Laughter.]

Tell Mr. Dingell that we said that.

And we are very pleased that you are with us this morning, and we recognize Representative Baldwin.

STATEMENT OF HON. TAMMY BALDWIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Ms. BALDWIN. Thank you, Chairman Andrews and Ranking Member Kline and members of the committee, for the opportunity to testify today. I am here, clearly, as a strong supporter of H.R. 2015, the Employment Non-Discrimination Act of 2007.

As my colleagues know, more than 40 years ago, we enacted the Civil Rights Act of 1964 that banned employment discrimination in certain circumstances. We did so based on a clear record demonstrating that some employers were judging employees by factors wholly unrelated to their work performance, their skills and their abilities. We found, as a nation, that when employer judgments were based upon race, color, sex or national origin, these discriminatory decisions should be unlawful.

Today, we can point to a clear record demonstrating further employment discrimination based on sexual orientation and gender identity. And I think it is high time that we, as a nation, declare this sort of discrimination unlawful, as well.

Twenty-five years ago my own state of Wisconsin was the first state in the nation to add sexual orientation to its antidiscrimination statutes. At that time—and we are talking about 1982—only 41 municipalities in this country and 8 counties offered limited protections against discrimination based on sexual orientation.

Wisconsin's efforts to pass the nation's first sexual orientation antidiscrimination statute were supported by a broad, bipartisan coalition, including members of the clergy, religious denominations, medical and professional groups. The measure was signed into law by a Republican governor, Lee Sherman Dreyfus. And he signed the bill based on his belief that the success of municipal ordinances providing similar protections spoke for the need for a statewide prohibition.

Now, prior to my election to the Wisconsin state legislature back in 1992, I practiced law at a small, general practice law firm in Madison. And, on occasion, I represented clients in employment discrimination cases. Through this work, I was able to see firsthand the importance of Wisconsin's landmark antidiscrimination statute, and the positive effect that it had on our state.

I represented a number of clients who were fired from their jobs because of their sexual orientation. And Wisconsin's statute was vital in affording them the employment protection that I think all Americans deserve.

I was struck during my time as a practicing attorney by the depth of the emotional and financial devastation and consequences of employment discrimination.

My clients were frequently fearful and ashamed. They were talented and hard workers. And they had had their livelihood taken away for reasons wholly unrelated to their talents, their drive, they loyalty, their commitment and their skills. But the fact that Wisconsin had a law that said that this type of discrimination was wrong gave them hope and helped them find the courage they needed to publicly confront the injustice that they had experienced.

Since Wisconsin passed its statute 25 years ago, 18 additional states and the District of Columbia have passed similar protective measures. And we have a chance to now set a higher standard for our nation by passing 2015.

As my colleagues know, the Employment Non-Discrimination Act, or ENDA, will provide basic protections against workplace discrimination on the basis of sexual orientation and gender identity. ENDA does not create special rights. It simply affords to all Americans basic employment protection from discrimination based on irrational prejudice.

I would like to take a moment to focus on the protections in ENDA that prohibit workplace discrimination on the basis of gender identity, because I have found that there is a great deal of question and confusion about this term.

Gender identity is a person's internal sense of his or her gender. In the vast majority of our population, an individual's gender identity and his or her birth sex match. But for a small minority of people, gender identity and birth sex conflict.

Because an individual was born one sex and presents to the world as another, or in a way other than people think is consistent with how a man or a woman should present themselves, he or she

can face many forms of discrimination, from physical violence to employment discrimination.

ENDA contains language that makes it clear that an employer may establish and enforce reasonable and otherwise lawful dress and grooming standards for employees. But it also provides assurances that aspects of a person's gender identity and gender expression cannot be the basis for workplace discrimination. ENDA ensures that an employer cannot fire an employee solely because she is a woman with a masculine walk or a man with an effeminate voice.

In conclusion, I want to underscore that the purpose of ENDA is to ensure that hardworking Americans cannot be denied job opportunities, fired or otherwise discriminated against just because of their sexual orientation or gender identity. There is nothing more American than ensuring that people should have equal job opportunities.

And I want to thank Congressman Frank for his leadership on the issue, also acknowledging Congresswoman Pryce and Congressman Shays for their commitment on this issue.

And, again, I sincerely appreciate the opportunity to testify before you on this important matter today. Thank you.

[The statement of Ms. Baldwin follows:]

Prepared Statement of Hon. Tammy Baldwin, a Representative in Congress From the State of Wisconsin

Thank you Chairman Andrews, Ranking Member Kline and members of the Committee for allowing me the opportunity to testify today.

I am a strong supporter of H.R. 2015, the Employment Non-Discrimination Act of 2007.

As my colleagues know, more than 40 years ago, we enacted the Civil Rights Act of 1964 that banned employment discrimination in certain circumstances. We did so based on a clear record demonstrating that some employers were judging employees by factors wholly unrelated to their work performance, skills and abilities.

We found—as a nation—that when employer judgments were based upon race, color, religion, sex, or national origin, these discriminatory decisions should be unlawful.

Today, we can point to a clear record demonstrating further employment discrimination based upon sexual orientation and gender identity, and it is high time that we as a nation declare this sort of discrimination unlawful, as well.

Twenty-five years ago, my own state of Wisconsin was the first in the nation to add sexual orientation to its anti-discrimination statutes. At the time, and this was in 1982, only 41 municipalities and 8 counties in the entire United States offered limited protections against discrimination based on sexual orientation.

Wisconsin's efforts to pass the nation's first sexual orientation anti-discrimination statue were supported by a broad, bipartisan coalition, including members of the clergy, various religious denominations, medical, and professional groups. The measure was signed into law by a Republican Governor, who based his decision to support the measure on the success of municipal ordinances providing similar protections.

Prior to my election to the Wisconsin Assembly in 1992, I practiced law at a small general practice law firm. On occasion, I represented clients in employment discrimination cases. Through this work, I was able to see first-hand the importance of Wisconsin's sexual orientation anti-discrimination statute and the positive effect it had on our state. I represented a number of clients who were fired because of their sexual orientation and Wisconsin's sexual orientation anti-discrimination statute was vital in affording them the employment protection that all Americans deserve.

Since Wisconsin passed its statute in 1982, nineteen additional states and the District of Columbia have passed similar protective measures. And we now have a chance to set a higher standard for our nation by passing H.R. 2015.

As my colleagues know, the Employment Nondiscrimination Act, or ENDA, will provide basic protections against workplace discrimination on the basis of sexual

orientation or gender identity. ENDA does not create "special rights." It simply affords to all Americans basic employment protection from discrimination based on irrational prejudice.

I'd like to take one moment to focus on the protections in ENDA that prohibit workplace discrimination on the basis of gender identity, because I've found that there is a great deal of confusion about this term.

Gender identity is a person's internal sense of his or her gender. In the vast majority of the population, an individual's gender identity and his or her birth sex "match." But for a small minority of people, gender identity and anatomical sex conflict. Because an individual was born one sex and presents themselves to the world as another—or in a way that other people may think is inconsistent with how a man or a woman should present themselves—he or she can face many forms of discrimination.

ENDA contains language that makes it clear than an employer may establish and enforce reasonable and otherwise lawful dress and grooming standards for employees. But it also provides assurances that aspects of a person's gender identity and gender expression cannot be the basis for workplace discrimination. ENDA ensures that an employer cannot fire an employee solely because she is a woman with a "masculine" walk or a man with an "effeminate" voice.

In conclusion, I want to underscore that the purpose of ENDA is to ensure that hard-working Americans cannot be denied job opportunities, fired or otherwise be discriminated against just because of their sexual orientation or gender identity. There is nothing more American than ensuring that people should have equal job opportunities.

I want to thank Congressman Frank for his leadership on this issue. I also want to thank Congresswoman Pryce and Congressman Shays for their commitment to this issue.

Once again, I sincerely appreciate the opportunity to testify today and look forward to the discussion.

Thank you.

Chairman ANDREWS. Tammy, we thank you very much.

There are certain members that, when they rise to take the floor of the House, command the attention of just about everyone in the House.

I am reminded of my predecessor as chairman of this subcommittee, Sam Johnson from Texas, for example. Whenever there is a military issue, a foreign policy issue, Sam, given his incredible heroism for this country as a POW, when he gets up, people listen to what he has to say. And Barney Frank is a very similar kind of member.

Whether he is talking about banking issues, housing, foreign policy, civil rights, Barney is one of those members that, when he rises to the floor to speak, people who agree with him and people who disagree with him, stop and listen to what he has to say.

He is chairman of the Financial Services Committee, wrestling with some very difficult economic issues as we speak.

He has made a life and a career out of advocating for civil rights for all people. He is the lead sponsor of the bill in front of us. And it is our honor to welcome him to the committee this morning.

Welcome, Barney.

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. FRANK. Thank you, Mr. Chairman. I am very appreciative of what you say.

And it is true. As members know, we are subject to conflicting demands.

I just left the hearing of the Financial Services Committee on the issues in the financial market, which I am chairing, so I am very

torn today. And I got up this morning, I didn't want to sort of play favorites in my responsibilities. So that is why I appear before you today in a pinstripe suit and a lavender tie. I figured that would be kind of a sartorial compromise that could reach everything. [Laughter.]

I am very pleased that the subcommittee is taking this up. And I am pleased you heard from my colleague, Ms. Baldwin, who has been a pioneer in helping this country deal with questions of sexual orientation.

The bill before us is a very straightforward one. But I do want to begin with one acknowledgment, and that is: I requested Police Officer Michael Carney, who is seated in the front row, to testify. And there are people who say, "Well, what do you need this law for? What good will it do?" I asked him to testify because he is an example of what the law can do.

He was a police officer, as he will tell you. He left the force because of personal problems that grew out of his being a closeted gay man, a subject on which I am far more of an authority than I wish I was.

And he and several others who had left the force applied a few years later for readmission. They were all admitted except Mr. Carney—because he had come to terms with being gay, had cleaned up the behavioral issues that had accompanied that—and he was denied readmission when everybody else was allowed.

And because Massachusetts had passed a law signed and administered under a Republican governor—started first by Michael Dukakis but signed by Governor Weld—that law was used and he was reinstated. And he has since then been an extraordinarily able member of the police department. And you will note that he is here with the full support of his union and others.

But one thing I want to mention particularly.

There is an article in today's Boston Globe, which I will submit for the record. Springfield Police Commissioner Edward Flynn said "The department supports Carney. This is an important social issue and it is important that a credible police officer come out and speak about it."

What is relevant is that Mr. Flynn is now the police commissioner in Springfield but, as my colleague Mr. Tierney knows, prior to that, he was the secretary of public safety for the Commonwealth of Massachusetts, appointed by Governor Mitt Romney.

Now, I do not mean to infer that because Governor Mitt Romney appointed this man, Presidential Candidate Mitt Romney would want to be associated with that. But it is relevant, it seems to me, that the appointee as secretary of public safety of Governor Mitt Romney is one of the men who endorses and enabled Officer Carney to be here.

The principle of the bill is very simple. In America, if you apply for a job and are working on that job, you should be judged by your job performance only. That is it.

Now, frankly, one of the difficulties we have encountered when we have pushed for laws like this is people say, "Well, what are you really up to," because that must already be the law.

Frankly, a large number of Americans not conversant with these issues instinctively say, "Well, that must already be the law. How

can you fire someone just because she is a lesbian? I mean, she is a good cook at Cracker Barrel"—which is one of the cases we had—"and she never caused any trouble. And you fired her because she is a lesbian. That must not be fair."

But as members know, fair isn't necessarily illegal or legal, and it is not now. It is perfectly legal in most of the states of this country to fire someone, or otherwise discriminate against that individual in employment, because of his or her sexual orientation wholly outside of any job-related issues.

Now, I say that because nothing in here gives you any permission to misbehave on the job, to do anything on the job that violates any of the rules. It explicitly says no affirmative action.

I believe in affirmative action in the race area. But I think that the cases of race discrimination and sexual orientation discrimination differ in many ways. And this explicitly disavows any affirmative action.

It says you do not have the disparate impact for members who are—and I noticed one of the witnesses said, "Well, you don't do that well enough." Fine, fix it up more.

Because this is not an effort to have affirmative action—by the way, you couldn't do affirmative action because we still respect people's right of privacy. And it would be impossible because the only way you could do a disparate impact would be to compel everybody to tell his or her sexual orientation, which we certainly don't want to have happen.

So you couldn't even begin to make a disparate impact case unless you got the sexual orientation of everybody at the workplace. And I hope nobody wants to see that. So it explicitly disavows affirmative action.

It also tries to respect the autonomy of religious organizations. Again, I noticed some of the religious organizations say it doesn't do well enough. Fine, let us work together to do it better. The principle that we should not impinge on them is there.

What that leaves us with is you don't fire someone, you don't refuse to hire someone, because he or she is gay or lesbian.

And people have said, "Well, what about my right to my opinion?" People have their rights to their opinions. People have a right to be racist. People have a right to dislike certain religions.

What you don't have a right to do, I believe, in our system, is in your economic interactions with people be prejudiced against them on that.

In your personal life, who you associate with, who comes to dinner at your house, all of those are left untouched by this bill. It is narrowly on employment.

And then we have the issue that my colleague so ably discussed of the transgender. And I understand that this is a new issue for people.

There are people who are born with the physical characteristics of one sex who strongly identify with the other. Some of them have a physical change. Some of them don't.

Let me make a plea to all of my colleagues. These are people—think what it must be like to be born with that set of feelings. Think what it must be like, think what stress, what agony you go through to defy society's conventions to the extent where you make

that kind of a statement. This is something people are driven to do.

Is there any reason why any of us should make those lives of those people more difficult than they already are? Obviously, these are people who are coping. And things are getting better. Things are better.

When I was younger, a lot of things were difficult that are less difficult today. But what we say here is, "If someone has these feelings, if someone is born with one set of characteristics, strongly identifies the other way, should you fire them? You deny them a promotion? You say no matter how good your job is that makes me uneasy, so out you go?"

Now, we say in here you can make rules that those people have to abide by, that they have to dress in a gender-consistent way. We say in there, yes. There is an issue—we shouldn't have to talk about it, but we do—what happens when they are all in the shower together? You know, you can segregate bathrooms. A shower is a little difficult. This says, "No. People don't have the right to go into open places where people are unclothed in a way that is going to embarrass people."

Now, we talk about an accommodation. Again, people have said, "Well, you didn't do that well enough."

There is room for some fine-tuning there, but on the fundamental principle—you know, particularly for those people who are themselves made the most uneasy by the transgender issue—and, I must say, having worked with a lot of transgender people, I would tell my friends, you get over it pretty quick, because what you find out is you are dealing with human beings like all the rest of us, normal human beings who have the same emotions and needs and strengths and weaknesses of all of us.

But for those who are not yet at the point of comfort with them, do we really feel driven to make lives harder for these people who already have, through no—and, by the way, you know, I just want to deal with this choice issue.

No one, I believe, in the history of the world has said, "You know what? Life is too easy. I think, although I was born a woman, I am going to act like a man. I think that would be a real lark. I think I will just go through life that way and invite physical abuse and invite all kinds of ridicule." So that is all we are saying.

And let me say here, a final appeal. If there is any institution that ought to understand this, it is here.

Let me tell you what I know. This institution—we, as members, are very well served by a large number of gay and lesbian employees. And many of my colleagues on the Republican side know that and have, to their credit, employed them.

And I might say—you know, I wouldn't have said this a couple of years ago, but after the recent incident, it is now public.

For years, the clerk of this House was a gay man, a Republican named Jeff Trandahl whose orientation became public because he behaved in a very honorable and admired way on the issue of our former colleague, Mr. Foley. And the Ethics Committee saluted Mr. Trandahl.

You know, Jeff Trandahl is an example. And I know Jeff well, and he is a friend whom I respect and admire. And look at the role he played.

How much easier it would have been, maybe some troubles could have been avoided, if there were legal protections that he and others would have had so they would not be subject to prejudice.

I will acknowledge, yes, as Mike Carney's example will show, as my own example will show, people say, "Well, you know, some of these gay people are misbehaving."

Yes. Living a life that you are trying to hide from others is not a prescription for model behavior. And you do dumb things in the closet sometimes. It is not an excuse. It is your fault when you do them.

But it is in society's interest to diminish that pressure. And you can do that today.

Thank you.

[Newspaper article submitted by Mr. Frank follows:]

[From the Boston Globe, September 5, 2007]

Gay Officer to Speak Out for Job Rights Bill

U.S. Measure Would Forbid Discrimination

By MARIA CRAMER, *Globe Staff*

Springfield Patrolman Michael Carney decided to hide his homosexuality immediately after he graduated from the police academy.

At a graduation party, he saw a fellow officer come out of the men's room with a bloody nose. A police supervisor had beaten him up when he learned the officer had brought a male friend to the party, Carney recalled.

For years, Carney never spoke about his attraction to men. To deflect suspicion, he would make homophobic remarks in front of fellow officers.

But today, 25 years after he became a police officer, he will speak in the most public way about his sexual identity. He will ask Congress to pass the Employment Non-Discrimination Act, a bill US Representative Barney Frank, a Democrat, introduced in April that would make it illegal to fire gays and lesbians because of their sexual orientation.

"My objective is to support those who are closeted as well as out," said Carney, who will testify in full uniform. "I feel when I speak I speak for those who can't speak for themselves."

Springfield Police Commissioner Edward Flynn said the department supports Carney.

"This is an important social issue and it's important that a credible police officer come out and speak about it," he said.

Carney, 47, will testify before the Education and Labor Committee about the bill, which also would make it illegal to refuse to hire someone based on their sexual orientation. Some critics of the bill have expressed reservations that it does not clearly state the extent to which religious organizations are exempt.

Frank said he asked Carney to speak because he is a beneficiary of Massachusetts' antidiscrimination law—the state is one of 17 that prohibits discrimination against gays and lesbians—and because as a law enforcement figure, Carney helps fight the stereotype of gay men as weak or effeminate.

"He's a thoughtful, articulate guy, and he's very honest about his story," Frank said.

Carney said he knew he was gay when he was about 12. The son of Irish-Catholic immigrants, he was afraid to tell his family.

As a young man, he dated men on the sly. He was more afraid that his fellow officers would find out he was gay than he was of the dangers he faced on duty.

"Who's going to find out?" he said. "That became the focus of my career."

The pressure to stay quiet overwhelmed him. Carney began to drink heavily, and in 1989, he was so depressed, he resigned from the Police Department. He sought counseling to help him face his sexual orientation and deal with his alcoholism. He said he never drank again.

Carney told his parents, and in 1991, he helped found Gay Officers Action League of New England, a support group for gay law enforcement officers. In 1992, he tried to get his job back, and during his interview, he acknowledged he was gay. He was

denied reinstatement and filed a complaint with the Massachusetts Commission Against Discrimination. In 1994, the agency ruled that there was probable cause the department had discriminated.

Carney returned to the Police Department that year. Since then, he has joined the department's uniform division, patrolling the city on foot and on bicycle. Two years ago, he helped solve the murder of a man who was killed because he was gay. Veteran officers with gay children have approached him for advice. Others on the 450-member force have talked to him about their sexuality.

Still, Carney said, the fear of coming out to fellow officers remains pervasive. "Sadly enough today, I am the only one that is publicly out," he said.

Chairman ANDREWS. Chairman, thank you very, very much for what I think was very moving testimony.

Representative Emanuel Cleaver is a person who is, frankly, a joy to encounter around the halls of this institution.

There are some people who read their religious scripture. There are others who live it.

And Representative Cleaver is someone who, in any small interaction—2 o'clock in the morning during late votes—if you encounter him, there is a warmth. There is a glow. I think there is a godliness about the way he conducts himself, which makes him an asset to this institution, not simply as a lawmaker, but as a human being.

And, Representative, we are glad to welcome you here with us this morning.

STATEMENT OF HON. EMANUEL CLEAVER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. CLEAVER. Thank you, Mr. Chairman. I apologize. I have been in a little struggle for the last week.

I would like to thank you and Ranking Member Kline for holding this hearing. And I think this hearing is extremely important because this may be the first of many discussions in the 110th Congress on the status or perceived status of an individual's sexual orientation and their right to employment.

And I look forward to both bodies and both parties in Congress working together to help strengthen and expand the Civil Rights Act of 1964 so that our nation can further empower and engage the patchwork of all Americans in every community toward achieving full participation in every sphere of life in our nation.

Simply put, Mr. Chairman, we are talking about jobs and an individual's right to work. The measure we are examining here today, H.R. 2015, the Employment Non-Discrimination Act of 2007, known as ENDA, will strengthen the legal right for all individuals and allow them to be assessed on their ability to do a job because of their skill set and not a set of prejudices.

Most of the arguments against this measure, as I have listened to religious radio, which my wife thinks that it is an act of self-torture, but nonetheless, I do listen almost on a daily basis, and I hear the arguments against this measure. And they usually take the form of some kind of an attack on family values. And that somehow protecting those who are, or are perceived to be, gay, lesbian, bisexual, transgender from equal legal consideration for employment is an affront to family and, somehow, specifically their family.

In all the discussions I have heard on this subject, no one has yet explained how keeping someone from gaining equal consideration based on their individual skill set to obtain lawful employment pleases God. How can an American who claims to embrace God and uses that theology to then discriminate against another individual.

Before I was elected to Congress, I very happily, and I might add, considered my only full-time job, even when I served as mayor of Kansas City, to being the pastor of the St. James United Methodist Church. And against all odds and against the Wesleyan tradition, I have held this appointment for 30 years. The average tenure of a Methodist pastor in our country is 3 years.

However, I have two full-time jobs. I still remain the unpaid senior pastor of St. James, while I serve as the representative from Missouri's 5th Congressional District.

The role as pastor will never leave me, and I will never leave it. I am compelled to go home each weekend. And I generally preach and teach and visit hospitals. And I counsel all people who come to me.

And I have never been able to get over the fact that, when a parishioner comes to me and expresses discrimination he or she has felt based on their sexual orientation, how I could then say, in the name of God, "I am sorry. I cannot be supportive." I have theological difficulty in doing that.

And I say here, now, with absolute conviction and confidence, that an individual's sexual orientation has nothing, absolutely no connection with my God's interpretation of my need to minister to them.

Three of the greatest sins, I believe, are indifference to, neglect of, and disrespect for God's other sheep. Now, I will not delve too deeply into the political or ecclesiastical details of my position on those questions. Suffice it to say, none of the world's major religions—and certainly, not the three monotheistic religions—believe that God endorses discrimination based on sexual orientation.

Now, opponents of this legislation—at least the ones on radio—argue that homosexuality and transgender identity are unnatural, immoral, or that someone else's sexual orientation offends their religious senses.

Let there be no doubt. I am certainly pro-marriage. As an ordained United Methodist pastor, I have performed more than 400 heterosexual weddings. And I have been happily and fortunately married to the same woman for three decades, even the same woman who thinks that I am mentally ill for listening to the radio programs that condemn me. [Laughter.]

Nonetheless, those opposing the legislation, I believe, have their issues confused. We are not discussing whether a state should recognize an individual's right to marry. That was, is and shall, hopefully, always be left to the wisdom of state legislatures around the country. Although it is much too often discussed in Congress, marriage is not a federal issue.

Today we are trying to further extend the rights of individuals who have been marginalized and discriminated against and denied legal federal protection for an equal playing field in their own country.

Mr. Chairman, members of the committee, I have watched, over my lifetime, a person who has almost the same name as me—his name is Gary Emanuel Cleaver, my first cousin—I have seen him with a college education move from job to job to job. Once he was discovered, or once people believed him, to be homosexual, all of a sudden the pressures became too difficult for him to stay in that job.

I never thought it was right, when I didn't see Gary being mistreated, but when I watched someone with my same DNA, with a very healthy IQ, and with a very, very good work ethic have difficulty staying on a job, I became more and more committed to this cause.

Before I was mayor, I was the national vice president of the Southern Christian Leadership Conference. It is the organization founded by Martin Luther King, Jr., and four other mentors of mine: Joe Lowery, Fred Shuttlesworth, C. K. Steele and Ralph David Abernathy. We realized—or they did, I was much younger and just following behind these giants—that the federal government was our friend. In fact, absent the actions of the federal government, I am not sure what would be happening in our country today.

The federal government took the lead in providing us with civil rights and with equal rights. And, therefore, I was very pleased on July 26, 1990, when President George H. W. Bush signed one of the most groundbreaking civil rights laws in our nation's history: the Americans with Disabilities Act. No law since the Civil Rights Act of 1964 has been as sweeping and as all-encompassing as the bill signed by former president Bush.

And I think today of the words of Dr. Martin Luther King, Jr., because they still ring true. And he said, "I refuse to accept the idea that the is-ness of man's present nature makes him morally incapable of reaching up for the ought-ness that forever confronts him."

This legislation ought to be approved. No matter where we are, we need to reach for the ought-ness.

In conclusion, let me just say, Mr. Chairman, I believe that all Americans deserve the right of equal protection under the law. Now is the time to guarantee all Americans the God-given right to be. Thank you.

[The statement of Mr. Cleaver follows:]

Prepared Statement of Hon. Emanuel Cleaver, a Representative in Congress From the State of Missouri

Mr. Chairman, I would like to thank you and Ranking Member Kline for holding this hearing and examining, what I hope to be the first of many discussions in the 110th Congress, on the status or perceived status of an individual's sexual orientation and their right to employment. I look forward to both bodies and both parties in Congress working together to help strengthen and expand the Civil Rights Act of 1964, so that our nation can further empower and engage the patchwork of all Americans in every community towards achieving full participation in every sphere of life in our nation.

Simply put, Mr. Chairman, we are talking about jobs and an individual's right to work. The measure we are examining here today, H.R. 2015, the Employment Non-Discrimination Act of 2007, known as ENDA, would strengthen the legal right for all individuals and allow them to be assessed on their ability to do a job because of their skill set and not based on who an individual's personal life-style choice. Most of the arguments against this measure have taken the form of "family values,"

and that some how protecting those who are or are perceived to be gay, lesbian, bisexual, transgender from equal legal consideration for employment is an affront to family—and somehow, specifically their family. In all the discussions I have heard on this subject, no one has yet explained how keeping someone from gaining equal consideration based on their individual skill set to obtain lawful employment pleases God. How can an American's choice to live with the person they choose become an affront to someone they have never met and will never know?

Before I was elected to Congress, I, very happily I might add, considered my only full-time job to be that of Senior Pastor of St. James United Methodist Church in Kansas City Missouri. Against all odds and Wesleyan Tradition, I have held this appointment for 30 years. However, now I have two full time jobs. I still remain Senior Pastor at St. James while I serve as the Representative of Missouri's Fifth Congressional District. The role as pastor will never leave me, and I will never leave it. I am compelled to go home and preach every Sunday. I will pastor and counsel all people until I return to my maker. And I say here now, with absolute conviction and confidence, that an individual's sexual orientation has nothing, absolutely no connection with my God's issued mandate to minister to their needs, including their right to barrier-free access to employment. Three of the greatest sins, I believe, are indifference to, neglect of, and disrespect for God's other sheep.

Opponents of this legislation argue that homosexuality and transgender identity are "unnatural," "immoral," or that someone else's sexual orientation offends my religious senses. Let there be no doubt. I am certainly pro-marriage. As an ordained member of the clergy, I have performed more than 400 hundred weddings and I have been happily and fortunately married to the same lovely woman for three decades. However, to this I say, those opposing the legislation have their issue confused. We are not discussing whether a state should recognize an individual's right to marry. That was, is, and shall, hopefully, always fall to the wisdom of the state legislatures around the country. Although it is much to often discussed in Congress, marriage is not a federal issue. Today we are trying 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.

Further, the opponents of ENDA are concerned about creating a protected class that promotes homosexuality and thus negatively impacting the institution of marriage and family values. They cite the profusion of local laws on the subject, and suggest that country-wide protection is unnecessary. Again, I ask how protecting an individual's right to pursue a job on an equal playing field with equal consideration is promoting homosexuality and hurting the values within their family? Moreover, I say to these naysayers the current draft of this legislation goes beyond every previous incarnation of the legislation to protect small businesses and religious-based organizations and institutions that may preach against and hold tenants opposing same sex orientation. There are protections within the measure, so as to exempt these groups who have centralized these values of marginalization and separation.

On July 2, 1964, the Civil Rights Act of 1964 was signed in to law. It was landmark legislation in the United States that outlawed segregation in the American schools and public places. Originally conceived to legally help African Americans, the bill was amended prior to passage to protect women. Once it was implemented, its effects were far reaching and had tremendous long-term impacts on the whole country. It prohibited discrimination in public facilities, in government, and in employment, invalidating the "Jim Crow" laws in the South. It became illegal to compel segregation of the races in schools, housing, or hiring. Powers given to enforce the law were initially weak, but were supplemented in later years.

On July 26, 1990, President George H.W. Bush signed one of the most groundbreaking civil rights laws in our nation's history—the Americans with Disabilities Act (ADA). No law since the Civil Rights Act of 1964 has been as sweeping and all encompassing as the ADA addressing employment, businesses, public accommodations, and telecommunications. As far reaching and effective as the ADA is, now is the time for Congress to continue what we started a decade ago. Today, the words of Rev. Martin Luther King, Jr. still ring true, "I refuse to accept the idea that the 'isness' of man's present nature makes him morally incapable of reaching up for the 'oughtness' that forever confronts him." This legislation ought to be approved. Because of things that have happened to me and others who look like me, I have come to see that it is a first class mistake treat anyone as a second class citizen.

Now is the time for us to go further, so that all individuals will be able to work, promoting their own self-sufficiency and independent living. Now is the time for millions of Americans who are gay, lesbians, bisexuals, or transgenders to receive equal protection under the law. Now is the time for a guarantee to all Americans the God

given right to be. I know that everyone's participation is key. The same is true for enacting ENDA.

Although I was not a Member of Congress when the ADA was written and made its precarious way through Congress, I am keenly familiar with expanding individual's civil rights and the suffering of all people when constrained, confined, and cut off. The premise of civil rights is simple: that all men, women, and children are created equal. We include rather than exclude. We engage rather than withdraw. We become one rather than segregate. I was an active member of the Civil Rights movement, and feel blessed to be a participant in this civil rights movement. I am proud to cosponsor this legislation and I am proud to be speaking in support of it today.

Each year millions of Americans travel to Washington to talk to their elected officials, so that their voices can be heard by those who shape policy. Thank God they do come because they can effect change. The majority of Americans cannot make the trip to our nation's capital and are constrained by location and circumstances. As Members of Congress, we must reach out to our constituents through traditional and new technologies such as the Internet. I invite every Member of the House and Senate to engage our constituents and disabilities groups in our districts to participate in this vital discussion. Our nation is at the threshold of a vital second step, and as policy makers, this hearing is a chance to directly listen to the people affected by these issues, and to contribute to the national dialogue on the issues that affect their everyday lives, so that we can expand the rights and liberties of all Americans for full and equal employment.

Thank you Mr. Chairman and the Committee for the opportunity to join and address you today.

Chairman ANDREWS. We thank you, our friend and colleague, Mr. Cleaver, for your very powerful and eloquent statement.

Each member has the prerogative of asking questions to the witnesses on this panel. It has generally been our practice, when we have lay witnesses, as it were, to try to move on to the second panel. So I would first ask my friends on the minority side, are there any questioners who would like to ask questions of this panel before we move on?

Okay.

And my friends on the majority side, do we have anybody that wants to ask questions of this panel?

Well, let me express my appreciation to our colleagues for their indulgence this morning. We are very pleased you were here. Thank you.

I would ask if the witnesses for the second panel would proceed to the witness table, and we will proceed in short order with their testimony.

It is my understanding there is unanimous consent that Officer Carney can be introduced by his congressman, Congressman Neal, without objection.

So what I am going to do is introduce the other witnesses. And then, Rich, I will turn to you to introduce Officer Carney last, if we would.

Helen Norton is an associate professor at the University of Colorado School of Law. Previously, Ms. Norton served as a political appointee in the Civil Rights Division of the White House from 1998 until January of 2001, first as counsel to the assistant attorney general for civil rights, and then later as a deputy assistant attorney general for civil rights, where her duties included supervision of the employment litigation section.

Welcome, Professor Norton, we are happy to have you with us.

Mark Fahleson is an attorney with the law firm of Rembolt Ludtke, LLP in Lincoln, Nebraska. He earned his J.D. from the University of Nebraska at Lincoln. He is currently an adjunct pro-

fessor of employment law at the University of Nebraska College of Law.

Mark, glad to have you with us this morning.

Lee Badgett is an associate professor of economics at the University of Massachusetts at Amherst. She is the research director of the Institute for Gay and Lesbian Strategic Studies. Professor Badgett received her B.A. in economics from the University of Chicago and a Ph.D. in economics from the University of California at Berkeley.

Professor Badgett, we are very happy you are with us this morning.

Lawrence Z. Lorber is a partner in the Washington, DC, office of Proskauer Rose, LLP, a fine firm. Mr. Lorber was formerly the deputy assistant secretary of labor and director of the Office of Federal Contract Compliance Programs during the Ford administration. Mr. Lorber received his undergraduate degree from Brooklyn College and his J.D. from the University of Maryland Law School.

Welcome, Mr. Lorber. We are glad you are with us.

Kelly Baker is presently the vice president of corporate diversity for General Mills in Minneapolis, Minnesota. Ms. Baker has a B.A. in Business Administration from Howard University and an MBA from an institution that lost to Appalachian State on Saturday, the University of Michigan. [Laughter.]

Broderick will not like that. [Laughter.]

That is for all my Buckeyes out there. I got to try to win some help in Ohio.

Brooke Waits is from Dallas, Texas. She was previously an employee for Cellular Sales of Texas, and she is going to share her experience with us this morning.

Nancy Kramer is the founder and CEO of Resource Interactive, a marketing service company in Columbus, Ohio, home of the Buckeyes. Her business has been recognized by Business Week, Working Women, Inc., and Interactive Week and, in the past year, has been acknowledged by the Ohio Chamber of Commerce as the best place to work in Ohio. Congratulations.

And, Rich Neal, welcome to the committee. I understand you have a very special constituent that you are going to introduce.

And, frankly, once that introduction is done, Officer Carney, if you would like to proceed with your testimony.

Let me just say one thing. You will notice the battery of lights in front of you. The yellow light indicates that you have 1 minute of your 5 left. The red light means we would like you to wrap up and conclude.

Your written statements have been included, without objection, in the record of the hearing. So we would ask you to summarize your written statements so we can get on to questions from the panel.

And as soon as our friend, Rich Neal, is done with an introduction of Officer Carney, we will proceed.

Rich, welcome.

Mr. NEAL. Thank you very much, Mr. Chairman, and to members of the subcommittee.

Let me begin by thanking you, Mr. Chairman, for embracing that notion of moving swiftly to the second panel. [Laughter.]

After 19 years here, I am indeed grateful for that position you have taken.

Mr. Chairman, it is a pleasure for me today to not only introduce a constituent, Michael Carney, but also to certainly embrace the Employment Non-Discrimination Act.

I have known Mike Carney's parents for many, many years. And, indeed, they have been unyielding in their support for me over those years.

His sister worked for me when I was mayor of the city of Springfield. And his brother-in-law, to this day, remains one of my closest advisors. The Carneys are a first-class family.

And for the 30 years that I have known Officer Carney, I knew him simply as a guy who had the same aspirations in our neighborhood as many do who embrace being police, fire, teachers, telephone company employees, gas company employees. I have known him just as a regular neighborhood guy, always pleasant when I saw him, kind, and always very, very decent. And I am happy that he is here today to offer his own testimony before your subcommittee.

Mike Carney has a very compelling story to tell. I took the time to read that testimony that he is about to offer, last evening. And it is very important testimony because it reflects the transition that many neighborhoods across America find themselves in.

Like most of us in this Congress, peer review is very important. We all know who the good members of Congress are, just as teachers know who the good teachers are, good firefighters know who the good firefighters are, and yes, good patrolmen and women know who the good patrolmen and women are. That peer review still in our lives counts for something. And if you were talking to the men and women of the Springfield Police Department, they would confirm my assessment that Mike Carney is a good police officer.

He currently does outreach within the Springfield Police Department. He has been great for me to work with over many years. He is a gentleman. He is a very decent public servant. And I am glad that I had the opportunity today to introduce him to all of you.

Thank you, Mr. Chairman.

Chairman ANDREWS. Thank you very much, Rich.

And, Officer Carney, if you would take your place at the table, we would proceed with your testimony. And we welcome each of the witnesses.

STATEMENT OF MICHAEL CARNEY

Mr. CARNEY. Thank you.

Good morning. And thank you, Congressman Neal and Congressman Frank and Chairman Andrews. I am honored and privileged to be here this morning.

The bill you are debating, which is so important to the gay and lesbian, bisexual and transgender community, is even more important to America.

As a first-generation Irish-American, I grew up hearing stories that when the Irish looked for jobs in the United States, they found signs that said, "Irish not need apply." I was also told that those days were behind us, that I could be anything that I wanted to be in America.

I found out the hard way that that is not true. Today, there remains an invisible and just insidious obstacle to employment that cuts across all racial and ethnic lines in America.

I realized soon after graduating the police academy, because I was gay, my safety as a police officer and my future as a public servant was seriously jeopardized.

After a classmate and his work partner were gunned down and murdered on the streets of Springfield, it forever changed the way that I viewed my job as a gay cop. Every time my partner and I rolled into a domestic or a gun call, all I would think of was who would notify my life partner. Would he first learn of my shooting on the 11 o'clock news? How would he be treated by my colleagues at my funeral?

I am a good cop, but I have lost 2½ years of employment fighting to get that job back, because I am gay. And I never would have been able to do that had I not lived in Massachusetts or in one of the handful of other states that protect gay employees from discrimination. In fact, if I were a federal employee living in Massachusetts, I would not be covered at all.

Discrimination impacts the lives of everyone. It not only deprives people of jobs and safe working conditions, it also robs our most vulnerable citizens of the vital services that they would have received from talented and dedicated gay workers.

Throughout America, men and women from all backgrounds benefit from the talents and the dedication of gay employees. Many of these employees work without protection because they live in states that have no such guarantees. The Employment Non-Discrimination Act would guarantee that America's gay, lesbian, bisexual and transgender workforce would never again fear that they might not be hired or be able to keep their jobs solely because of their sexual orientation or their gender identity.

I am proud to be Irish-American. I am proud to be gay. And I am proud to be a cop in Springfield, Massachusetts.

I want to thank the panel for allowing me to testify today. And, please, put an end to this kind of employment discrimination that I have had to endure.

Thank you.

[The statement of Mr. Carney follows:]

Prepared Statement of Officer Michael P. Carney, Springfield, Massachusetts Police Department

Thank you for the opportunity to tell you why the bill you are debating—which is so important to the Gay, Lesbian, Bisexual and Transgender community—is even more important to America.

As a first generation Irish-American, I grew up hearing stories from my Mom and Dad that when the Irish looked for work in the United States, they found signs that said, "Irish not need apply."

I was also told that those days were behind us. That I could be anything I wanted to be in America.

Well, as luck would have it, I always wanted to be a police officer. You'd think that of all the things an Irish-American boy wanted to be, becoming a cop would be a slam-dunk.

But there was an invisible, but just as insidious obstacle that I confronted—one that cuts across all racial and ethnic lines in America.

I was gay.

And there was nothing I could do about it. I didn't choose to be gay. I just was.

It doesn't affect job performance, but it continues to affect the employability of millions of people in America.

Here's how it affected me:

On April 9, 1979 I joined the Springfield Police Department as a Police Cadet. It enabled me to work in every facet of policing while I obtained my college degree.

In September of 1982, after I graduated from the police academy, I was appointed as a police officer. I felt I had no choice but to keep my personal life a secret from my co-workers and supervisors. Not being able to share my personal life with those I spent so much time with was extremely painful.

Can you imagine going to work every day and avoiding any conversations about with whom you had a date * * * or a great weekend * * * or an argument—basically not sharing any part of your personal life for fear of reprisal or being ostracized.

I did this in a career that prides itself on integrity, honesty and professionalism—and where a bond with one's colleagues and partner is critical in dangerous and potentially deadly situations.

At my police graduation, a colleague's sexual orientation was the topic of conversation because he brought a man to our graduation party. Although he told everyone he was just a friend, by the end of the evening the police officer was assaulted by a police supervisor.

That evening, I got an early lesson on how police officers like me are punished on the job, so I did everything in my power to be "one of the boys" and hide.

A few years later, another classmate and his work partner were gunned down—murdered on the street. It forever changed the way I viewed the job as a gay cop.

Every time my partner and I rolled into a domestic or a gun call, all I could think of was who would notify my life partner? Would he first learn of my shooting on the 11 o'clock news? How would he be treated by my colleagues at my funeral?

The more I thought of these things, the more isolated and insecure I felt; the more singled-out and second-class I realized I truly was.

I was beginning to feel like my grandfather's generation must have felt—that I wasn't good enough, that I was a second-class citizen.

And then the irony hit me: wasn't it my job to ensure the rights of all citizens? Wasn't I sworn to uphold the constitution of the United States—a document anchored in the fundamental principle that all men are created equal, that they are endowed, by their Creator, with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness?

Every day, I felt the disconnect, the irony. The pain was deep. I felt ashamed. I kept thinking, what would happen if they found out? What would they do?

In 1989, after years of pain and self-abuse from drinking I hit bottom. I could not face my peers. I felt like I didn't fit in. I was humiliated. I was afraid. I resigned as a police officer.

Three months later, it turned out to be the turning point of my life. I got professional help. I've been sober ever since.

A close friend of mine told me, "the truth will set you free." A year later, I was on the road to a new life as a sober gay man. For the first time in my life I was honest with my family and friends and lived openly as the person God created.

In 1991 I helped co-found the Gay Officers Action League of New England, a support group for gay law enforcement officers.

Our organization struck a responsive chord with the law enforcement community. Not only did I meet hundreds like me, our organization began getting requests from police chiefs around the country asking for training and practical advice.

I found the support that I needed, and in 1992 I decided to return to the job I loved. I received news that the police department was taking back officers for reinstatement, so along with four colleagues, I applied.

I was granted an interview, and this time I decided to be honest with them and tell them who I really was. I came out in that interview. Three days after my interview, I was notified that I was denied reinstatement.

I was dumbfounded. I could not believe this was happening. I retained an attorney and he spoke with city officials. He told me to reapply. I did and a week later I received a letter stating that I was denied again. My four colleagues were all reinstated.

I felt like I was kicked in the gut. But this time, I was also furious. I asked my lawyer to file a complaint with the Massachusetts Commission Against Discrimination for employment discrimination based on my sexual orientation.

My lawyer talked me out of it. He said, "your friends and family members know about you, but if you file this complaint, it will be a public document and everyone will know."

He then talked to the Mayor. The Mayor agreed that I should be granted another interview and called the chairman of the Police Commission. He complied. During the interview, the Police Chief told the Police Commission that I did a "commend-

able job as a police officer." The Sheriff of Hampden County also spoke on my behalf.

I felt uplifted and finally believed I would get my job back.

Three days later, I received a letter from the Police Commission. I opened it nervously. I could not believe what I read. I was denied again. I immediately went to the Massachusetts Commission Against Discrimination and filed the first case of sexual orientation discrimination against a law enforcement agency in Massachusetts.

A few days later it hit the media. I was out publicly. The Police Commission later defended its position, claiming that "other candidates were more enthusiastic and more forthright."

The Massachusetts Commission Against Discrimination's investigation took two and half years of my life—two and half years that I could not be a police officer.

I felt so humiliated, so lost. I wondered if I did the right thing.

In 1994, citing the police commission's rationale for my rejection "as pretext," the Massachusetts Commission Against Discrimination ruled probable cause that discrimination did in fact occur.

On September 22, 1994, the City settled my case and at a press conference held by the Massachusetts Commission Against Discrimination. My parents, who were 73 years of age at that time, stood by my side as the settlement announcement was made. I will never forget how proud they were of me and how grateful I was that they understood why I put myself and them and my City through all of this.

I just wanted to be a cop. I've always wanted to be a cop.

I returned to work, and since then I have worked as a police academy instructor, a detective in the youth assessment center, a detective in the narcotics division, as an aide to the Chief of Police and, most proudly, I am now assigned to the uniform division.

I've been recognized for saving a man who jumped from a bridge into the Connecticut River in a suicide attempt. I've received letters of recognition for a youth mentorship program that I co-founded, as well as a letter of commendation from the Police Commission for outstanding police work in capturing a bank robber. In 1997, I was a guest at the White House Conference on Hate Crimes. I served from 1996 to 2002 on the Governor's Hate Crimes Task Force under three governors in Massachusetts.

I have been honored and blessed to serve my department and the citizens of my community.

I'm a good cop. But I had to fight to get my job because I'm gay. And I never would have even been able to do THAT—had I not lived in Massachusetts or in one of the handful of other states that protect gay people from discrimination.

In fact, if I were a federal employee living in Massachusetts I would not be protected at all.

Had I not been successful in fighting the bias that tried to prevent me from working, all the good that I have done for some of the most vulnerable people in my community would never have happened.

Discrimination impacts the lives of everyone. It not only deprives people of livelihoods and safe working conditions, it also robs the public of vital services they would have otherwise received from talented and dedicated workers.

Throughout America, men and women of all backgrounds benefit from the talent and dedication of gay employees. Many of these employees work without protection because they live in states that have no such guarantees.

The Employment Non-Discrimination Act would guarantee that America's Gay, Lesbian, Bisexual and Transgender workforce would never again fear that they might not be hired or might not be able to keep their jobs solely because of their sexual orientation or gender identity.

I'm proud to be Irish. I'm proud to be gay. I'm proud to be a cop in Springfield, Massachusetts. And I'm grateful for the opportunity to tell you my story.

Please put an end to the kind of employment discrimination that I have had to endure.

Chairman ANDREWS. Thank you, Officer Carney, for your testimony and for your service to the community. It is very much appreciated.

Mr. CARNEY. Thank you.

Chairman ANDREWS. Ms. Kramer, welcome to the committee.

STATEMENT OF NANCY KRAMER, FOUNDER AND CEO, RESOURCE INTERACTIVE

Ms. KRAMER. Thank you. Thank you, Chairman Andrews and the members of the subcommittee. I am very happy to be here to present my point of view about a topic for which I am very passionate.

As a business owner and entrepreneur, I am here to talk about the importance of creating this workplace that we are talking about that welcomes people from all walks of life.

Discrimination against gay, lesbian, bisexual and transgender workers deprives American business of too many talented and hard working people, quite frankly. In my 26 years running a business, I have learned that an inclusive workplace which judges people on their merits, not on unrelated matters like sexual orientation or gender identity, is the key to success in a competitive, ever-changing marketplace.

When I started Resource Interactive as a traditional marketing services company with two partners in 1981, the working world was very different. The Internet, the basis for our entire business today, wasn't even conceived.

We were lucky to start with an innovative and progressive client, Apple Computer. And that set the tone for our culture from day one.

But I, as a woman, experienced discrimination in the business world. When I bought out my partners in 1984, I couldn't even get a basic line of credit for the business without my then-husband co-signing on the loan. In fact, over the years as a woman in business, I have been second-guessed, underestimated, and even propositioned more often than I care to remember. I understand what it means to be discriminated against in the workplace.

Looking back, it is hard to believe that my gender potentially stood in the way of my success as a business person. It is equally baffling to me today that members of the GLBT community see their desire to simply do a job, and do it well, thwarted by being who they are.

As the world changes, business leaders know they must also change to remain competitive. My company has embraced new technologies and become a leading digitally-focused marketing firm, growing from just three people in 1981 to over 200 associates today.

Along the way, we have acquired some great clients, including Hewlett-Packard, Procter & Gamble, Best Buy, and L.L.Bean. Like us, these corporations recognize the key to success is to create an environment that recruits, retains and rewards talented associates, regardless of characteristics unrelated to their job performance. This simple premise has led nearly 90 percent of Fortune 500 companies to adopt nondiscrimination policies that include sexual orientation, with a quarter of them including provisions for gender identity.

I have had the great fortune to lead a small business to success and to be recognized for those efforts.

I was honored to have recently been appointed by Governor Ted Strickland as chairperson of the Governor's Workforce Policy Advisory Board for the state of Ohio.

My business, Resource Interactive, has received numerous national recognition for its innovative workplace environment from sources as varied as Business Week, Working Woman, Inc. magazine, and Interactive Week. And, as Chairman Andrews was saying, we were recently honored by the Ohio Chamber of Commerce as best place to work in the state of Ohio.

Over the years, I have learned that living a secret life is not good for anyone. In fact, it is highly destructive, especially in the workplace. I am extremely proud of the fact our company's culture encourages people to be the same person on the outside that they are on the inside and to not live in secret.

Preparing for today, I was reflecting on some of our past and present Resource associates. There are at least a half a dozen examples of folks who entered our business projecting the acceptable sexual orientation, but eventually realized being who they are was not only accepted at Resource, but embraced.

As a CEO, as a public board director, and as an entrepreneur, I know you need every talented person you can hire. Passing the Employment Non-Discrimination Act will not create a burden on business, large or small. Instead, it will ensure that the hard working GLBT Americans can earn a living, provide for their families, and contribute to the innovation and creativity that makes American business great. And it is simply smart business.

Two of my daughters are here with me here today. I am grateful that, because laws have changed, they won't have to face the same discrimination I faced 26 years ago today.

I have always taught them that every person has value and should be judged on his or her merit. I brought them to Washington with me today in hopes that they might witness this first step toward eliminating workplace discrimination for all those Americans in the GLBT community.

Thank you for your time. And I strongly encourage passage of this important legislation.

[The statement of Ms. Kramer follows:]

Prepared Statement of Nancy Kramer, Founder and Chief Executive Officer, Resource Interactive

Thank you to Chairman Andrews and the members of the subcommittee for inviting me to present my point of view about a topic for which I am very passionate. As a business owner and entrepreneur, I am here to talk about the importance of creating a workplace that welcomes the best and the brightest, from all walks of life. Discrimination against gay, lesbian, bisexual and transgender workers deprives American business of too many talented and hardworking people. In my twenty-six years running a business, I have learned that an inclusive workplace, which judges people on their merits, not on unrelated matters like sexual orientation or gender identity, is the key to success in a competitive, ever-changing marketplace.

When I started Resource Interactive as a traditional marketing services company with two partners in 1981, the working world was very different. The Internet, the basis for our entire business today, wasn't even conceived. We were lucky to start with an innovative and progressive client—Apple Computer—that set the tone for our culture from day one. But I, as a woman, experienced discrimination in the business world. When I bought out my partners in 1984, I couldn't even get a basic line of credit for the business without my then husband as a co-signer. In fact, over the years, as a woman in business, I've been second-guessed, underestimated, and even propositioned more often than I care to remember. I understand what it means to be discriminated against in the workplace.

Looking back, it is hard to believe that my gender potentially stood in the way of my success as a businessperson. It is equally baffling that, today, members of the

GLBT community see their desire simply to do a job, and do it well, thwarted by being who they are.

As the world changes, business leaders know that they must also change to remain competitive. My company has embraced new technologies and become a leading digitally-focused marketing firm, growing from just the three of us in 1981 to over 200 employees today. Along the way we have acquired great clients like Hewlett-Packard, Procter & Gamble, Best Buy and L.L. Bean. Like us, these corporations recognize that the key to success is to create an environment that recruits, retains and rewards talented associates regardless of characteristics unrelated to job performance. This simple premise has led nearly 90% of Fortune 500 companies to adopt nondiscrimination policies that include sexual orientation, with a quarter of them also including gender identity.

I have had the great fortune to lead a small business to success, and to be recognized for those efforts. I was honored to have recently been appointed by Governor Ted Strickland as Chairman of the Governor's Workforce Policy Advisory Board for the State of Ohio.

My business, Resource Interactive, has received national recognition for its innovative workplace environment from sources as varied as Business Week, Working Woman, Inc. magazine and Interactive Week; and just this past year, was recognized by the Ohio Chamber of Commerce as Best Place to Work in the State of Ohio.

Over the years, I have learned that living a secret life is not good for anyone; in fact it's highly destructive—especially in the workplace. I am extremely proud of the fact that our company's culture encourages people to be the same person on the outside that they are on the inside, not live in secret. Preparing for today, I was reflecting on some of our past and present Resource associates. There are at least a half dozen examples of folks who entered our business projecting the 'acceptable' sexual orientation, but eventually realized being who they really are was not only accepted at Resource, but embraced.

As a CEO, public board director, and entrepreneur, I know you need every talented person you can hire. Passing the Employment Non-Discrimination Act will not create a burden on businesses, large or small. Instead, it will ensure that hard-working GLBT Americans can earn a living, provide for their families, and contribute to the innovation and creativity that makes American business great. And, it's simply smart business.

Two of my daughters are here with me today. I am grateful that, because laws have changed, they won't have to face the same discrimination I faced 26 years ago. I have always taught them that every person has value and should be judged on his or her merit. I brought them to Washington with me today in hopes they might witness the first step toward eliminating workplace discrimination for all those Americans in the GLBT community. I thank you for your time and I strongly encourage you to pass this extremely important legislation.

Chairman ANDREWS. Ms. Kramer, thank you. At the risk of destroying your credibility as a mom of teenage girls, could we ask you to name your daughters and have them stand so they can be introduced?

Ms. KRAMER. Yes. My daughter, Marika Kramer Verog, is a junior in high school. And my daughter, Anna Kramer Verog, is a freshman in high school.

Chairman ANDREWS. Welcome. And if they need a note from the committee to excuse them from Social Studies, we—Mr. Kline——

[Laughter.]

Ms. KRAMER. The school was quite excited about this opportunity.

Chairman ANDREWS. Okay.

Ms. KRAMER. So, thank you.

Chairman ANDREWS. Thank you. And welcome, young ladies, to the committee, as well.

Brooke Waits has come a long way to tell the story she is going to tell today. She is typical of a lot of women in this country who have—and men—who have had to deal with the pain of discrimina-

tion and risen above it to be strong. We are very fortunate she is with us today.

Ms. Waits, welcome.

STATEMENT OF BROOK WAITS

Ms. WAITS. Thank you.

I want to begin today by thanking you, Chairman Andrews, for the opportunity to come and testify about my personal experience with the kind of discrimination that shockingly still affects people across the country.

Like so many other gay, lesbian, bisexual and transgender victims of workplace discrimination, I didn't lose my job because I was lazy, incompetent, or unprofessional. Quite the contrary. I worked hard and did my job very well.

However, that was all discarded when my boss discovered that I am a lesbian. In a single afternoon, I went from being a highly-praised employee to out of a job. The experience has been very, very 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 part of what I know about myself, how I feel about myself. I never went to work simply to get through another day. I went to work to be a rock star. How I feel today is vastly different.

Up until a month ago, I had not been employed full-time since the summer of 2006. For a few hours a week, I did some bookkeeping and taxes for my father's small business. Working part-time and earning less than half the money I had still felt better than an atmosphere of contempt.

Cellular Sales of Texas hired me in March of 2006 for the position of inventory control manager. I was responsible for all the stores throughout Texas and Oklahoma. My job was a position of trust: keeping track of valuable and frequently-stolen electronics. I was excited to take on a position of such importance and responsibility.

I spent hours, even before the work day started, implementing a control system to help the store manage its inventory. I was frequently praised by my supervisor for dedication and quickly received praise for my job performance.

But there was a negative side to my workplace, the side that kept me, an otherwise open lesbian, from being honest about myself with my coworkers. It wasn't long before I began to hear male coworkers making jokes and other derogatory comments about gay, lesbian and bisexual, transgender people. A fellow female employee told me that my walk was not too feminine.

I did not want to create any problem in this new job. In conversation, I tried to stay engaged, while carefully avoiding all pronouns, in particular, "she." I spoke very generally, never using my girlfriend's name. Instead, I used things like my better half.

But that was not enough to keep my sexual orientation from costing me my job. Ironically, my cell phone proved to be the problem. Like many people, I had a photo of me and my girlfriend sharing a midnight kiss at a New Year's Eve party saved as my cell phone screen saver.

One day, in May 2006, my manager came into the back office to ask me a question. I was across the room sending a fax, but my manager stopped at my desk, noticing my cell phone sitting on it. Out of what I can only imagine was innocent curiosity, she opened my phone and exclaimed, "Oh, my."

I turned and looked at her. She didn't even make eye contact before snapping her phone and rushing back into her office. She avoided me for the rest of the day, and I overheard her telling a coworker that she knew there was something off about me.

I dreaded coming to work the next day and, to my dismay, my manager was already there 3 hours earlier than she usually arrived. As I passed her office door, she called me in, stood up, and without the slightest hesitation, told me that she was going to have to let me go. When I asked why, she told me that they needed someone more dependable in the position.

I was shocked. I had arrived at work an hour early for weeks, not only implementing a brand new inventory system, but programming it and drafting instructions on how to use the software.

When I defended myself, she simply repeated, "I am sorry. We just need to let you go."

I realize a law still won't change the way some people like my employer feel about other people and certain issues. However, there is a sense of security knowing that the other hardworking Americans like me are protected under a law from situations like this from happening again.

I do not believe that anyone should be exposed to a workplace where they have to worry about being who they are costing them their livelihood. Congress has the power to help stop the devastating effects of discrimination against gay, lesbian, bisexual and transgender people. Please pass the Employment Non-Discrimination Act.

[The statement of Ms. Waits follows:]

Prepared Statement of Brooke Waits

I want to begin by thanking Chairman Andrews and the members of subcommittee for giving me the opportunity to testify today about my personal experience with a kind of discrimination that, shockingly, still affects people across the country. Like so many other gay, lesbian, bisexual and transgender victims of workplace discrimination, I didn't lose my job because I was lazy, incompetent or unprofessional. Quite the contrary—I worked hard and did my job well.

However, that was all discarded when my boss discovered that I am a lesbian. In a single afternoon, I went from being a highly praised employee to out of a job. The experience has been very 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. I never went to work simply to get through another day; I went to work to be a rock star.

How I feel today is vastly different. Up until a month ago, I had not been employed full-time since the summer of 2006. For a few hours a week I did the bookkeeping and taxes for my father's small business. Working part-time and earning less than half the money I had still felt better than an atmosphere of contempt

Cellular Sales of Texas hired me in March of 2006 for the position of inventory control manager. I was responsible for all stores throughout Texas and Oklahoma. My job was a position of trust—keeping track of valuable, and frequently stolen, electronics. I was excited to take on a position of such importance and responsibility. I spent hours, even before the workday started, implementing a control system to help the store manage its inventory. I was frequently praised by my supervisor for my dedication, and quickly received a raise for my job performance.

But there was a negative side to my workplace, a side that kept me, an otherwise open lesbian, from being honest about myself with my co-workers. It wasn't long be-

fore I began to hear male coworkers making jokes and other derogatory comments about gay, lesbian, bisexual and transgender people. A fellow female employee told me my walk was "not too feminine". I did not want to create problems in a new job, so, in conversation, I tried to stay engaged while carefully avoiding all pronouns, in particular, "she." I spoke very generally, never using my girlfriend's name. Instead I said things like, "my better half."

But that was not enough to keep my sexual orientation from costing me my job. Ironically, my own cell phone proved to be the problem. Like many people, I had a photo of me and my girlfriend—sharing a midnight kiss at a New Year's Eve party—saved as my cell phone screensaver. One day in May 2006, my manager came into the back office to ask me a question. I was across the room sending a fax, but my manager stopped by my desk, noticing my cell phone sitting on it. Out of what I can only imagine was innocent curiosity, she opened my phone and then exclaimed "Oh my!" I turned and looked at her. She didn't even make eye contact before snapping my phone shut, tossing it back on my desk and rushing back to her office. She avoided me for the rest of the day, but I overheard her tell a coworker that she "knew there was something off" about me.

I dreaded coming to work the next day and, to my dismay, my manager was already there, three hours earlier than she usually arrived. As I passed her office door, she called me in, stood up and, without the slightest hesitation, told me that "she was going to have to let me go." When I asked why, she told me that they needed someone more "dependable" in the position. I was shocked—I had arrived at work an hour early every day for weeks, not only implementing a brand new inventory system, but programming it and drafting instructions on how to use the software. When I defended myself, she simply repeated, "I'm sorry, we just need to let you go."

I realize a law still won't change the way some people, like my former employer, feel about other people or certain issues. However, there is a sense of security, knowing that other hardworking Americans like me are protected under law from situations like this happening again. I do not believe that anyone should be exposed to a workplace where they have to worry that simply and honestly being who they are could cost them their livelihood. Congress has the power to help stop the devastating effects of discrimination against gay, lesbian, bisexual and transgender people. Please, pass the Employment Non-Discrimination Act.

Chairman ANDREWS. Ms. Waits, thank you very, very much for something I know that was difficult to do, but so very necessary for us to hear. And you did a great job, and we are so fortunate you are here today. Thank you.

Ms. WAITS. Thank you.

Chairman ANDREWS. Ms. Baker, welcome to the committee. We are happy to have you.

STATEMENT OF KELLY BAKER, VICE PRESIDENT OF DIVERSITY, GENERAL MILLS, INC.

Ms. BAKER. Thank you.

Thank you, Chairman Andrews, and greetings to Ranking Member Kline from our mutual home state of Minnesota. And thank you to all of the distinguished members of the subcommittee for the opportunity to speak about the Employment Non-Discrimination Act of 2007.

My name is Kelly Baker. I am the vice president of diversity at General Mills. We make Cheerios, Green Giant vegetables, Progresso soups, Pillsbury baked goods, and Yoplait yogurt, just to name a few of our household brands.

We have over 28,000 employees. About 18,000 of those employees work in the United States. And we have sales of about $13.4 billion.

We market our products to everyone. Today, 98 percent of U.S. households have a General Mills product within their kitchen. So

it just makes good business sense for us to value all of our consumers, and we do.

It also makes good business sense for us to create a work environment where every employee is respected, valued, challenged, and rewarded for their contributions and their performance each and every day.

A diversity of opinions is vital for an innovative company like ours that creates hundreds of new products every year. A culture of respect and inclusiveness is also important to retaining top talent and recruiting new stars. The bottom line is that a respected employee is a productive employee.

Our work environment was built on the foundation of our equal employment opportunity policy, which prohibits the discrimination of anyone based on age, race, color, religion, sex, national origin, marital status, disability, citizenship, military service, sexual orientation and gender identity, and any other characteristic that is protected by law. Sexual orientation has been part of our policy since the early 1990s. And we added gender identity to our policy in 2004.

We know our policy and, more importantly, our company culture exemplifies the spirit of the Employment Non-Discrimination Act. In fact, 94 percent of our employees say that General Mills provides a working environment that is accepting of differences in backgrounds and lifestyles.

As proud as I am of that statistic, I am even more proud when I walk around our campus and look at the varied pictures of families and the various compositions of families on all of our employees' desks.

Our culture of inclusion has been regularly recognized by external groups. Just last week, for example, LATINA Style Magazine named us once again as one of the top 50 companies for Latinas in America.

We have also achieved 100 percent on the Human Rights Campaign Corporate Equality Index. And we are very proud of that. It recognizes our policies and practices that support our GLBT employees.

We have also been honored by other organizations from Working Mother to Business Ethics to Fortune magazine. We are very proud of that.

In addition to promoting diversity because of its benefits to our business, we also support this legislation because we believe it is the fundamental right of all American citizens to be treated fairly, with respect and dignity in their workplace, regardless of their sexual orientation or gender identity.

Our support mirrors the state in which we are headquartered, Minnesota. We believe federal protection of our citizens will be a symbolic and effective means to deliver civil rights to everyone.

We know that providing an environment where people of different backgrounds and lifestyles can grow and thrive is essential to our long-term success. In our business, innovation is key. People with diverse experiences and backgrounds bring different and uniquely valuable perspectives and solutions. This diversity drives innovation. That is why we support any practice or policy that encourages bringing more diversity to the table.

Internally, we have done several things to encourage diversity, including the creation of several employee networks that we visibly and financially and through our senior leadership support. These affinity groups include our Black Champions Network, our Hispanic Network, our American Indian Council, our South Asian Employee Network, our Asian American Employee Network, our Women's Leadership Group, and Betty's Family, which is our GLBT network.

Betty's Family is named after one of our key icons, Betty Crocker. The mission of this network is to create a safe, open and productive environment for General Mills GLBT employees. One of our most senior executives helped co-found this network and has commented frequently on the powerful impact this network has on our ability to attract and retain top talent across the company.

We know that these networks, in addition to our other policies and practices, are a tangible demonstration of our commitment to attracting, developing and advancing every unique employee at our company.

We know that establishing a culture of respect is just a baseline for our employment standards. Beyond that, we strive to be an employer of choice, a place where we demonstrate a support for the personal needs of our employees, allowing them to be fully committed to work. And in 1999, we did introduce domestic partner benefits.

In closing, please let me reiterate why General Mills believes this legislation is good for business and good for America. It will help businesses attract and retain top talent. It will help provide a safe, comfortable and productive work environment free from any form of discrimination. And it will help create a culture that fosters creativity and innovation that is vital to the success of all businesses.

Thank you so much for the opportunity to speak today.

[The statement of Ms. Baker follows:]

Prepared Statement of Kelly Baker, Vice President, Diversity, General Mills, Inc.

Thank you Chairman Andrews and Ranking Member Kline for the opportunity to speak today in support of the Employment Non-Discrimination Act of 2007 (H.R. 2015). And thank you distinguished members of the Subcommittee on Health, Employment, Labor and Pensions. My name is Kelly Baker and I am vice president of Diversity at General Mills. We make Cheerios, Green Giant vegetables, Progresso soups, Pillsbury baked goods and Yoplait yogurt, to name a few of our household brands. We have 28,500 employees—about 18,000 work in the United States—with annual sales of $13.4 billion.

We market our products to everyone. Today, 98 percent of all U.S. households have at least one General Mills product in their kitchen. So it just makes good business sense to value all of our customers, which we do. But it also 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.

A diversity of opinions is vital for an innovative company like ours that creates hundreds of new products each year. A culture of respect and inclusiveness is also important for retaining top talent and recruiting new stars. The bottom line is that respected employees are productive employees. Our work environment was built on the foundation of our Equal Employment Opportunity policy, which prohibits discrimination based on age, race, color, religion, sex, national origin, marital status, disability, citizenship, sexual orientation, gender identity, military service, or other characteristic protected by law. Sexual orientation has been a part of our policy since the early 1990s and we added gender identity in 2004.

We know our policy and, more importantly, our company culture exemplifies the spirit of the proposed Employment Non-Discrimination Act (ENDA). In fact, 94 percent of our employees say General Mills provides a working environment accepting of differences in background and lifestyle. As proud as I am of that statistic, I'm even prouder when I see this diversity prominently represented by all kinds of family pictures proudly displayed in peoples' offices at General Mills.

Our culture of inclusion has been regularly recognized by a variety of external groups. Just last week, for example, Latina Style magazine once again named General Mills as one of the top 50 companies in America for Latinas. We also achieved a 100 percent score on the Human Rights Campaign's Corporate Equality Index, which recognizes the policies and practices we have that are supportive of our GLBT employees. We have also been honored as one of the:

- 100 Best Companies to Work For, Fortune 2006, 2005, 2004
- 100 Best Corporate citizens, Business Ethics magazine, 2006, 2005, 2004, 2003
- 100 Best Companies for Working Mothers, Working Mother magazine, 11 straight years
- Top 50 Companies for Diversity, DiversityInc, 2007, 2005, 2004

DiversityInc said that for the fourth year in a row, its Top 50 companies—expressed as a stock index—beat the S&P 500, Dow Jones Industrial Average and the Nasdaq on a 10-, five- and one-year basis. That performance underscores the link between good diversity management, excellent corporate governance and return on equity for shareholders.

In addition to promoting diversity because of its benefits to our business, we support the ENDA legislation because we believe it is a fundamental right of all American citizens to be treated fairly, with respect and dignity in the workplace, regardless of their sexual orientation or gender identity. Our support mirrors the state in which we are headquartered, Minnesota, which is one of 20 states to adopt legislation preventing discrimination on the basis of sexual orientation and gender identity. We believe federal protection of our citizens will be a symbolic and effective means to deliver civil rights to all.

We know that providing an environment where people of different backgrounds and lifestyles can grow and thrive is essential to our long-term success. In our business, innovation is the key to survival. People with diverse experiences and backgrounds bring different and uniquely valuable perspectives and solutions. This diversity drives innovation. That's why we support any practice or public policy that encourages bringing diversity to the table.

Internally, we've done several things to encourage diversity. In the mid-1990s, we created our GLBT network, Betty's Family, named after one of our key icons—Betty Crocker. This network's mission is to create a safe, open and productive environment for General Mills' GLBT employees. One of our most senior executives helped found this network and has commented frequently on the powerful impact it has had on our ability to recruit and retain top talent. We know this network, in addition to our six other affinity groups, is a tangible demonstration of our commitment to attracting, developing and advancing every unique employee.

One of our newer employees, a marketing manager recruited from Northwestern's Kellogg School of Management's MBA program, said one of the reasons she chose to join General Mills, among many opportunities, was because of our dedicated GLBT network. She told me that any company can claim to have a GLBT network on their corporate Web site. But after talking with one of our employees who described how active our network is, she made her decision to join General Mills.

We also understand that establishing a culture of respect is a baseline for our employment standards. Beyond that, we strive to be an employer of choice—a place where we demonstrate support for the personal needs of our employees to allow them to be fully committed to their work. In 1999, we introduced Domestic Partner benefits, another demonstration that we are committed to providing equality to our GLBT employees in all of our employment benefits.

In closing, let me just reiterate why General Mills believes this legislation is good for business and good for America. It will:

- Help businesses attract and retain top talent.
- Help provide a safe, comfortable and productive work environment, free from any form of discrimination.
- Help create a culture that fosters creativity and innovation that is vital to the success of all businesses.

Thank you for the opportunity to speak to you today. I would be happy to take any questions.

Chairman ANDREWS. Ms. Baker, thank you very, very much for your very thorough testimony.

Mr. Lorber, we are fortunate you are bringing your wealth of experience to the committee this morning. Thank you and welcome.

STATEMENT OF LAWRENCE LORBER, PARTNER, PROSKAUER ROSE, LLP

Mr. LORBER. Thank you, Chairman Andrews, Ranking Member Kline. I appreciate the opportunity to testify before you.

As Mr. Kline stated in his opening comments, words have meaning. And what I would like to do in this legislative hearing is to comment on the proposed language in H.R. 2015 and suggest that there may be some issues which this committee might want to consider as it considers this legislation.

While I do bring experience here as an employment law practitioner, I am not testifying today on behalf of my law firm, clients or other affiliations.

Let me begin by going through some of the sections of the act and highlight issues which I think may be subject to some consideration as you consider this bill.

Sections 4(a)(1) and (2) are the nondiscrimination provisions of ENDA. They do incorporate within it the concept of gender identity, first introduced in this version of ENDA, which appears in Section 3(a)(6), which gives a definition of gender identity. However, this is a definition, frankly, without much meaning and without reference to a characteristic or status which is normally the basis upon which employment discrimination laws are passed.

Employers have to know what they are dealing with in order to comply with the law. And to put a burden on an employer to deal with somebody's innate personal consideration of their gender identity, without any reference to any specific action or status, places that employer in an extraordinarily difficult position.

To the extent to which gender identity talks about sexual mannerisms, I would simply point out to the committee that in 1989 the Supreme Court, in the Price Waterhouse v. Hopkins decision, held, in part—and really the key to its decision—that sexual stereotyping manifested by assumptions as to proper behaviors would form a basis for a Title VII violation.

This has been the law since 1989. The Congress in 1991 in the Civil Rights Act, in fact, put that provision into Title VII.

So now we have not a conflict, but we have a protection already. And to read gender identity now you have to read it to mean something else. And that something else is simply unclear.

Let me address Section 4(g), which is the disparate impact section.

Congressman Frank said that this bill does not require affirmative action. And I think it is appropriate, as the congressman noted, why it should not. However, 4(g), which is clear and unambiguous on its face, seems to be excepted specifically by Section 8(a)(5), which creates an exception for the condition of marriage or marriageability.

Quite candidly, it is absolutely unclear what Section 8(a)(5) means and how it can be applied in the context of this act. If, in fact, it is meant to prevent a consideration of a condition as a pre-

text for discrimination, a disparate treatment issue, then there is no need to except it from the prohibition against disparate impact under Section 4(g).

So, too, Section 8(a)(1) can be construed as incorporating concepts of disparate impact in the treatment of employer rules and policies. While the legislation allows employers to establish their rules and policies, it does have a provision that none of those rules should circumvent the purposes of the act. If, for example, the committee might wish to add the word "intentionally" before "circumvent the purposes of the act," I think it would be clear as to what this provision means and make it clear that the 4(g) prohibition on disparate impact would not apply.

Let me briefly talk about Section 8(a)(3), which is the provision requiring adequate shower or dressing facilities.

Again, it is unclear whether or not this would require employers to establish either additional facilities or to triage the use of facilities, particularly when you are talking about gender identity, which, as I noted, is not a status or a characteristic. Therefore, it is unclear to an employer what it must do. And it is absolutely unclear how this provision would apply.

Let me move to Section 8(b).

This is a section which states that nothing in this act shall require an employer to provide benefits on the basis of marriage. Nevertheless, Section 8(b), in the second clause of Section 8(b), I think represents an absolutely dramatic change in our understanding and the 33-year history of employment law, particularly ERISA preemption.

There is no basis to this. I think this is not the purpose to talk about ERISA preemption. Quite frankly, that would take a hearing which might last days to examine.

But, nevertheless, it seems to me that including this provision in this act, in this legislation, which will have the effect of eroding ERISA preemption, at least for the narrow purposes of ENDA, makes absolutely no sense.

In conclusion, I do believe that the issues I have raised are appropriate for this committee as it works its way through this legislation.

I would note that my own experience in dealing with employers is that the concern is to attract and retain the most competent, efficient and productive employees, without regard to personal characteristics and which do not have anything to do with the person's sexual orientation. It is hoped that this committee will focus on this and work constructively with employer and interest groups to craft a statute consistent with sound employment policy and sound public policy.

Thank you very much.

[The statement of Mr. Lorber follows:]

Prepared Statement of Lawrence Z. Lorber, Partner, Proskauer Rose, LLP

Chairman Andrews, Ranking Member Kline, members of the Committee, I am pleased to be invited to testify before you today on H.R. 2015, the Employment Non-Discrimination Act of 2007, "ENDA".

My own background may be relevant to my comments on this legislation. I have been a labor law practitioner for 35 years starting in the Solicitor's Office at the Department of Labor. I am a labor and employment partner in the Washington DC

office of Proskauer Rose, LLP. In 1975 I was appointed by Secretary of Labor John Dunlop as a Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs, OFCCP, which enforces the various non-discrimination and affirmative action laws applicable to government contractors. In that capacity, the first regulations enforcing section 503 of the Rehabilitation Act were issued as well as the first comprehensive review of the E.O. 11246 regulations was undertaken. In private practice, I have represented and counseled employers on various issues relating to equal employment matters. In 1989 I was asked to represent various employer groups with respect to the consideration and ultimate passage of the Americans with Disabilities Act, and in 1991 I was counsel to the Business Roundtable during the consideration of the Civil Rights Act of 1991. In 1995 I was honored to be appointed as a Member of the first Board of Directors of the Office of Compliance, which enforces the Congressional Accountability Act, applying 11 employment and labor laws to the Congress. I have been management co-chair of the federal legislation committee of the Labor Section of the ABA and am chair of the EEO subcommittee of the US Chamber of Commerce. Over the years I have been asked to testify on various employment issues being considered by the Congress.

The Employment Non-Discrimination Act of 2007

My purpose here today is not to recommend whether this Committee or the Congress should ultimately decide to pass this legislation but rather to offer comments on the latest version, and highlight issues which may warrant the attention of this Committee as it examines the legislation. While I do bring extensive experience as an employment law practitioner, I am not testifying today on behalf of my law firm, clients or other affiliations.

The 2007 version of ENDA represents a continuation of the examination of the issues involving the consideration of sexual orientation under our federal employment laws and potential legislative responses. However, as I will highlight, the 2007 version does contain several significant changes from prior versions which should be closely examined as they represent potentially far reaching changes in accepted employment law and may well have significant impact upon employers and employees. As a preliminary matter, it should be noted that without categorizing one or another of the laws as necessary or superfluous, there are probably more and different employment laws impacting upon the workplace, including federal, state and local than apply in other regulated areas. Some cover the same areas but have different administrative or enforcement procedures. Others include overlapping federal, state and local requirements but differ in scope, procedure or administration. And still others overlap within the same jurisdiction, so that one federal law implicates another. And it should be noted that the greatest 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. And while section 15 of ENDA provides that nothing in this legislation, or law if it becomes enacted will invalidate or limit the rights under any other federal, State or local law, in fact there are some examples in the 2007 version of ENDA in which the plain meaning of the draft language will serve to circumvent or change other laws. Thus may I suggest that the Committee carefully weigh the impact of ENDA and its requirements on how the regulated community must adopt to its proscriptions and how the protected community will understand their rights.

Section 4(a)(1)(2)

The analysis of ENDA should begin with Section 4 (a)(1) and (2), the core description of unlawful employment practices. There is a major new issue raised in this section which the Committee may wish to focus on. For the first time, a new protected category, Gender Identity, has been introduced into the legislation. The term is defined in section 3 (a) (6) as "the gender related identity, appearance, or mannerisms or other gender-related characteristics of an individual, without regard to the individual's designated sex at birth." While gender identity may be viewed as a manifestation of an individual's sexual orientation as defined in section 3 (a)(9), gender-identity, as defined in the bill does not seem to relate to any discernable innate characteristic or sexual orientation. Rather, as used in section 4 (a) it appears to relate to actions or representations of an individual perhaps related to sexual orientation or perhaps not. Thus, it stands as an independent protected classification not grounded in any discernable characteristic or status which is the basis for all of the non-discrimination legislation. I would suggest that the Committee examine in more detail how an employer might deal with this issue and insure that it does not violate the law. While, for example, section 8 (a)(4) permits employers to estab-

lish neutral reasonable dress or grooming standards, might not the requirement to accommodate an individual's gender identity, which may or may not have relationship to the individual's sexual orientation or gender transition, undermine the protection of section 8 (a)(4)? It is unclear why this new protected classification was added to ENDA when the protection for sexual orientation would seem to encompass activities and mannerisms related to orientation. And further, existing Title VII case law and statute would seem to adequately deal with the issue raised by the addition of gender identity into the proposed legislation. In Price Waterhouse v Hopkins, 490 US 228 (1989), the Supreme Court held in part that improper sexual stereotyping manifested by assumptions as to "proper behaviors" based upon sex could well form the basis for a Title VII action. The Hopkins decision was further clarified in Section 107 of the 1991 Civil Rights Act, see 42 USC §2000e-2(m) which codified the plurality holding in Hopkins regarding mixed motive cases.

Section 4(e)

I would note as well that section 4 (e) of the legislation which prohibits association discrimination also includes gender identity. Section 4 (e) is modeled after the ADA,42 USC 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.

Section 4(g), Section 8 (a)(5)), Section 8(a)(1)

Section 4 (g) appropriately provides that only disparate treatment and not disparate impact claims may be brought under this Act. I would suggest that direct reference be made to section 42 USC §2000e-2(k) which is the first statutory definition of disparate impact so that the concept of disparate impact is clearly understood.

However, I must note that while section 4 (g) seems clear and unambiguous, it is excepted by section 8 (a)(5), which seems to prohibit any employer action based upon the legal status of marriage and is expressly distinguished from section 4 (g). It is not clear at all what is meant by this section, particularly as section 8 (b) states that notwithstanding section 8 (a)(5), employee benefits conditioned on marriage are not affected by this Act. If this section is meant to clarify the concept of pretext under traditional disparate treatment analysis, then certainly there is no basis to exempt it from the prohibition against considering disparate impact claims under this statute. However, if section 8(a)(5) calls for some form of disparate impact analysis, then I think it is both inappropriate in the context of the legislation as drafted and subject to a great deal of confusion. I am not aware of any employer which requires employees to be married, nor would I believe such a requirement would stand analysis under existing employment law. So too section 8(a)(1) could be construed as incorporating concepts of disparate impact in its treatment of employer rules and policies. In particular, the Committee might wish to add the word "intentionally" before "circumvent the purposes of this Act" to insure that this language is not used to attack neutral policies which may be perceived to violate the Act, which would directly import disparate impact into the Act.

Section 5

Section 5 prohibits retaliation against an individual who opposes any practice made unlawful by this Act, or who makes a charge or testifies pursuant to this Act. Prohibition against retaliation is well understood in the broad context of employment law and appropriate to be included in ENDA. However, since the concept of retaliation is well understood in employment law, the Committee might want to insure that the definition in section 5 is compatible with existing law rather than establish different concepts or use language not grounded in established precedent.

Section 6

Section 6 of ENDA deals with the application of the proposed statute to Religious Organizations. While I understand that this issue will be specifically addressed in this hearing, I do believe it important to note that religious organizations or religious affiliated organizations are employers and there seems to be a degree of uncertainty as to the precise meaning of section 6 particularly as it differs in structure from the analogous provision in Title VII. Therefore, it would seem appropriate for the Committee to undertake a careful examination of the exemption to assure that it is appropriately drafted to achieve its intended purpose.

Section 8(a)(3)

Section 8(a)(3) requires an employer to provide adequate shower or dressing facilities to employees undergoing transgender transition. The committee should address whether this section creates the requirement for the provision of additional facilities or the requirement that use of certain facilities be timed to insure employee comfort for all employees. In addition, section 8(a)(3) as drafted requires that facilities not only accommodate employees who have undergone or are undergoing gender transition, but to accommodate the employees self-perceived gender identity. This would seem to present an extremely difficult standard for employers to meet and in fact would seem to require an employee to register his or her gender identity with the employer at the time of employment which seems to be highly intrusive to both employer and employee.

Section 8(a)(4)

Section 8(a)(4) provides that an employer may apply reasonable dress code and grooming requirements. However, now that the concept of gender identity as a protected classification has been added to the bill, there are now certain issues which must be addressed. It is simply unclear how a reasonable dress code can coexist with the added, indefinite classification of self-perceived gender identity. This exception seems to negate any meaning for the rule. This differs from the consideration for employees who have undergone or are undergoing gender transition. Again, the practical implications of this provision should be carefully examined.

Section 8(b)

Section 8 (b) of the 2007 version of ENDA contains a significant change from prior versions of ENDA and which creates a substantial issue. Section 8(b) specifically permits a State or a subdivision of a State to pass a law or establish a requirement impacting an employee benefit notwithstanding any other law. Simply put, this section will overturn, in the circumstances of this Act only, the long standing concept of ERISA preemption. Without getting into the nuances and particulars, ERISA preemption has received solid Supreme Court approval , see e.g. Shaw v Delta Airlines, 463 US 85 (1983) and has been universally deemed to be the bedrock of national benefits policy. It would therefore seem to be highly questionable to cavalierly overturn that 33 year old concept in the context of this Act and for an undefined reason. This section should be carefully reviewed as it appears to directly contradict ERISA, undermine established precedent and, I believe, would engender significant opposition to the legislation..

Conclusion

I believe that the issues I have raised are appropriate as this Committee works its way through this legislation. I would note that my own experience in dealing with employers is that the concern is to attract and retain the most competent, efficient and productive employees without regard to personal characteristics and which do not have anything to do with a person's sexual orientation It is hoped that the Committee will focus on this and work constructively with employer and interest groups to craft a statute consistent with sound employment policy and sound public policy.

Thank you.

Chairman ANDREWS. Mr. Lorber, thank you for your very thoughtful testimony. It gives the committee a lot of good issues to consider. Thank you very, very much.

Professor Badgett, welcome to the committee.

STATEMENT OF M.V. LEE BADGETT, ASSOCIATE PROFESSOR OF ECONOMICS, UNIVERSITY OF MASSACHUSETTS; RESEARCH DIRECTOR, THE INSTITUTE FOR GAY AND LESBIAN STRATEGIC STUDIES

Ms. BADGETT. Thank you.

Good morning, Chairman Andrews and members of the committee.

Today, I want to make three main points to document the need for the Employment Non-Discrimination Act.

My first point is that decades of social science research have uncovered evidence of discrimination in employment against lesbian and gay, bisexual and transgender Americans—whom I will call, if you will, LGBT Americans, for short—in workplaces across the country.

Two recent national surveys give the clearest overall picture of discrimination. In 2000, a Kaiser Family Foundation survey found that 18 percent of LGBT people living in urban areas reported experiences of employment discrimination. In a 2005 survey, 16 percent of lesbians and gay men and 5 percent of bisexual people reported employment discrimination.

There were also many, many local community surveys of nonrandom samples of LGBT people that also find evidence of unequal treatment in the workplace.

Similar national studies have not been done on gender identity discrimination, unfortunately. However, 11 recent local surveys of transgender people have found that at least 20 percent, and as many as 57 percent, report having experienced some form of employment discrimination.

From another angle, in the states that already outlaw sexual orientation discrimination, we have seen that LGBT people are as likely to file discrimination complaints as are people in other groups that are currently protected under federal law.

My colleague, William Rubenstein, has shown that the annual rate of sexual orientation complaints was 3 per 10,000 LGBT people, on average, in these states. And I will point out that figure is quite similar to the number of sex discrimination complaints per woman, which is about 9 per 10,000 women, and race-related complaints per person of color, which is about 8 per 10,000 people.

A third way to identify the extent of discrimination is to create experiments to see if LGBT people and heterosexual job applicants are treated equally. All three such experiments in the U.S. have found evidence of unequal treatment of gay applicants in a variety of job situations.

Another way to measure discrimination is to compare the earnings of people who have different personal characteristics, like sexual orientation, but have the same productive characteristics to see if employers are paying people in those two groups equally.

Twelve studies conducted in the U.S. over the last decade show a significant pay gap for gay men. Gay and bisexual men earn from 10 percent to 32 percent less than similarly qualified heterosexual men. Now, economists and sociologists would interpret that wage gap as evidence of discrimination by employers.

Those studies also lead to my second main point, which is that sexual orientation discrimination results in economic harm to LGBT people, reducing their earnings by thousands of dollars. We have no similar studies related to gender identity, but the surveys I mentioned earlier do show that transgender people report very low incomes, often below the poverty line.

Although discrimination hurts, the good news is that nondiscrimination laws appear to help. Two very recent and, as yet, unpublished studies by my UCLA colleagues, find that state-level nondiscrimination laws reduce the wage gap for gay men.

My third and final point is that America's businesses are also likely hurt by the direct and indirect effects of discrimination in the workplace.

Economists and employers have long argued that businesses will be most successful when they recruit, hire and retain employees on the basis of ability, not personal characteristics like sexual orientation or gender identity that have no impact on an employee's job performance. You have heard several direct testimonies to that effect.

Employers would also gain from having LGBT workers who no longer need to conceal their sexual orientation or gender identity out of fear of discrimination. Employers have a stake in these individual decisions because research suggests that greater openness improves LGBT workers' well being and their job performance.

Perhaps the best evidence that nondiscrimination policies are good for business comes from the fact that many companies have voluntarily added sexual orientation and gender identity to their nondiscrimination policies. 88 percent of the Fortune 500 policies include sexual orientation and a quarter have added gender identity.

Despite that progress, however, only 17 percent of American workers are employed by companies with those policies, and only 29 percent of Americans live in states that prohibit both sexual orientation and gender identity discrimination, leaving a big hole in the legal protection for millions of other workers.

To sum up decades of research document discrimination based on sexual orientation and gender identity, our country's employers would be better off with an LGBT workforce that no longer fears discrimination. Passing the Employment Non-Discrimination Act would serve to benefit both employees and employers.

Thank you.

[The statement of Ms. Badgett follows:]

Prepared Statement of M.V. Lee Badgett, Associate Professor of Economics, University of Massachusetts

Good morning, Chairman Andrews and members of the committee. I am an economist and the research director of the Williams Institute on Sexual Orientation Law and Public Policy at UCLA, and I also direct the Center for Public Policy and Administration at the University of Massachusetts Amherst. I have studied employment discrimination based on sexual orientation, race, and gender for more than fifteen years and have published two books and numerous studies on this topic.

Today I am here to speak to you about HR 2015, the Employment Non-Discrimination Act of 2007. As you know, this bill would outlaw discrimination in hiring and other employment decisions based on sexual orientation and gender identity. I want to make three main points to document the need for this legislation.

First, decades of social science research have demonstrated that employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) Americans occurs in workplaces across the country. This evidence comes from many different methods of studying discrimination, including self-reported experiences on surveys, official complaints of discrimination in states that already ban it, experiments to measure the treatment of LGBT job applicants, and comparisons of wages earned by LGBT people and heterosexual people. Together these sources provide ample evidence that employment discrimination based on sexual orientation and gender identity is a serious problem in the United States.

Many academic researchers and community groups have surveyed lesbian, gay, bisexual, and transgender individuals. I have reviewed more than 35 such studies that have been conducted over the last two decades. Each survey documents numerous experiences of being fired, being denied a job, or some other form of unequal

treatment in the workforce that stemmed from these individuals' sexual orientation or gender identity.

Two fairly recent national surveys of random samples of the LGB population give the clearest overall picture of sexual orientation-related discrimination. In 2000, a survey by the Kaiser Family Foundation found that 18% of LGB people living in urban areas reported employment discrimination. Heterosexuals surveyed in a companion study agree that LGB people are vulnerable: more than three-quarters of heterosexuals surveyed by the Kaiser Family Foundation believed that LGB people commonly experience employment discrimination. More recently, a 2005 survey by Dr. Gregory Herek found that 16% of lesbians and gay men and 5% of bisexual people reported having experienced employment discrimination. A quarter of LGB people disagreed with a statement asserting that most employers in their areas would hire openly LGB people if they are qualified for the job. Numerous local community surveys of nonrandom samples of LGBT people find that sexual orientation discrimination is also commonly reported in those areas.

Similar national studies have not been conducted related to discrimination based on gender identity, unfortunately. However, eleven recent local surveys of transgender people have found that at least 20% and as many as 57% report having experienced some form of employment discrimination.

A different source of data supports the finding that discrimination based on sexual orientation is common, and perhaps as common as other kinds of discrimination. The GAO has collected the numbers of sexual orientation discrimination complaints in states that outlaw such treatment. The GAO reported that the number of complaints is relatively small compared with the overall level of complaints filed at state agencies. However, my colleague William Rubenstein has shown that in the 1990's the annual rate of complaints was 3 per 10,000 LGB people on average in these states (assuming that LGB people are 5% of the U.S. population). That figure is quite similar to the number of sex discrimination complaints per woman (nine per 10,000 women) and race-related complaints per person of color (8 per 10,000). In other words, LGB people are about as likely to file discrimination complaints as are people in groups that are currently protected against discrimination under federal law.

Another method of identifying the extent of discrimination is to create experiments in which some people are coded as LGB on a resume when they apply for a real or hypothetical job, and their experience is compared with that of an otherwise identical heterosexual applicant. Three such studies in the United States found evidence of unequal treatment of gay applicants in a variety of job situations.

An additional way that economists and sociologists look for evidence of discrimination is to compare the earnings of people who have different personal characteristics, such as sexual orientation, but the same productive characteristics. If there is a wage difference after controlling for all of the factors that we reasonably expect to influence wages, such as education and experience, then most of us would conclude that discrimination is likely the reason for the wage gap for the disadvantaged group.

We now have more than a decade of research and twelve studies that compare earnings by sexual orientation in the United States. All twelve studies show a significant pay gap for gay men when compared to heterosexual men who have the same productive characteristics. Depending on the study, gay and bisexual men earn from 10% to 32% less than similarly qualified heterosexual men. Lesbians generally earn the same as or more than heterosexual women, but lesbians earn less than either heterosexual or gay men.

The studies showing wage gaps also lead to my second main point: sexual orientation discrimination results in economic harm to LGB people, reducing their earnings by thousands of dollars. We have no similar studies related to gender identity, but the studies I mentioned earlier show that transgender people report very low incomes, often below the poverty line.

Discrimination hurts, but nondiscrimination laws appear to help. Two very recent and as-yet unpublished studies by my UCLA colleagues find that state-level nondiscrimination laws reduce this wage gap for gay men and lesbians when compared with heterosexual men. These studies drew on data from the 2000 Census and found that gay men and lesbians earned 2-4% higher wages when they lived in states with sexual orientation nondiscrimination laws.

My third and final point is that America's businesses are also likely hurt by the direct and indirect effects of discrimination in the workplace. Economists and businesses have long argued that businesses will be most successful when they recruit, hire, and retain employees on the basis of talent, not personal characteristics that have no impact on an employee's ability to perform a job well.

Beyond that most basic reason to forbid discrimination, the evidence suggests that employers would also gain in other ways if ENDA were passed. Numerous studies from various academic disciplines suggest that LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.

The key link here is between discrimination and disclosure of one's sexual orientation or gender identity. Many studies have demonstrated that discrimination keeps LGBT workers from revealing their sexual orientation in the workplace. Although having experienced discrimination directly is a powerful reason for some to "stay in the closet," many studies show that LGBT people who fear discrimination are also less likely to reveal their sexual orientation to co-workers and supervisors.

Employers have a stake in these individual decisions, since disclosure has potentially positive benefits to LGBT workers' well-being and job performance. Studies find that people who have come out report lower levels of anxiety, less conflict between work and personal life, greater job satisfaction, more sharing of employers' goals, higher levels of satisfaction with their co-workers, more self-esteem, and better physical health.

On the flipside, when fear of discrimination causes LGBT employees to conceal their sexual orientation or gender identity, employers experience negative costs along with LGBT people themselves. The time as well as social and psychological energy that is required to maintain a hidden identity would, from an employer's perspective, be better used on the job.

As in the case of wage gaps, nondiscrimination policies can improve the workplace climate and influence choices about disclosure and concealment. Several studies have found higher levels of disclosure in workplaces when employers have their own non-discrimination policies that include sexual orientation. And one study found that LGBT people who live in places covered by a nondiscrimination law had higher levels of disclosure than those in unprotected locations.

Perhaps the best evidence that nondiscrimination policies are good for business comes from the fact that many companies have voluntarily adopted such a policy. The most recent tally shows that 88% of the Fortune 500 companies have added sexual orientation to their nondiscrimination policies, and 25% have added gender identity. Despite that progress, only 17% of American workers are employed by companies with those policies, leaving a big hole in the legal protections provided for millions of other workers.

To sum up, decades of research show that discrimination based on sexual orientation and gender identity exists in our nation's workplaces. This discrimination hurts LGBT people in their paychecks and in their health and workplace experiences. Our nation's employers would be better off with an LGBT workforce that no longer fears discrimination. Passing the Employment Non-Discrimination Act would serve to benefit both employees and employers.

Chairman ANDREWS. Professor, thank you very much for giving us that context for the consideration of our deliberations here.

Mr. Fahleson? Professor Fahleson, welcome to the committee. We look forward to your testimony.

STATEMENT OF MARK FAHLESON, REMBOLT LUDTKE, LLP; ADJUNCT PROFESSOR OF EMPLOYMENT LAW, THE UNIVERSITY OF NEBRASKA COLLEGE OF LAW

Mr. FAHLESON. Not professor.

Mr. Chairman, Ranking Member Kline, members of the committee, again, my name is Mark Fahleson. I am an employment law practitioner from America's heartland in Lincoln, Nebraska. And I am here today as an employment law practitioner, someone whose clients are primarily small-and medium-sized businesses.

In addition, my practice includes representing a number of religious institutions and faith-based organizations. We currently provide legal services to a number of religious colleges and universities, high schools, elementary schools, as well as faith-based employers.

Like Mr. Lorber, I do not appear on behalf of my law firm, any particular client or organization, but rather testify as an employ-

ment law practitioner who spends the bulk of his day on the telephone, answering emails and questions from clients as they try to navigate the myriad employment laws with which employers must deal with on the local, state and federal level.

Unfortunately, in its current form, H.R. 2015 would add yet another layer of confusion for these employers, especially religious and faith-based organizations.

I generally concur with the analysis of Mr. Lorber, both in his written testimony, as well as that here today. Consequently, my remarks this morning will focus on Section 6, which is the so-called religious exemption.

As the ranking member noted in his opening comments, predecessor legislation to H.R. 2015 contained a blanket exemption for religious organizations.

For example, H.R. 3285 introduced in the 108th Congress by Mr. Frank and Mr. Shays expressly provided that the legislation shall not apply to a religious organization, which the legislation broadly defined to include religious corporations, associations, societies, schools, colleges, universities and educational institutions.

Again, while H.R. 2015 has a section entitled "Exemption for Religious Organizations," it is really no meaningful exemption at all. Essentially, Section 6 contains two very narrow avenues under which a religious organization or a faith-based organization or individuals employed by such may not be covered.

First is what I will call the religious enterprise exemption. And that provision, which is 6(a), states that the act shall not apply to the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief.

The second exemption is in Section 6(b), which I will call the limited individual exemption, which applies to a narrow subset of individuals who are employed by employers who are not already exempt under the limited religious enterprise exemption in 6(a). That exemption states that the act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading of religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participating in religious ritual or worship.

This individual exemption appears to codify a judicially-created exception called—and, unfortunately misnamed—the ministerial exception.

The proposed limited religious enterprise and individual exemptions raise a number of issues that would be of tremendous concern to the religious and faith-based employers that I represent. I have set forth a number of real-life hypotheticals in my written testimony. Let me highlight a couple of those here this morning.

First, is a Catholic high school that markets itself as a college-preparatory learning institution deemed under this legislation to have as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief and is, therefore, exempt under the enterprise exemption? If the answer is no, then would the limited individual exemption apply to the volleyball

coach at that same Catholic high school who, in addition to coaching and mentoring student athletes, also leads the team Bible study?

Would a Lutheran university with undergraduate and graduate degree programs ranging from art to chemistry to business to theology fall under the limited religious enterprise exemption? And if the answer is no, would the individual exemption apply to, for example, the Lutheran university provost, whose duties include administration of the academic, as well as ministry, programs?

As these hypotheticals point out, the exemptions are far too narrow to adequately cover these religious institutions. Moreover, the focus on the terms of primary purpose or primary duties are vague and highly fact specific, making it extremely difficult to advise religious and faith-based clients as to their duties and obligations.

In addition, the proposed primary purpose and primary duties test raise significant constitutional issues that must be addressed. The question for this subcommittee and committee is whether government should play a role in the selection of religious organization employees and whether this anticipated entangling of government into religious affairs is constitutionally permissible.

Obviously, the blanket exemption for religious organizations found in prior versions is preferred.

With that, I will conclude my testimony.

[The statement of Mr. Fahleson follows:]

Prepared Statement of Mark A. Fahleson, Rembolt Ludtke, LLP; Adjunct Professor of Employment Law, the University of Nebraska College of Law

Mr. Chairman and members of the Committee, I want to thank you for this opportunity to share my views with respect to H.R. 2015—The Employment Non-Discrimination Act of 2007, or "ENDA"—as it is currently drafted.

First, a little background about myself and why I am here. I practice employment and labor law in Lincoln, Nebraska, and have served as an adjunct professor teaching employment law at the University of Nebraska College of Law. Most of my clients are small to medium-sized employers. We also represent several religious-affiliated organizations, including religious colleges and universities, high schools and elementary schools, as well as faith-based employers. Today I do not appear on behalf of any particular client or organization but, rather, to testify as an employment law practitioner who spends the bulk of his day answering questions from clients about how to navigate the myriad employment laws and regulations that employers must deal with on a daily basis. Unfortunately, in its current form H.R. 2015 would add yet another layer of confusion for these employers, especially religious and faith-based organizations.

Is a Federal Remedy Necessary?

At the outset, 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.

Purported Exemption for Religious Organizations and Certain Employees Unnecessarily Narrow

Predecessor legislation to H.R. 2015 provided blanket exemptions for religious organizations. For example, H.R. 3285 introduced in the 108th Congress by Messrs. Shays and Frank expressly provided that the legislation "shall not apply to a religious organization," which was broadly defined to include religious corporations, as-

sociations, societies, schools, colleges, universities and educational institutions. Although H.R. 2015 contains a section entitled "Exemption for Religious Organizations," in reality it contains no meaningful exemption at all.

Section 6 contains two exceptionally narrow avenues under which a religious or faith-based organization or individuals employed by such an organization may not be covered.

First, Section 6(a) contains what I will call the limited Religious Enterprise Exemption. This provision states that the "Act shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief."

Second, Section 6(b) contains what I will call the limited Individual Exemption, which applies to a narrow subset of individuals who are employed by employers not wholly exempt under the limited Religious Enterprise Exemption. The limited Individual Exemption provides that the "Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participating in religious ritual or worship." This appears to be an attempt to partially codify what is (inaccurately) called the "ministerial exception." Rayburn v. Seventh-Day Adventists, 772 F.3d 1164, 1169 (4th Cir. 1985).

It is important to note that the limited Religious Enterprise Exemption is far narrower than the religious exemption currently found in Title VII with respect to claims of religious discrimination:

Title VII	H.R. 2015
This subchapter shall not apply to * * * a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.'' 42. U.S.C. §2000e-1.	This Act shall not apply to **any of the employment practices** of a religious corporation, association, educational institution, or society **which has its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief.** Section 6(a) **(emphasis added).**

The proposed limited Religious Enterprise and Individual Exemptions raise a number of issues that would be of tremendous concern to religious and faith-based employers such as those I represent. Consider the following real life hypotheticals:

- Is a Catholic high school that markets itself as a "college preparatory learning institution" deemed to have as "its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" and therefore exempt under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the volleyball coach at that same Catholic high school who, in addition to coaching and mentoring student-athletes, also leads the team Bible study?
- Would a Lutheran university, with undergraduate and graduate degree programs ranging from art to chemistry to business to theology, fall under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the Lutheran university provost position, whose essential duties include the administration of university's academic as well as ministry programs?
- Would a Jewish child care, affiliated with and housed adjacent to a Jewish synagogue, have as "its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" and therefore be exempt under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the child care teacher assigned to the three-year olds?
- Does the limited Religious Enterprise Exemption cover a social services organization affiliated with the Southern Baptist Church whose mission statement is "to bring compassion and justice to the world's poorest people"?
- How would caregiving employees for the Red Crescent Society, a Muslim-affiliated charitable organization, be treated under the Act?
- Would a charitable foundation affiliated with a Christian congregation have as "its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" and therefore be exempt under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the development director employed by that same charitable foundation if her primary

duties are to advise potential donors on estate planning issues and raise funds for the foundation, which benefits the Christian congregation?

These scenarios all seek to highlight some of the problems with the two limited exemptions as currently drafted. The most important flaw that needs to be addressed is each exemption's reliance on a "primary purpose" or "primary duties" test. Both of these tests are vague and highly fact-specific, thereby making it extremely difficult to advise religious and faith-based clients as to their duties and obligations. A similar "primary duty" standard has been used for purposes of the Part 541 overtime exemptions for the Fair Labor Standards Act, see 29 C.F.R. §541.700 (2006), and has been the source of significant uncertainty, high noncompliance rates and endless litigation. Use of the same or similar standard for purposes of the religious exemptions in H.R. 2015 will likely have the same costly result.

In addition, the proposed "primary purpose" and "primary duties" tests raise significant constitutional issues that must be considered. Courts generally recognize that government probing or examination of the affairs of religious organizations is to be avoided. Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.3d 360 (8th Cir. 1991). Given the vague and fact-specific nature of these two tests, it is inevitable that courts will be called upon to delve into church or religious matters to determine the "primary purpose" of a religious organization or the "primary duties" of a particular employee of a faith-based organization. Whether this anticipated entangling of government in religious affairs is constitutionally permissible must be addressed.

Finally, it is curious why the limited Religious Enterprise Exemption, unlike the Title VII religious exemption, exempts the "employment practices" of the religious organizations rather than the religious organizations themselves. The intent of this distinction requires exploration.

Obviously, the blanket exemption for religious organizations found in prior versions of ENDA provides greater certainty and is less problematic for religious and faith-based employers, as well as the judiciary.

While the main focus of my testimony is the problems I have identified with the purported religious exemptions, I do wish to comment on a few other issues with respect to the proposed legislation.

Definition of "Gender Identity" is Vague and Overly Broad

Unlike prior versions of this legislation, H.R. 2015 seeks to add a new protected class for actual or perceived "gender identity." The term "gender identity" is defined by the legislation as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." This definition is exceptionally vague and problematic.

For example, based upon the proposed definition, it appears that an employee can self-identify what their gender is, and that this subjective declaration can change an unlimited number of times without notice to the employer. Moreover, the expansiveness of this new protected class is demonstrated by protection of individuals because of a "perceived" gender identity.

The amorphous nature of the definition of "gender identity" is further compounded by the legislation's prohibition on "association" discrimination. Section 4(e) of H.R. 2015 prohibits adverse employment actions being taken against "an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated." Thus, in addition to protecting individuals based on their actual or perceived gender identity, the legislation protects individuals who presently associate or at some point in time associated with that individual.

Shared Shower or Dressing Facilities Requirement Problematic

Section 8(a)(3) of H.R. 2015 establishes requirements for covered employers with respect to access to certain shower or dressing facilities based on an individual's actual or perceived gender identity. Specifically, this section provides that it is not "an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being fully clothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later." This provision is problematic in at least two respects.

First, this provision requires an employer to accommodate an employee undergoing or having undergone gender transition. However, there is no requirement for the employee to provide advance notice to the employer of the gender transition so

that adequate time exists for the employer to provide the required "reasonable access to adequate facilities * * * " Moreover, the Committee should give consideration to adopting an "undue hardship" exception patterned after that found in the Americans with Disabilities Act under which such reasonable access could be denied where it would pose an "undue hardship" for the employer.

Second, at a minimum the phrase "in which being seen fully unclothed is unavoidable" should be deleted. Certainly there are shared shower or dressing facilities where being seen "fully unclothed" is not unavoidable, but where the presence of an employee undergoing gender transition may prove problematic for an employer.

Significant Regulatory Cost for Employers

If adopted in its current form, H.R. 2015 represents a significant new regulatory burden and cost for covered employers. In far too many instances the legislation adopts subjective or fact-specific standards that are subject to multiple interpretations. For example, as previously discussed, what is a particular organization's "primary purpose" for purposes of the limited Religious Enterprise Exemption. What is a particular employee's "primary duties" for purposes of the limited Individual Exemption? What exactly qualifies as association discrimination based upon the gender identity of someone the individual previously associated with? Under Section 8(a)(4), what is a "reasonable dress or grooming standard" that an employer may permissibly adopt? Why does Section 5 expand traditional retaliation protections to protect employees who oppose any practice the individual "reasonably believed" was unlawful under H.R. 2015, even though it perhaps was not? Because of this uncertainty and subjectivity, employers will be forced spend scarce resources seeking legal guidance on employment actions. Furthermore, given the fact-specific and subjective standards, it would be more difficult for employers to have meritless litigation under the Act dismissed prior to incurring the cost of a full-blown trial. While the cost is not insurmountable for large companies—many of which have voluntarily adopted protections based on sexual orientation—it could prove to be for employers of 20, 50 or even 100 employees, and especially those religious and faith-based organizations that have been swept within the Act's coverage.

Conclusion

I would like to thank the Committee for the opportunity to present my views on H.R. 2015 as currently drafted.

I strongly urge the Committee to give due consideration to returning to the broad blanket exemption for all religious organizations that was used in prior versions of this legislation. In addition, I urge the Committee to eliminate, where possible, the vague, fact-specific and subjective standards found throughout the bill.

Thank you.

Chairman ANDREWS. Mr. Fahleson, thanks very much. And thanks for including those provocative examples in your testimony. I am sure it will give the committee and the panel a lot to talk about. Thank you.

Professor Norton, welcome to the committee.

STATEMENT OF HELEN NORTON, ASSOCIATE PROFESSOR, UNIVERSITY OF COLORADO SCHOOL OF LAW

Ms. NORTON. Good morning.

Thank you, Mr. Chairman, members of the committee. And thank you for the opportunity to testify today.

My name is Helen Norton, and I am an associate professor at the University of Colorado School of Law. My testimony here draws not only from my work teaching and writing about employment discrimination as a law professor, but also from my experience as a deputy assistant attorney general in the Department of Justice, where my duties included supervising the Civil Rights Division's enforcement of Title VII.

Current federal law prohibits job discrimination on the basis of race, color, sex, religion, national origin, age and disability. These statutes provide many valuable safeguards for American workers.

But federal law currently fails to protect gay, lesbian, bisexual, or transgender workers from discrimination on the basis of sexual orientation or gender identity. In fact, the case law is replete with decisions where federal judges have characterized egregious acts of discrimination targeted at gay, lesbian, or transgender workers as morally reprehensible yet utterly beyond the law's reach.

You have heard some powerful examples already today. In the interest of time, I will focus on just one for now, but I refer you to my written testimony for further examples.

Michael Vickers, a private police officer employed by a Kentucky medical center, alleged that his coworkers subjected him to harassment on a daily basis for nearly a year after they learned that he had befriended a gay colleague.

According to Mr. Vickers, his coworkers repeatedly directed sexual slurs and other derogatory remarks at him. They placed irritants and other chemicals in his food and in his personal property. And they engaged in physical misconduct that included a coworker who handcuffed Mr. Vickers and then simulated sex with him. All because of Mr. Vickers' perceived sexual orientation.

Just last year, the Sixth Circuit's Court of Appeals dismissed his claim, concluding. "While the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, Vickers' claim does not fit within the prohibitions of the law."

To be sure, some states have tried to fill these significant gaps in federal law by enacting important antidiscrimination protections. Eleven states and the District of Columbia currently prohibit job discrimination on the basis of sexual orientation, as well as gender identity. And I note that the definition of gender identity in H.R. 2015 tracks the definition that a number of these state laws use and have enforced for a number of years.

Another eight states bar job discrimination on the basis of sexual orientation.

But employers in the majority of states remain legally free to fire, refuse to hire, harass, or otherwise discriminate against individuals because of their sexual orientation or their gender identity. As a result, current law, both federal and state, leaves unremedied a wide range of injuries and injustices.

H.R. 2015 would fill these gaps by clearly articulating for the first time a national commitment to equal employment opportunity regardless of sexual orientation or gender identity. H.R. 2015 does this while accommodating concerns that it would interfere with a religious institution's ability to make employment decisions consistent with their religious beliefs. In fact, H.R. 2015 not only incorporates Title VII's existing approach to issues involving religious institutions, it goes considerably further in accommodating such concerns.

First, the bill completely exempts from its reach those religious institutions primarily engaged in worship or the spreading of belief. This includes churches, mosques, synagogues, and other houses of worship, as well as parochial schools and religious missions.

Second, the bill further exempts an entire class of positions at other religious institutions: those jobs involving spiritual teaching or ministerial governance, such as chaplains or teachers of canon

law at religious institutions that are not primarily engaged in worship or the spreading of belief, and these might include religiously-affiliated hospitals, social service organizations, and religious universities.

Third, and finally, the bill makes clear that those religious institutions that are not primarily engaged in worship or the spreading of belief may still require that employees, even in nonministerial positions, conform to the institution's significant religious tenets, including tenets prohibiting same sex sexual activity. For example, if a religiously-affiliated hospital chooses to require that its doctors and nurses conform to its declared religious tenet against same sex sexual conduct, H.R. 2015 does not bar that hospital from firing or refusing to hire doctors or nurses who engage in such relationships.

H.R. 2015 accommodates other concerns, as well. And in the interest of time, I will reserve my discussion of them for any questions that you might have.

And thank you, again, for the chance to join you today.

[The statement of Ms. Norton follows:]

Prepared Statement of Helen Norton, Associate Professor, University of Colorado School of Law

Thank you for the opportunity to testify today. My name is Helen Norton, and I am an Associate Professor at the University of Colorado School of Law. My testimony here draws from my work as a law professor teaching and writing about employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's Title VII enforcement efforts.

Current federal law prohibits job discrimination on the basis of race, color, sex, national origin, religion, age, and disability.[1] While these statutes provide many valuable safeguards for American workers, federal law currently fails to protect gay, lesbian, bisexual, and transgender ("GLBT") employees from discrimination on the basis of sexual orientation and gender identity. Indeed, the case law is replete with decisions where federal judges have characterized egregious acts of discrimination targeted at GLBT workers as morally reprehensible yet utterly beyond the law's reach. Consider just a few examples:

Michael Vickers, a private police officer employed by a Kentucky medical center, alleged that his co-workers subjected him to harassment on a daily basis for nearly a year after learning that he had befriended a gay colleague.[2] According to Mr. Vickers, they repeatedly directed sexual slurs and other derogatory remarks at him, placed irritants and chemicals in his food and personal property, and engaged in physical misconduct that included a co-worker who handcuffed Mr. Vickers and then simulated sex with him—all because of Mr. Vickers' perceived sexual orientation.[3] In dismissing his claim just last year, the Sixth Circuit Court of Appeals concluded: "While the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, Vickers' claim does not fit within the prohibitions of the law."[4]

Postal worker Dwayne Simonton, a gay male, reported that co-workers targeted him for ongoing abuse because of his sexual orientation by directing obscene and derogatory sexual slurs at him and by placing pornographic and other sexually explicit materials in his worksite.[5] The alleged harassment was so severe that Mr. Simonton ultimately suffered a heart attack.[6] The Second Circuit Court of Appeals stated: "There can be no doubt that the conduct allegedly engaged in by Simonton's co-workers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace."[7] The court went on, however, to reject his claim, concluding that "[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."[8]

Robert Higgins, a gay male, brought a Title VII challenge to a workplace environment that the First Circuit Court of Appeals characterized as "wretchedly hostile."[9] Mr. Higgins alleged that his co-workers targeted him for both verbal and physical harassment because of his sexual orientation: he reported not only that they di-

rected threats, sexual epithets, and other obscene remarks at him, but also that they poured hot cement on him and assaulted him by grabbing him from behind and shaking him violently.[10] The court nonetheless affirmed summary judgment against Mr. Higgins: "We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation." [11]

To be sure, a few courts have broadly interpreted Title VII's prohibitions on sex discrimination to bar certain misconduct targeted at GLBT workers, such as sexual assault and other unwelcome physical conduct of an explicitly sexual nature by opposite-sex or same-sex co-workers, as well as employment decisions that punish workers who are perceived as failing to conform to certain gender stereotypes.[12] But even those federal courts that have acknowledged the availability of these theories have noted Title VII's substantial limits in addressing discrimination experienced by GLBT Americans in the workforce.[13]

To fill these significant gaps in federal law, some states have enacted important antidiscrimination protections for GLBT workers: indeed, eleven states and the District of Columbia have enacted statutes that currently prohibit job discrimination on the basis of sexual orientation as well as gender identity,[14] while another eight states bar job discrimination on the basis of sexual orientation alone.[15] But employers in the majority of states remain free to fire, refuse to hire, or otherwise discriminate against individuals because of their sexual orientation and/or gender identity.

As a result, current law—both federal and state—leaves unremedied a wide range of injuries and injustices suffered by GLBT workers. H.R. 2015 would fill these gaps by clearly articulating, for the first time, a national commitment to equal employment opportunity regardless of sexual orientation and gender identity.[16] More specifically, it forbids such discrimination in decisions about hiring, firing, compensation, and other terms and conditions of employment.[17] H.R. 2015 also incorporates the remedies and enforcement mechanisms available under Title VII.[18]

H.R. 2015 accomplishes antidiscrimination law's twin purposes of compensating victims of discrimination for their injuries and deterring future acts of bias while accommodating concerns that ENDA would interfere with religious institutions' ability to make employment decisions consistent with their religious beliefs. Indeed, H.R. 2015 not only incorporates Title VII's existing approach to issues involving religious institutions, but goes considerably further in accommodating such concerns.

First, section 6(a) of H.R. 2015 entirely excludes from the legislation's reach any employment action by "a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief." [19] In other words, an entire class of religious employers—including houses of worship, parochial schools, and religious missions—is completely exempt from this bill.[20]

Second, section 6(b) further excludes from the bill's coverage an entire class of positions at other religious institutions: those positions "whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship" at religious corporations, associations, educational institutions, or societies that are not already completely exempt under section 6(a). In other words, H.R. 2015 also completely exempts from ENDA scrutiny those jobs involving spiritual teaching or ministerial governance—such as chaplains and teachers of canon law—at religious institutions that are not primarily engaged in worship or the spreading of belief—such as religiously-affiliated hospitals, social service agencies, and religious universities.[21]

Third and finally, section 6(c) makes clear that those religious institutions that are not primarily engaged in worship or the spreading of belief may still require that employees in non-ministerial positions conform to the institution's significant religious tenets—including such tenets regarding same-sex sexual activity.[22] For example, if a religiously-affiliated hospital chooses to require that its doctors and nurses conform to its declared religious tenet against same-sex sexual conduct, H.R. 2015 does not bar it from firing or refusing to hire doctors or nurses who engage in such relationships.

H.R. 2015 accommodates other concerns as well. For example, section 8(a)(4) makes clear that employers remain free, during work hours, to require "reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law." In other words, employers remain free to establish and enforce otherwise lawful personal appearance standards in the workplace.[23] The section further makes

clear that an employee who notifies the employer that the employee has undergone or is undergoing gender transition must be held to otherwise lawful dress or grooming standards for the gender to which the employee has transitioned or is transitioning. For example, a transgender person designated female at birth must comply with the employer's otherwise lawful workplace grooming standards for men once he notifies his employer that he is transitioning. But while this section allows transgender employees to follow the standards established for the gender with which they identify, it does not protect employees who refuse to conform to those standards or who change their gender presentation from day to day.

H.R. 2015 similarly permits employers to respond to the privacy concerns of transgender employees and their co-workers by addressing access to sex-segregated facilities—like locker rooms and shower facilities—where being seen unclothed is unavoidable. Section 8(a)(3) permits employers to deny or limit access to such facilities "based on actual or perceived gender identity" so long as the employer "provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity. * * *" Examples include installing privacy screens or curtains in existing facilities or setting aside a time to provide a transgender employee sole access to an existing facility.

In sum, H.R. 2015 proposes to fill significant gaps in existing federal and state antidiscrimination law by clearly articulating, for the first time, a national commitment to equal employment opportunity regardless of sexual orientation and gender identity while accommodating concerns raised by religious institutions and other employers. Again, thank you for the opportunity to testify here today. I look forward to your questions.

ENDNOTES

[1] 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).

[2] Vickers v. Fairfield Medical Center, 453 F.3d 757, 759 (6th Cir. 2006), cert. denied, 127 S.Ct. 2910 (2007).

[3] Id. at 759-60.

[4] Id. at 764-65.

[5] Simonton v. Runyon, 232 F.3d 33, 34-35 (2nd Cir. 2000).

[6] Id. at 34.

[7] Id. at 35.

[8] Id.

[9] Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258 (1st Cir. 1999).

[10] Id. at 257.

[11] Id. at 259. For just a sampling of additional cases in this vein, see 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); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984); cert. denied, 471 U.S. 1017 (1985) (rejecting transgender employee's Title VII claim: "While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals.").

[12] E.g., Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004) (holding that transgender employee sufficiently alleged Title VII cause of action for sex discrimination with his claim that he suffered adverse employment actions based on "his failure to conform to sex stereotypes concerning how a man should look and behave"); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064-66, 1068 (9th Cir. 2002) (en banc), cert. denied, 538 U.S. 922 (2003) (holding that gay male plaintiff had stated a claim for Title VII sex discrimination based on his allegations that co-workers had physically and sexually assaulted him and had singled him out for harassment because he failed to conform to gender stereotypes of how men should behave).

[13] See, e.g., Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2nd Cir. 2005) (rejecting lesbian plaintiff's claim of Title VII discrimination: "Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'") (citation omitted); Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1063 (7th Cir. 2003) (rejecting plaintiff's Title VII claim by concluding that co-workers' alleged harassment of him was based on his perceived sexual orientation rather than on sex-based stereotypes).

[14] Along with the District of Columbia, those states are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Rhode Island, Vermont, and Washington. Oregon's legislation banning job discrimination on the basis of sexual orientation and gender identity will become effective in January 2008.

[15] Those states are Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

[16] See H.R. 2015, § 2.

[17] See id. at § 4.

[18] See id. at § 10.

[19] Id. at § 6(a).

[20] Note that, at the time of its debate, Title VII faced similar objections from those who feared that its ban on religious discrimination would intrude upon religious institutions' ability to hire members of their own faith. Title VII similarly accommodated this issue by protecting the ability of "a religious corporation, association, educational institution, or society" to make employment decisions on the basis of religion. 42 U.S.C. §2000e-1(a). Such religious institutions are not, however, generally exempt from Title VII's prohibitions on discrimination on the basis of race, color, sex, or national origin. See id.

[21] This section codifies for ENDA purposes the "ministerial exception" adopted by most courts when considering Title VII's application to religious institutions' decisions about their spiritual leaders. Recognizing the significant constitutional and other interests involved, these courts have interpreted Title VII to exclude religious institutions' employment decisions involving "ministerial" positions. See, e.g., McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972) (rejecting plaintiff minister's claim of sex discrimination by holding that Title VII does not apply to religious institutions' employment decisions regarding ministers and similar spiritual leaders); EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996) (rejecting plaintiff's claim of sex discrimination by holding that the ministerial exception exempts tenure decisions involving teachers of religious canon law from Title VII).

[22] H.R. 2015, § 6(c).

[23] Note that § 8(a)(4) insulates only personal appearance standards that apply "during the employee's hours at work." H.R. 2015's general prohibition of job discrimination based on gender identity prohibits employers from discriminating against individuals based on their off-the-job expression of gender identity.

Chairman ANDREWS. Professor Norton, thank you for bringing your experience to bear on this discussion.

Let me thank each of the witnesses for very edifying testimony, also very succinct, because now that gives us a chance to interact with each other and ask questions.

So start the clock, Carlos, I am on the clock here.

Ms. Waits, thanks again for what had to be a very difficult personal experience, which you handled just so courageously.

Do you know what would have happened to you if you had been fired from your job because of your religion? Do you know what legal rights you would have?

Ms. WAITS. What would have happened to me——

Chairman ANDREWS. Had you been fired because of your religion.

Ms. WAITS. I could have sued, I guess.

Chairman ANDREWS. You could have sued because there is a federal law that protects you that prohibits what happened to you because you were Baptist or Catholic or whatever.

In Texas, which is where you live, where this happened, your state does not have a law which prohibits a person from being dismissed because of their sexual orientation.

Mr. Fahleson, in your testimony, one of the issues you raise is whether a federal remedy is necessary. But, you know, there are 31 states where what happened to Ms. Waits could happen to a person because there is no federal protection. Don't you think that a federal remedy is necessary because of that significant vacuum that exists?

Mr. FAHLESON. Certainly that is a policy decision for the subcommittee, committee and Congress to make.

I will tell you, however, in advising employers, they are already burdened with the significant number of local, state and federal laws with which they must deal. And, again, Fortune 500 companies, they have HR departments, legal departments, who can handle those things.

Chairman ANDREWS. Yes.

Mr. FAHLESON. But the bulk of my practice, again, is that employer of 20, 50, or 100 employees. And it is very difficult for them to have yet another regulatory burden heaped upon them.

Chairman ANDREWS. I say this with respect. We don't really view it as a burden to look at a qualified person and say, "We don't care what your sexual orientation is, we are going to hire you because you are qualified." We don't really think that that is a burden. And I think the employer witnesses would echo that.

Let me ask you a question about the religious exemption. And I want to go to your example about the volleyball coach at the religious high school.

Now, putting aside for a moment whether the school would be exempt under subsection 6(a), which I frankly think it would, but putting that aside for a minute and putting aside whether the volleyball coach would be excluded under Section 6(b), which I think there is a strong argument that he or she would be included, let me ask you to analyze this fact pattern under Section 6(c), which I note you do not mention in your testimony.

If the high school in its job wanted ad said that anyone applying for a coaching position or anyone that interacts with the students must be a heterosexual because it is part of the religious tenets of the school that heterosexuality is the right way to live, would the school be justified in refusing to hire a gay person?

Mr. FAHLESON. The discussion that we are having here today is the problem that I have identified in my testimony.

You know, my job on a day-to-day basis is to advise that school who happens to call me and says, "Okay. Is this particular coach covered by this exemption?"

Chairman ANDREWS. Right.

Mr. FAHLESON. And I respectfully disagree with you that it is as clear as to whether that individual falls under (a) or (b).

Chairman ANDREWS. No, I—but what is the answer under Section 6(c)?

Mr. FAHLESON. Okay.

Chairman ANDREWS. If the school did that, what would you advise your client? What——

Mr. FAHLESON. Again, I don't fully understand 6(c)——

Chairman ANDREWS. Okay.

Mr. FAHLESON [continuing]. And its terms. And, also, I find it incongruous in its current form that it clearly states that the declaration by the religious corporation essentially shall not be subject to judicial or administrative review, whereas subsections (a) and (b) clearly invite judicial or administrative review when it comes to what is a primary purpose or primary duties. And so——

Chairman ANDREWS. No——

Mr. FAHLESON [continuing]. My point is——

Chairman ANDREWS. Primary purpose and primary duties are not in Section 6(c). What it says is if the religious organization says that in similar positions people have to conform to religious tenets they announce. And they say one of our tenets is that we think that homosexuality is wrong. And so we don't want anybody who is a homosexual coaching one of our teams. And they put it in the want ad. Isn't it very clear under Section 6(c) they have the right to do that?

Mr. FAHLESON. If that is your reading of it. Again, I find it rather confusing.

Chairman ANDREWS. What is yours?

Mr. FAHLESON. My reading——

Chairman ANDREWS. Why would yours disagree with that?

Mr. FAHLESON. Okay, a couple points.

One, it is unclear that—it says, under this act a religious corporation—so I assume we have now already excluded what is already exempt under (a), and it talks about applicants for similar positions—I am not sure what is meant by similar positions—conform—is this requiring an inquiry by the school to then actually evaluate what this individual is engaged in——

Chairman ANDREWS. Well, I don't think so because under the facts that I gave you, first of all, it is an educational institution. That covers the school. The similar position is coaching. They say anybody who is a coach that interacts with the students has to be a heterosexual. And they declare that as one of the tenets of their religion. Don't they have the right to do that under Section 6(c)?

Mr. FAHLESON. Again, if that—I think that that is a reasonable reading, as you have indicated. However, again, my concern is that religious institution is going to have to hire a lawyer, have someone interpret, when, in fact, a very broad prohibition which apparently was acceptable to the sponsor in prior versions of this legislation would be much more clear.

Chairman ANDREWS. Well, with all due respect, I think that if—and I see my time is up—but if the prior language you make reference to were there, they would probably have to hire a lawyer for that, as well. I mean, statutes are never case specific looking into the future. Thank goodness people have to hire lawyers. It is good for both you and me, Mr. Fahleson. [Laughter.]

I turn to my friend, the ranking member.

Mr. KLINE. Thank you, Mr. Chairman.

We are so often in this subcommittee in a discussion about lawyers and what is good for them. And apparently most legislation that comes from here is good for lawyers.

And I always make the point with some pride that I am not a lawyer, but nevertheless, we are in the business of making law here that affects the American people—employees and employers—and we want to make sure that we make good law.

Let me just thank all the witnesses.

I won't have a chance to ask all of you questions, but certainly, Ms. Baker, it is very nice to have someone from Minnesota here and representing such a great Minnesota company.

And I just make the comment that you have put in place—General Mills has put in place—policies which seem to be working very well for the company without the mandate of federal law. You have done that on your own.

And one of the things we want to explore is when we make federal law, will you be able—and other companies—be able to implement policies in the way you would like to that would further your human resources capability, or does it, in fact, get perhaps too complicated?

In a previous panel, our colleague and good friend, Emanuel Cleaver, talked about theological difficulties with perhaps not supporting this legislation.

I just make a note that I know that there are many people who have some theological difficulties with the legislation as it is, and we won't have an opportunity to explore that today. But he did bring it up, and I think we ought to make note of that as we go forward. I am sure there will be some discussion of that.

Speaking of theologies and religious institutions, I am going to go back to Mr. Fahleson for some more study of the sections, including 6(c).

But before I do that, Mr. Chairman, I would like to ask unanimous consent to be included in the record this letter to you and me and the other members of the committee from the General Conference of Seventh Day Adventists, the Union of Orthodox Jewish Congregations, and the U.S. Conference of Catholic Bishops.

Chairman ANDREWS. Without objection.

[The letter follows:]

General Conference – Seventh Day Adventist Church
12501 Old Columbia Pike, Silver Spring, MD 20904 (301) 680-6688
Union of Orthodox Jewish Congregations of America
800 8th Street, NW, Washington, DC 20001 (202) 513-6484
U.S. Conference of Catholic Bishops
3211 4th Street, NE, Washington, DC 20017 (202) 541-3000

September 4, 2007

Hon. Robert Andrews, Chairman
Hon. John Kline, Ranking Member
Subcommittee of Health, Education
Labor & Pensions
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Andrews, Ranking Member Kline
and Members of the Subcommittee:

We write to you on behalf of our respective organizations - the General Conference of Seventh-day Adventists, the Union of Orthodox Jewish Congregations of America and the United States Conference of Catholic Bishops - with regard to your consideration of H.R. 2015, the Employment Non-discrimination Act of 2007 ("ENDA").

Our respective organizations have neither opposed nor endorsed past versions of ENDA introduced in prior congresses. We have serious concerns, however, about ENDA as introduced in the 110th Congress, due to its substantial revision of the religious exemption provision.

In stark contrast to the single sentence provision contained in past versions of ENDA,[1] the revised exemption, embodied in Section 6 of H.R. 2015, contains a multi-part matrix elaborated in three paragraphs. In reviewing this revised section, we find that it leaves religious institutions with insufficient protection from the infringement of their religious liberties as guaranteed by the United States Constitution and federal civil rights statutes.

We are confident that you, and other Members of Congress, considering ENDA will want to ensure that the effort to expand legal protections in one direction does not come at the expense of longstanding liberties in another realm.

We appreciate your consideration of our views and welcome the opportunity to discuss them with you further as you work on this legislation.

Nathan J. Diament Director of Public Policy Union of Orthodox Jewish Congregations of America	Jeffrey Hunter Moon General Counsel (Acting) U.S. Conference of Catholic Bishops	James Standish Legislative Director General Conference of Seventh Day Adventists

[1] For example, in the 108th Congress, H.R. 3285 (Sec. 9) provided: "This Act shall not apply to a religious organization."

Mr. KLINE. Thank you.

Now, Mr. Fahleson, going back, what is always concerning to me in this discussion with lawyers and about lawyers, and you are sitting in battery there—a whole bunch of you. You have different interpretations of what this language is today.

And I think that part of our job is to make public policy that is understandable by all of those who have the job of implementing it and enforcing it. And so we want to make it as clear as possible.

Going back to Section 6(c) that the chairman was talking about, part of the language in 6(c), it says: This would allow a religious employer to require that applicants for employment conform to those religious tenets that the religious employer "declares significant." And I think it is the "declares significant" that is part of the

issue here. And I want to ask you what you think that means and how this differs from other law, other policy.

Mr. FAHLESON. Right.

Mr. KLINE. Would you expand on that because we got kind of cut off there when——

Mr. FAHLESON. Sure.

Mr. KLINE [continuing]. The chairman correctly limited himself to 5 minutes.

Mr. FAHLESON. Again, it is my preference as an employment law practitioner in advising religious institutions and faith-based organizations for the blanket prohibition. For me, as an attorney, it is much easier for me to understand and to communicate that to my clients.

The three subsections set forth therein—we have heard several times during this hearing that words have meaning—all of the words in those exemptions have meanings. Again, the more words, the more potential interpretations by lawyers, both on the committee, as well as here on the panel.

With respect to the reference to "declares significant," I have a concern. I do not profess to be a constitutional lawyer. But I have concerns as to whether Congress can mandate that a religious institution declare certain things to be significant or not.

Again, at what point does that institution have to declare that significant—and, again, I have concerns about why the religious organization should have to go to this length in essence to say, "Here are the 10 things that we believe in," and "Oh, by the way, it must be set forth in writing herein."

Moreover, as I stated in my prior discussion, there is an incongruity in how the statute or the exemption is currently drafted in that it says under subsection (c) that that will not be subject to judicial review or administrative review, yet the other two exemptions clearly invite such review by the use of the terms "primary purpose" or "primary duties."

So I believe the entire exemption—a, b and c—is vague, is concerning, and I believe—again, I would encourage the committee to accept Congressman Frank's invitation to work with those who represent religious organizations to try and clarify some of these issues.

Chairman ANDREWS. Are you finished, Mr. Kline?

Mr. KLINE. Yes, and I yield back.

Chairman ANDREWS. Thank you.

Mr. KLINE. Thank you very much.

Chairman ANDREWS. I would ask unanimous consent—one of the issues Mr. Lorber had raised, which is about the preemption issue, ERISA preemption—unanimous consent that a letter dated August 7 from Congressman Frank to the committee be entered into the record.

The Congressman frankly agrees with your assessment, Mr. Lorber, at least agrees with your identification of the problem. And it is something we are going to work on trying to fix.

[The letter follows:]

U.S. HOUSE OF REPRESENTATIVES,
Washington, DC, August 7, 2007.

DEAR COSPONSOR: On rereading the Employment Nondiscrimination Act that you have cosponsored, I realized that we had included a provision that, while I support it as a matter of public policy, is not properly part of this bill in terms of the arguments we have made for it. I am referring specifically to section 8, subsection 5(b), which would in effect amend ERISA. As you know I am myself a supporter of full partnership rights for people of the same sex, including marriage. But we have always been clear to differentiate that issue, including domestic partnerships, from the basic principle of opposing discrimination. While nothing in the language as drafted would have compelled the recognition of domestic partnerships, it would in effect amend a provision of ERISA that now governs what states can do in compelling the recognition of domestic partnerships by companies within their boundaries. This should not have been included and I write to notify you of my intention to request that the Education and Labor Committee strike this provision from the bill when it is considered.

Thus, if you are asked about this provision between now and the time of the committee markup, I hope you will feel free to note that it will not be part of the final bill, and that no one should decide to be against the basic nondiscrimination bill because of its inclusion. I and others will be pursuing the right of people of the same sex to have their relationships fully recognized, but in other contexts, and not here where it would not be legislatively appropriate nor helpful to getting the bill passed.

BARNEY FRANK.

Chairman ANDREWS. The chair recognizes the gentleman from Michigan, Mr. Kildee, for 5 minutes.

Mr. KILDEE. Thank you, Mr. Chairman.

Officer Carney, I share the same Irish heritage that you share. My grandmother was born in Cork and my grandfather in Donegal. And my son used to live near Boston, up there near you.

I have served in Congress, Officer Carney, for 31 years. And I have, at various times, had homosexuals on my staff.

I hired some aware of that fact. Some I became aware after they were hired. And some I became aware after they had left my staff to go on to better jobs. And some I am sure I never have learned of their orientation because it was not significant to me.

They were very good staff members whether they were heterosexual or homosexual. My staff has always served me well.

And I think those of us in Congress—I am cosponsor of this bill. I think it is long overdue. I have been cosponsor for too many years. I think it is time to move this bill this year.

But, you know, we deal with about 660,000 people we represent. We are kind of a small business in the sense of our size of our offices. I have about 16 people working for me.

And I have never considered sexual orientation one of the criteria by which I judge whether the person is a good employee or not. The time that they arrive in my office, generally on time, do their work, that is the main consideration I have in serving the 660,000 people that I work for myself.

And it has always baffled me why people get so concerned about what people do outside the office and what they do in their bed—when they are in their bedroom or with whom they do it. It just baffles me. And it is an injustice.

And we are told that we are to be seekers after justice. One of the great things of John XXIII, he said: If you are to be a seeker after justice, you have to pursue your own justice. And I think that we certainly have a moral and legal obligation to remedy these injustices.

Just a question to you, Officer Carney. How does the Gay Officers Action League of New England help build a more just society? And does it play any role in making the public aware that a police department should better reflect the full society?

Mr. CARNEY. Over the years, the last 16 years, the Gay Officers Action League has prided itself on professionalism and outreach to other law enforcement agencies throughout New England, in fact, throughout the country.

We have been invited guests to speak to the International Chiefs of Police. We have held conferences so other law enforcement agencies will know how to interact with the gay and lesbian community, in fact, how to act and work with your gay and lesbian, bisexual and transgender employees. And we have been called upon by literally chiefs across America.

I personally, acting as vice president, cofounder, president of the organization, I have been contacted by many chiefs throughout the United States who have issues where they don't have knowledge. They never had an issue with a gay employee before. They may have never met, that they are aware of, a gay employee before. So we have acted in that capacity.

We have trained many law enforcement officers. Proudly enough, we train many recruits. We train recruits in police academies, as well as state police academies.

And we try to work with the law enforcement community to know how to better serve our community and how our community can better interact with the police department.

If anybody knows anything about the gay and lesbian civil rights era, it started back in the late 1960s, and it started in New York City. And it started over the way that the NYPD interacted with the gay community. And, in fact, it wasn't a pleasant interaction.

Sadly enough, the gay bars were raided. People were outed on TV and through the newspaper when they were arrested for whatever they were arrested for, when they got in the bars.

And the community fought back. That started the civil rights era which is now known as the month of pride, June 27th, and why we celebrate. Often people want to know why we celebrate, you know, who we are.

We have been through a lot. We have been treated differently.

And interesting enough, now we are law enforcement officers. We are out of the closets. Some are still hidden. Often I feel like I speak for them because they are not here to speak for themselves.

So when I am here today as a voice for myself or the Gay Officers Action League, I represent, I feel, hundreds and thousands of employees who work for law enforcement agencies, who are firefighters, who work for federal agencies, who can't come here and can't sit here and tell their personal story like I can.

I am blessed that I have a law in the Commonwealth of Massachusetts that protects me. But, as I indicated earlier, if I was a federal employee, if I was an FBI agent or a CIA agent, I would not be covered.

Mr. KILDEE. Thank you very much for what you are doing. Thank you very much.

Chairman ANDREWS. The gentleman's time is expired.

The chair is pleased to recognize the gentleman from Georgia, Dr. Price?

Dr. PRICE. Thank you, Mr. Chairman. I want to thank you and Ranking Member Kline for holding this hearing.

I want to thank each of the witnesses for coming and for your testimony, oftentimes heartfelt and many personal stories. And I for one appreciate that.

Mr. Chairman, you have mentioned a couple times that we appreciate the comments that were made by the panel because we were going to deliberate and it would give us much to talk about. That would be a welcome addition to this committee, that is, to have the majority side and minority side deliberating and having much to talk about and having input into the process. And so I look forward to that, and I will hold you to that, I hope, as we move forward with this issue.

I want to thank Mr. Fahleson for your hypotheticals because I think they are very instructive. And I think the chairman mentioned that, as well.

I would note, Professor Norton, that one of the examples that you gave about tainted food and handcuffing of an individual, I am not an attorney, don't know the case. But it strikes me that that kind of affront to an individual in the workplace would fall under other law, as well: assault or kidnapping, or I don't know what it would be. But it seems to me that it would fall under somewhere else. And if that individual, in fact, didn't bring those kinds of charges, then it may be that the attorney needs to be talked with, which brings me to attorneys.

The chairman made the comment that, "Thank goodness they have to hire a lawyer," when it comes to this proposal. I would suggest that that may be the title of this hearing: Thank goodness they have to hire a lawyer.

But I think what we are here to do is to determine whether or not some type of federal action is needed. And if federal action is taken, what would the potential unintended consequences be of that federal action?

I would like to address the ERISA provision, the Section 8(b) provision. And I presume that the attorneys on the panel agree that that section that was identified by Chairman Frank, 8(b), ought to be stricken from the bill.

Is that accurate, Professor Norton? Do you agree with that?

Ms. NORTON. Do I agree that that provision should be stricken from the bill?

Dr. PRICE. Yes.

Ms. NORTON. I agree that ERISA preemption is a large and complicated problem that probably deserves a comprehensive solution. I agree with that statement. And whether or not it is addressed in this bill or some other context, I agree that it was a preemption that should be looked at more broadly.

Dr. PRICE. So you don't necessarily agree that it ought to be stricken.

Mr. Fahleson, do you agree?

Mr. FAHLESON. I concur wholeheartedly.

Dr. PRICE. Professor Badgett, I presume you agree?

Ms. BADGETT. I am not an attorney. I am going to defer to my lawyer colleagues on that.

Dr. PRICE. There we go.

Mr. Lorber, I suspect you agree?

Mr. LORBER. Yes, yes, I do.

Dr. PRICE. Any other attorneys down here?

Ms. Baker, I just want to commiserate with you about Saturday's game. It was an awful, awful occurrence.

I think the chairman mentioned that he would respect—actually, entered Mr. Frank's letter into the record. And in that letter, Mr. Frank says that, "This should not have been included." He also says, "It will not be part of the final bill," which strikes me as interesting, as well, about the conversation about deliberation and having input. But I hope that it won't be part of the final bill.

Let me switch, if I may, for a moment to the religious exemption, which I think is problematic.

I would agree about the definition. I think the definitions are a challenge.

The language about "declares significant" that it puts the onus upon the institution to declare what is significant in their belief system. I would suggest it puts the federal government in a position that then requires them to determine what each religious entity declares significant, which I would suggest is an unintended consequence that I am not sure we want to head toward.

I would ask anybody to comment, though, if we believe that church-related organizations, religious organizations, ought to be able to have this exemption, I guess that is the question.

Professor Norton, do you believe that religious entities ought to be able to have this exemption?

Ms. NORTON. I believe that there should be a combination of religious institutions' interest in being able to make employment decisions consistent with their religious beliefs. Yes.

Dr. PRICE. And so if we are going to allow religious institutions to respond to their moral principles, does it follow that we ought to allow nonreligious employers to adhere to their moral principles?

Ms. NORTON. Well, Congressman Price, I would remind you that the same sets of objections were raised to Title VII back in 1964, that employers argued that having to associate with African Americans or folks of other religions—private employers, folks that were not members of religious institutions, argued that having to associate with these folks would violate their religious or moral precepts. And Congress made the determination that the national interest in equal opportunity outweighed those concerns about association.

And as Congressman Frank pointed out, there is an important distinction between economic relationships, jobs, the income that jobs bring, and intimate, personal, private associations, who you spend time with away from work. And I think Title VII struck the correct balance there. And I think H.R. 2015 strikes the correct balance, as well, by requiring private employers who are not religious institutions to adhere to nondiscrimination principles.

Dr. PRICE. I appreciate that.

My time is—I do have some other questions, and I hope that we will be able to submit them for the record.

Chairman ANDREWS. Of course, without objection.

I would want the record to reflect that my comments that I am glad people are hiring lawyers are just the nature of my sunny disposition and good humor. It is not a literal position that I am taking. [Laughter.]

You notice I left that ambiguous, though.

The chair is pleased to recognize the gentleman from Illinois, Mr. Hare, for 5 minutes.

Mr. HARE. Thank you, Mr. Chairman. And thank you very much for having the hearing.

And let me just say from the very beginning here, I am honored to be a cosponsor of this piece of legislation.

Just, in this country, it is still amazing to me that we have to have hearings and have laws to treat people as equals. I sometimes just shake my head on this.

I just want to say, Mr. Fahleson, to you, I was a little troubled when you said about the extra—your comment about the extra burden that it would place on some people. I think, if you take a look at the testimony of Ms. Waits and Officer Carney, I think a lot of undue burden was put on those two people and thousands of other people, too.

So, with all due respect, I would just say that, when this bill passes and is signed into law, and I believe that it will be, I think what we ought to do is be very mindful of the fact that there are people who are wonderful people and should never be judged. And if it is a burden on the business community to treat people as equals, then I would submit that irregardless of who they are, what they are, I would submit to you that perhaps that burden, you know, may have to be borne.

But this is the United States of America. And we shouldn't be tolerating what happened to two of our witnesses today ever.

So I also just want to say to both of you who lost your jobs, I find it amazing that we have people—employers in this country—that are so narrow minded and so afraid—and my friend, Mr. Kildee, and I think share the same thing—I for the life of me don't get what everybody is so nervous about and worried about and scared about. I shake my head in disbelief.

So I just want to say to you particularly, Ms. Waits, I am sorry this happened to you. I wish there was a way you could sue this employer because if anybody deserved to get sued, and I am not an attorney either, I would like to take this one up for you because I cannot believe—how many years did you work for that company?

Ms. WAITS. It was less than a year. It was just a couple months.

Mr. HARE. But everything was going good before this happened, right?

Ms. WAITS. Yes. It was great. I got a raise within the first 2 weeks I was there. And, yes, I got a lot of praise.

I was setting up their system for them. Their company had never even seen their inventory system before because nobody had ever done it until I started, so.

Mr. HARE. And, Officer Carney, I am assuming, you know, before you said it was 2½ years you had to fight to get your job back?

Mr. CARNEY. Correct.

Mr. HARE. And during that period of time, I mean, you had to feel, besides anger, I am just kind of interested in how you felt about how this ever happened and what you went through, just emotionally and mentally.

Mr. CARNEY. The pain was very deep. I felt ashamed. I often was humiliated.

For me, it allowed me to hit a bottom that—to seek some help. To find out who I really am, and, more importantly, it is okay who I am. And it is okay to be a gay American. And now, it is okay, with laws in place in the Commonwealth of Massachusetts, to work for my agency and very proudly to do so.

As you know, I am here today in full uniform. My police commissioner is well aware that I am here testifying.

And in the article that Congressman Frank spoke about today, spoke about my work ethic. And I am honored to serve my department and the gay and lesbian community, bisexual and transgender to be here to testify.

Mr. HARE. Well, I just want to let you know I appreciate everything you and your fellow officers do. And, you know, I don't know where this nation would be without our first responders. And to have to fight to get your job back for 2½ years, for that, to me, I think is just appalling.

I just want to ask maybe one question, if I could, of you, Ms. Baker.

Again, I appreciate the testimony you gave today, and I really commend General Mills for doing what they have done. And it appears that General Mills was way ahead of the curve when it comes to adopting policies.

I am wondering if you could explain how these policies, you know, came about. And is there more that you might be able to say to the business community about why these policies are good for not only General Mills, but for the employees?

Ms. BAKER. Sure. We included sexual orientation in our equal employment opportunity policy in the early 1990s and then adopted gender identity in 2004.

I can talk very specifically to the gender identity addition. And that came, one, from just our recognition throughout the United States that this was an issue. But it also came from very active and very vocal members of our Betty Family, the employee network that I referred to earlier, which is the employee network for our GLBT employees, that felt very comfortable approaching management and approaching our company about this very important issue to that community. So we partnered with the community and learned more and decided to adopt that policy.

Mr. HARE. Thank you very much.

I yield back.

Chairman ANDREWS. The gentleman's time has expired.

The chair recognizes Mr. Walberg for 5 minutes. Welcome.

Mr. WALBERG. Thank you, Mr. Chairman.

And I apologize for being late, so I have not had the pleasure of hearing all the testimony from the individuals who took their time to be here today. I did come in on the final testimony.

And, Professor Norton, I thank you for your testimony. It suggests, though, that Section 6 seems to be very clear that the con-

cerns of religious organizations are met. I think there has been, from what I have heard, extensive disagreement on that on this committee, as well as in the panel, as well as the clear directives of a number of religious organizations who have concerns with this bill.

As I read it myself, I see that, while it may give opportunity for a very clearly defined church or religious organization that has a very unique purpose of directly displaying their beliefs and spreading the gospel, so to speak, of their particular tradition, yet I think there are still questions and concerns.

For instance—and I guess I would ask you to respond to this—if there were a science teacher at a religious school—again, a science teacher responsible for teaching science—would they be protected under this act?

Ms. NORTON. Just so I am clear, Congressman. The question is would H.R. 2015 scrutinize this religious school's decision about who to hire as a science teacher. Is that——

Mr. WALBERG. Scrutinize the decisions of hiring, but also the teacher themselves in working with other employees in the school in their personal-held beliefs that would run amok of this act if it were implemented.

Ms. NORTON. First, if the high school is a religious school that is primarily engaged in spreading belief, and if this school is dedicated to spreading religious doctrine and belief, in other words, students are required to attend worship services and the curriculum has a religious tenor, this school is completely exempt under 6(a) as a religious educational institution primarily engaged in worship or the spreading of belief.

If it is not—say it is a religiously-affiliated educational institution, like Georgetown University, it certainly has a close religious affiliation, but it is not primarily engaged in the spreading of belief, the curriculum——

Mr. WALBERG. Well, I would contend to you that the majority of Christian schools, religious schools, parochial schools aren't primarily engaged in spreading a belief, but rather, educating with a set of principles that underlie the approach that they take.

Ms. NORTON. Yes.

Mr. WALBERG. And as I understand that, those schools would certainly not be protected or be very unclear that they would be protected under this piece of legislation. In fact, I don't know of any school in my district that is a parochial, Christian, religious school that its primary purpose is to propagate their belief system, but rather, within their belief system, to do a good educational process.

Ms. NORTON. I don't know if I agree with that characterization of many religious schools. But even if I am wrong, if it is a religious school that does not characterize its primary purpose as spreading of belief, if it chose to require that its science teachers or any other teachers or any other employees must conform to their church's teaching on same sex sexual behavior, they could require conformance to that teaching as a condition of employment.

Mr. WALBERG. What about a religious publisher?

Ms. NORTON. Again, the first question——

Mr. WALBERG. Again, they are publishing documents, books, materials. They are not necessarily in the purpose as a religious orga-

nization teaching or propagating their faith, but they are a publisher.

Ms. NORTON. Right.

Mr. WALBERG. What about their hiring practices?

Ms. NORTON. They, too, would, under 6(c), could require that particular employees or all employees conform to their religion's teachings, including their religion's teaching on same sex sexual behavior.

Mr. WALBERG. Thank you.

Mr. Fahleson, would you agree with that?

Mr. FAHLESON. I do not.

One point I want to highlight that I forgot to mention earlier.

Under this 6(c), which, again, I fail to fully comprehend, it states that this declaration of what is significant is not subject to review.

So the school that you mentioned may declare it requires employees to sign something that a faithful adherence to the Bible is, you know, something they want them to adhere to. But whether that individual conforms to that can be subject to judicial review. That is not exempt.

And so, therefore, a very strict reading of 6(c) would indicate that courts are now going to determine whether that employee has strictly adhered to the Bible for this particular position.

Again, this is a very—with no disrespect to those who worked on the section—the section is a mess from a legislative standpoint. And I would strongly encourage the committee to look at going to the language that was in previous versions, which is the very broad blanket exemption.

Mr. WALBERG. Okay. Thank you.

Thank you, Mr. Chairman.

Chairman ANDREWS. The gentleman's time has expired.

It is my sad duty, at this point, to interrupt the hearing briefly to announce some really terrible news which just came to us.

We are told that our friend and colleague, Congressman Paul Gillmor of Ohio, has just passed away of a heart attack; someone who was well known to many members of this committee as a very jovial, collegial person.

So I would ask if we could just observe a moment of silence to, each of us in our own way, contemplate his passing.

(MOMENT OF SILENCE)

Chairman ANDREWS. The committee will resume, and, obviously, our heartfelt condolences to our friend's family and staff and constituents on this very, very considerable loss.

The chair recognizes the gentleman from Iowa, Mr. Loebsack, for 5 minutes.

Mr. LOEBSACK. Thank you, Mr. Chair.

I, too, want to apologize to all of you for not having been here during your testimony. And I don't have any questions at this point.

I just want to—and I was at an Armed Services Committee hearing, where we are listening to the comptroller general, David Walker. As a new member, I quickly became all too aware of sort of the complicated nature of this job, and hearings being scheduled against one another. But I was over there.

But I just want to state very briefly.

First of all, Ms. Baker, I am happy that there is a General Mills plant in Cedar Rapids, in my district. And I really appreciate all that General Mills is doing on this particular issue.

And I am very happy and proud to cosponsor this legislation. I am doing what I can with Congresswoman Baldwin to try to gain some more support for this measure here in Congress. I just think it is an absolutely critical thing.

I don't believe that we should, in fact, ever discriminate on the basis of race or gender or religion or sexual orientation or gender identity.

I am happy to be a representative of a state, Iowa, which is one of the few that does, in fact, now have a law that protects folks on the basis of gender identity, as well as sexual orientation.

So I don't want to take up a lot of time. I just want to thank those on the previous panel who spoke in favor of this piece of legislation and those who spoke in favor of it, as well, here.

And I will yield back the balance of my time. Thank you, Mr. Chair.

Chairman ANDREWS. The gentleman's time has expired. Thank you.

The chair recognizes the gentlelady from California, Ms. Sanchez, for 5 minutes.

Ms. SANCHEZ. Thank you, Mr. Chairman.

I just sort of want to start out by dispelling a myth that has sort of cropped up here this morning.

Contrary to popular belief, we don't write legislation to create job opportunities for attorneys. And I say that because I don't want us to lose sight of the forest for the trees.

We write legislation to try to address problems and to try to find solutions for those problems. And sometimes, yes, there is a little complexity that comes into the legislation that we write. And if a little complexity is the price that we have to pay for trying to make sure that this country creates equality and equal opportunity for everybody, then it is a price that I think is well paid.

If, you know, if we just gave up on writing legislation every time it seemed hard or every time it seemed that it might be a little more complex, you know, we would have given up on great things like the Civil Rights Act, and other pieces of legislation, that really say a lot about the country that we are and the kind of people that we are and the beliefs and the values that we hold dear.

So, yes, we do try to craft legislation in a way that is very thoughtful and that avoids needless complexity. But, you know, discrimination is a pretty complex issue. And so, you know, sometimes the answers have to be a little bit complex.

And now I am going to step off my soapbox. And I am going to ask some questions of the panelists.

My first question is for Professor Norton.

I believe that there are some in the Congress and, in fact, maybe even, in fact, on this committee who would like to broaden the religious exemption in ENDA to allow employers to discriminate against employees if they have "religious objections" to hiring LGBT persons.

Does Title VII have a religious exemption? And do you believe that adding such an exemption to ENDA would swallow the rules?

Ms. NORTON. First, Congresswoman, let me make sure I understand. Some folks are proposing that there be an exemption for private employers who have religious——

Ms. SANCHEZ. Correct. Religious——

Ms. NORTON [continuing]. Religious objections.

Ms. SANCHEZ [continuing]. Objections to hiring.

Ms. NORTON. Title VII exempts religious corporations, associations, societies, and educational institutions from the prohibition on religion discrimination. In other words, religious institutions can prefer members of their own religion under Title VII. However, Title VII requires those employers, those religious institutions, to comply with the remainder of Title VII, meaning its prohibitions on race discrimination, sex discrimination, and national origin discrimination.

Those institutions, including churches, cannot discriminate on the basis of race, sex, et cetera, with the exception of certain ministerial employees. Courts have recognized that churches, mosques, synagogues, and other houses of worship should have the freedom to choose their spiritual leaders free from Title VII scrutiny.

But with respect to all other hires by those religious employers, janitors, accountants, et cetera, et cetera, Title VII requires that they comply with the prohibition on race discrimination, sex discrimination, and national origin discrimination.

H.R. 2015 tracks the exemption for religious institutions in Title VII and significantly expands it.

Houses of worship and other religious institutions dedicated to the spreading of belief are exempted entirely. Other religious institutions, like religiously-affiliated hospitals, social service agencies that are not primarily dedicated to the spread of belief, their decisions about ministerial employees, spiritual leaders, are exempted entirely. And their decisions about all other employees are exempted so long as that employer requires conformance with their religious tenets, including a religious tenet prohibiting same sex conduct as a condition of employment.

That is significant expansion on the prohibitions available under Title VII. But neither Title VII nor this bill would exempt private employers, employers that are not religious corporations, associations, societies of educational institutions from the antidiscrimination principles.

Ms. SANCHEZ. So do you believe that H.R. 2015 accommodates, where necessary, religious institutions, et cetera, in their hiring practices in a way that is a workable solution?

Ms. NORTON. I do.

Ms. SANCHEZ. Okay. And it is your opinion, I take it—and I think you may have mentioned this in your testimony—that private employers who conduct business for profit should not be exempted from the requirements of 2015.

Ms. NORTON. They are not exempted under Title VII, and they should not be exempted from this bill.

Ms. SANCHEZ. Thank you.

One of your fellow panelists this morning mentioned the potential mountain of litigation that ENDA might cause, with respect to enforcing the protections on gender identity. Do you agree with that analysis? Do you think that the provisions on gender identity

are too vague, or do you think that they are sufficiently stated in the legislation?

Ms. NORTON. The definition of gender identity that appears in this bill is drawn from the definition that appears in state legislation that has been on the books and enforced for a number of years.

The General Accounting Office has engaged in a study of state laws prohibiting sexual orientation and gender identity and have found them to be quite workable. In fact, that the levels of litigation and complaints are comparatively low. So there seems to be no reason to fear that there would be a problem when that definition is used in this bill.

And, again, as Congressman Frank and Congresswoman Baldwin pointed out, the point of the gender identity protections is to protect the very real employment concerns faced by transgender employees who do face very real and often very egregious discrimination.

Ms. SANCHEZ. Thank you.

I see that my time has expired. I just want to thank all of the witnesses for their testimony today.

Chairman ANDREWS. Thank you. The gentlelady's time has expired.

The chair is pleased to recognize the gentlelady from New York, Ms. Clarke, for 5 minutes.

Ms. CLARKE. Thank you. Thank you very much, Mr. Chairman.

And I want to thank all of the folks who have come to testify before us today.

I, too, am a proud cosponsor of this legislation.

And in 1995, there was a very distinguished New Yorker, a Congresswoman named Bella Abzug, who first introduced legislation to address sexual orientation discrimination in America.

This legislation is modeled after the succession of civil rights bills previously passed that prohibited employment discrimination based on race and sex. The Employment Discrimination Act of 2007, also known as ENDA, is the culmination of the work of Bella Abzug and many other like-minded crusaders for social justice and equity champions.

As we are all aware, the Employment Non-Discrimination Act of 2007 prohibits employment discrimination on the basis of sexual orientation and, for the first time, includes a prohibition against employment discrimination on the basis of gender identity and sexual orientation. The act also prohibits preferential treatment and retaliation. And finally, the act provides broad exemptions for the armed forces and religious organizations, such as churches, whose purpose is purely religious.

I am proud to carry the torch first lit in 1975 by Bella Abzug in support of civil rights. And I wholeheartedly support the Employment Non-Discrimination Act of 2007, a bill that is long overdue.

And I just wanted to add that, you know, this legislation, I believe, is very sensitive, and I would call it a real 21st century piece of legislation. It is closing the gap in favor of the expansion and inclusion of everyone in our human family.

I, too, am not a lawyer like many of my colleagues here. But I have full faith in the attorney world that they will refine Section 6(c) so that those those who have had the concern of interpretation

will use their best instinct, intuition and intellect to work this out. Otherwise, I know that perhaps this is something that our Supreme Court will bring to closure and make sure that our human family is indeed embraced and addressed in the way that it should in the 21st century.

Let me ask the panel.

Congress has historically given employment protection to the victims of discrimination in employment. The protections have been hailed as advancements in civil rights. They have also led to diversity in the workplace, which most agree has broad benefit.

I am making the positive assumption that everyone on the panel supports employment protections for victims of discrimination, such as members of racial minorities, religious minorities, and women.

Here is my question: Why should individuals discriminated against based on sexual orientation and gender identity not receive the same protections as others under civil rights protections?

Is there a reason why they should not?

Am I getting unanimous consent here?

Mr. CARNEY. If I may. I just find it twisted and ironic that I go to work every day to uphold the law and the civil rights of many others. Some of those civil rights I don't have as a gay American.

Ms. CLARKE. I appreciate your response, Officer Carney. Let me just ask a follow-up question.

ENDA has the support of the labor community, as well as many of the large businesses, such as Levi Strauss and, as we see, General Mills. This is one of the few areas where these two communities find common ground. In fact, 90 percent of Fortune 500 companies have adopted antidiscriminatory policies based on sexual orientation and approximately one-third have adopted antidiscrimination policies based on gender identity.

If these types of employment discrimination policies would have the negative consequences, such as significant increases in regulatory costs, that some have suggested, why do you think these companies have chosen to adopt these policies?

I want to present that to the lawyers because they seem to be concerned about that.

Mr. Fahleson?

Mr. FAHLESON. Can you summarize your question?

Ms. CLARKE. Sure.

If the major corporations, so many of them that are multinational in nature, have no problem in implementing this policy and have not seen a significant decrease in their bottom line, it has not adversely impacted their growth and development, why do you think that these companies have chosen to adopt these policies? Why was it a business decision to do so?

Mr. FAHLESON. Right. And those are voluntary decisions.

Obviously, the resources that a Fortune 500 company, such as General Mills, has differs greatly from that of an employer of say 20 employees, who doesn't have an HR department, can't afford to hire a lawyer. And so, it is simply a difference of resources.

That is the reason why many of our federal, state and local employment laws have different thresholds as to which is applicable. That is why the Family Medical Leave Act kicks in at 50 employees

for private sector employers. And so, I think there is a difference between large and small.

Ms. CLARKE. Yes. But you know what? All larger companies start small. And part of how they become successful is embracing the growth and development of our society. So perhaps they need to look at some of the models that these multinationals have started if they plan to stay in business in the United States.

Thank you very much, Mr. Chairman.

Chairman ANDREWS. Thank you.

I would ask unanimous consent that the record reflect a list of the Business Coalition for Workplace Fairness, a list of many firms that support this legislation, without objection.

[The information follows:]

HUMAN RIGHTS CAMPAIGN

BUSINESS COALITION FOR WORKPLACE FAIRNESS

END WORKPLACE DISCRIMINATION

The vast majority of United States businesses have already started addressing workplace fairness for gay, lesbian, bisexual and transgender employees. But we still need a federal standard that treats all employees the same way.

The Business Coalition for Workplace Fairness is a group of leading U.S. employers that support the Employment Non-Discrimination Act, a federal bill that would provide the same basic protections that are already afforded to workers across the country.

Gay, lesbian, bisexual and transgender employees are not protected under federal law from being fired, refused work or otherwise discriminated against. ENDA would do just that.

www.hrc.org/enda/businesses

Leading employers that support workplace fairness and the passage of the federal Employment Non-Discrimination Act:

Accenture Ltd.	New York, NY	Google Inc.	Mountain View, CA
Alberto – Culver Co.	Melrose Park, IL	Harrah's Entertainment Inc.	Las Vegas, NV
Bank of America Corp.	Charlotte, NC	Hewlett-Packard Co.	Palo Alto, CA
Bausch & Lomb Inc.	Rochester, NY	HSBC – North America	Prospect Heights, IL
Boehringer Ingelheim Pharmaceuticals Inc.	Ridgefield, CT	Integrity Staffing Solutions Inc	Wilmington, DE
BP America Inc.	Warrenville, IL	J.P. Morgan Chase & Co.	New York, NY
Bristol-Myers Squibb Co.	New York, NY	Kaiser Permanente	Oakland, CA
Capital One Financial Corp.	McLean, VA	KPMG LLP	New York, NY
Charles Schwab & Co.	San Francisco, CA	Lehman Brothers	New York, NY
Chevron Corp.	San Ramon, CA	Levi Strauss & Co.	San Francisco, CA
Chubb Corp.	Warren, NJ	Marriott International Inc.	Bethesda, MD
Cisco Systems Inc.	San Jose, CA	Merrill Lynch & Co. Inc.	New York, NY
Citigroup	New York, NY	Microsoft Corp.	Redmond, WA
Clear Channel Communications Inc.	San Antonio, TX	Morgan Stanley	New York, NY
Coca-Cola Co.	Atlanta, GA	Nationwide	Columbus, OH
Coors Brewing Co.	Golden, CO	NCR Corp.	Dayton, OH
Corning Inc.	Corning, NY	Nike Inc.	Beaverton, OR
Deutsche Bank	New York, NY	Pfizer Inc.	New York, NY
Diageo North America	Norwalk, CT	QUALCOMM Inc.	San Diego, CA
Dow Chemical Co.	Midland, MI	RBC Dain Rauscher Inc.	Minneapolis, MN
Eastman Kodak Co.	Rochester, NY	Replacements Ltd.	McLeansville, NC
Electronic Arts Inc.	Redwood City, CA	Robins, Kaplan, Miller & Ciresi LLP	Minneapolis, MN
EMC Corp.	Hopkinton, MA	Ryder System Inc.	Miami, FL
Ernst & Young LLP	New York, NY	Sun Microsystems Inc.	Santa Clara, CA
Gap Inc.	San Francisco, CA	Time Warner Inc.	New York, NY
General Mills Inc.	Minneapolis, MN	Travelers Companies Inc.	St. Paul, MN
General Motors Corp.	Detroit, MI	Washington Mutual Inc.	Seattle, WA
GlaxoSmithKline	Philadelphia, PA	Xerox Corp.	Stamford, CT
Goldman Sachs Group Inc.	New York, NY	Yahoo! Inc.	Sunnyvale, CA

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phone: 202/628-4160 | *fax*: 866/369-3348

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Small employers that support workplace fairness and the passage of the federal Employment Non-Discrimination Act:

Ability Market	Morristown, NJ
All Pro Home Inspections	San Diego, CA
ALT Services Inc.	Plano, TX
Americas Trade & Supply Co.	Miami, FL
August eTech LLC	Hamilton Square, NJ
BancForce Financial Staffing	San Diego, CA
Calvert Group Ltd.	Bethesda, MD
Classic Doors and Shutters Inc.	Memphis, TN
Cooney, Daniel Fine Art	New York, NY
Corner Office Consultants	Tucker, GA
David W. Cropper Insurance Agency LLC	Alexandria, VA
Delucchi Plus LLC	Washington, DC
Emilio Robba Boutique	Coral Gables, FL
Environmental Waste Solutions Inc.	Media, PA
Fair Measures Inc.	Santa Cruz, CA
Floordesigns Inc.	San Francisco, CA
Four Star Cargo Inc.	Miami, FL
Frontline Data Group	Vienna, VA
Funny Boy Films LLC	Los Angeles, CA
Galerie	Hebron, KY
Greater San Diego Business Association	San Diego, CA
Green Ink Communications	Voluntown, CT
Hanlon Brown Design Inc.	Portland, OR
Instant Signs of Santee	Santee, CA
Intersource Inc.	Minneapolis, MN
Jennifer Brown Consulting LLC	New York, NY
Kell Consulting LLC	Louisville, KY
Leverage Technologies Inc.	Brecksville, OH
Masters Realtors Inc.	Dallas, TX
McCown & Evans LLP	San Francisco, CA
Merge Media Group Gp LLC	Dallas, TX
Michael Chamness Co.	Montpelier, ND
Michael Toomey Pa	Miami, FL
Mirage Images Inc.	Chattanooga, TN
On-Site Productions Inc.	Alexandria, VA
Osmosis Medialab Inc.	New York, NY
P2p Staffing Corp.	Coral Springs, FL
PinnaclePay Merchant Services Inc.	Lawrenceville, GA
Prime Access Inc.	New York, NY
Production Solutions Inc.	Vienna, VA
Project Designworks	San Diego, CA
Pulse Communication Inc.	New York, NY
Quorum	St. Paul, MN
Route 7 Productions Inc.	Miami Beach, FL
RSF Execare	Rancho Santa Fe, CA
Scoji Enterprises LLC	Natchitoches, LA
Scotwork, NA, Inc.	Parsippany, NJ
Sky's The Limit Consulting Inc.	Estero, FL
Smart Women Co.	St. Paul, MN
SQN Communications Design Inc.	Vienna, VA
Stanley Sumner LLC	Miami Shores, FL
Trillium Asset Management	Boston, MA
Unique Impressions	Phoenix, AR
Walden Asset Management	Boston, MA
Westlake Drug Inc.	Kalamazoo, MI
Witeck-Combs Communications Inc.	Washington, DC
Zebra Printing & Graphic Inc.	Dallas, TX

HRC is proud to partner with NGLCC in obtaining small business support for ENDA.

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Chairman ANDREWS. I would turn to my friend and ranking member, Mr. Kline, for any concluding remarks he would choose to make.

Mr. KLINE. Thank you, Mr. Chairman. These will be concluding and brief.

Let me say, just because I can't pass it up, that I do not share Ms. Clarke's faith in attorney world. [Laughter.]

But it is an interesting concept.

And just a comment, if I could.

First of all, let me say thank you to all of the panelists. It has really been an excellent panel with a great deal of expertise and a great deal of passion that we have heard. And so I want to thank you all for that.

Just a comment about the complexity and burdens issue, and it relates to the Fortune 500 and the big companies like General Mills.

General Mills has implemented a very successful policy. And they have done it without federal regulation.

And so they are not complying with federal law. They don't have any of those issues of whether or not they are complying. They are simply putting forward policy which they believe is good policy and is working for them. When you add federal regulation, that complexity and burden can become a factor, and particularly for small businesses.

So I think it is incumbent upon this subcommittee and this committee and this Congress to do everything we can to make sure that the legislation is as clear and uncomplex and doesn't impose undue burdens as we go forward.

So, with that parting comment, Mr. Chairman, just let me again thank the witnesses and thank you for holding this hearing.

I yield back.

Chairman ANDREWS. Well, I want to thank my friend for his comments.

And just to reflect my own views on that. The bill in front of us does not apply to employers with fewer than 15 employees, a very small employer.

And second, my own view is this. That if someone comes to work for you and they want to, as I say, they want to be a bank teller or bus driver or computer programmer, I think you are already asking them, "How good are you at that job? What experience do you have?" And that is all you have to do. It just says that if they are the right person for the job, you hire them, without having to worry about or asking about how they conduct their personal lives.

So I think this doesn't create a burden. I think it lifts a burden on people who have been unfairly burdened under the law.

I also want to add my appreciation to each of the witnesses here today. You have given us an excellent mix of the theoretical and legal issues raised by this bill and then the very real-life implications of the problem this bill is trying to resolve and some of the solutions.

I would particularly like to thank the employer business witnesses for discussing the real-life impact in their very successful enterprises, one very large, one rather small, of a policy of inclusion, of letting all talents be included in the conduct of the enterprise.

So, again, you have done us a great service here on the committee and in the Congress, and we thank you for the inconvenience and time you have had to give us today.

As previously ordered, members will have 14 days to submit additional materials for the hearing record. Any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within 14 days.

Without objection, the hearing is adjourned.

[Additional submission by Mr. Andrews follows:]

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 364,
SPRINGFIELD, MA, POLICE DEPARTMENT,
September 1, 2007.

Re: *Written Testimony in Support of H.R. 2015—Employment Nondiscrimination Act*

I write in support of H.R. 2015 because it fulfills our Union's fundamental position that employment decisions such as hiring, firing, promotion and compensation should never be based on our member's sexual orientation or gender identity.

H.R. 2015 strengthens our Union's ability to collectively bargain for the welfare of all of our members which is critical to labor's commitment to our membership. And it strengthens our ability to negotiate labor issues when equal treatment is threatened by discrimination based on sexual orientation or gender identity.

Our union urges the Committee to report out H.R. 2015 with a favorable vote. It is time to prohibit discrimination based on sexual orientation and gender identity and to provide basic protection to ensure fairness in the workplace for Americans who are currently denied equal protection under the law.

Respectfully Submitted,

THE MEMBERS OF THE EXECUTIVE BOARD OF LOCAL 364,
THOMAS M. SCANLON, *President,*
Local 364/IBPO, Springfield MA Police.

[Additional submissions by Mr. Kline follow:]

September 14, 2007.

Hon. JOHN KLINE, *Ranking Minority Member,*
Subcommittee on Health, Employment, Labor, and Pensions, Education and Labor Committee, U.S. House of Representatives, Longworth House Office Building, Washington, DC.

Re: *H.R. 2015, Employment Non-Discrimination Act of 2007*

DEAR CONGRESSMAN KLINE AND SUBCOMMITTEE MEMBERS: The American Association of Christian Schools writes to oppose the Employment Non-Discrimination Act of 2007 (ENDA). This legislation would have a deleterious effect on the ability of religious Americans to follow the dictates of their respective faiths while still in accordance with the law.

The issue of homosexuality is a contentious one in American society. The Bible, the Torah, and the Qu'ran all explicitly condemn homosexual behavior, and millions of Americans recognize these religious texts as the foundation for their beliefs regarding human conduct.

However, the AACS opposition to ENDA does not find its basis primarily in the moral questionability of the bill. Rather AACS objects to the bill on the grounds that it undermines the very foundation of our free society: religious liberty. The last four decades have seen a concerted effort to marginalize religion in the public sphere. This is unfortunate—both for the religious and non-religious who benefit equally from the contributions of people motivated by their faith to meet the needs of their neighbors and communities. Discrimination is an important issue in modern American society and with good reason. But any actual or perceived discrimination against certain communities is not wisely dealt with by restricting the freedoms of others and jeopardizing the religious freedom of an entire country.

In 1620, three ships left England for a new world. The non-separatists on board the Mayflower assuredly thought that the Pilgrims were strange, but the success of the journey to forming their new society was inextricably tied to the notion of religious freedom. Compulsion is not a hallmark of the American experience. Sadly, we have arrived at the point in American society where tolerance, rather than freedom, has become the highest value of our land. Proponents of this bill seem to be saying that religion is a fine thing as long as there is no clash with popular culture.

ENDA contains an exemption clause, Section 6, designed to offer a semblance of tolerance to religious organizations, but the exemption is flawed and presents no meaningful protection for religious organizations.

AACS has over 1100 schools in 46 states. Although it is the goal of our school teachers to conduct all education through the prism of a Biblical worldview, the main purpose of our schools is education rather than strictly religious propagation. Consequently, our schools would not qualify as "wholly" exempt entities. Only our school principals, administrators, and religious instructors would qualify.

This partial exemption would infringe on the ability of our schools to maintain their distinctive religious character. Schools would not have the freedom to follow the principles of their faith when hiring teachers for science, history, math, English, or other subjects that are not specifically religious in nature. If Christian schools

cannot require their faculty and staff to follow the tenets of their faith, then they have lost the very reason for their existence.

Proponents of H.R. 2015 point to Section 6(c) as the escape clause because it states that religious organizations would still be allowed to require employees to "conform" to "significant" tenets of the organization/school's religious faith. However, nowhere in the document does it address what constitutes "conformity" or "significance" according to the schools' policies.

Section 6 (c) states that "Under this Act, such a declaration by a religious corporation, association, educational institution or society stating which of its religious tenets are significant shall not be subject to judicial or administrative review." This last clause appears confusing and disingenuous. By the very nature of the narrow exemption, religious schools and organizations would be forced to undergo both administrative and judicial review of their beliefs and policies to determine whether current and potential employees are covered by the exemption.

If the Non-Employment Discrimination Act of 2007 (H.R. 2015) is passed by Congress and signed into law, religious organizations and religious people would be compelled to act in conflict with their deeply-held religious beliefs. It is no exaggeration to say that ENDA is a direct repudiation of the Free Exercise Clause of the First Amendment to the U.S. Constitution.

Sincerely,

DR. KEITH WIEBE, *President,*
American Association of Christian Schools.

Prepared Statement of Diane Gramley, President, American Family Association of Pennsylvania

Mr. Chairman and Members of the Subcommittee: Americans expect to feel safe within their work places. The passage of the Employment Non-Discrimination Act could present certain safety issues and employee relations problems to small and large businesses alike:

• When in our nation's history has the government forced employers to permit men to use the women's restroom or vice versa? As a woman, I would not want to enter a restroom and encounter a man using the facilities.

• H.R. 2015 would only prohibit transsexuals from using showers and dressing rooms 'where being seen fully unclothed is unavoidable'; thus, forcing employers to expend money to provide accommodations to such individuals. [Referenced in the proposed bill, "* * * provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity."]

• This will place a serious financial strain on small businesses which, according to the Small Business Association website, represent 99.9 percent of the 26.8 million businesses in the United States.

Previously, Representative Barney Frank opposed the inclusion of 'gender identity' in such employment non-discrimination laws because he knew that radical transgender activists would demand to use shower facilities in the workplace. To date, there has yet to be sufficient evidence that this issue has been addressed. If this bill passes, radical transgender activists will still cry 'discrimination' and demand full 'inclusion' in all shower facilities, etc. Passage of H.R. 2015 would be a "foot in the door" to requiring businesses to allow transgender individuals full access to showers and dressing rooms where "being fully unclothed is unavoidable."

There also exists major safety issues—not to mention financial burdens—involved with the passage of ENDA:

• In Allentown, PA (Lehigh County) revised their human relations ordinance by adding 'sexual orientation and gender identity' in 2002. The following year, a podiatrist brought suit against St. Luke's Hospital saying he had been discriminated against because he had announced he was transitioning to a female. The podiatrist continued on with the hospital, but says his contract as program director was terminated. Apparently, the hospital was concerned how their patients would take the news that Dr. Gary Greenberg was going to become Dr. Gwen Greenberg. The settlement forced the hospital to expend money to offer education to hospital staff on gender identity and sexual orientation issues.

• In 2003, in neighboring Carbon County, a prison guard announced he was transitioning into a woman and expected to be accommodated. Security concerns prompted the prison to relieve the guard of duty. Because his union is headquartered in Allentown, he sued the prison and as a result was reinstated. Carbon County Prison now has a man dressed as a woman for a corrections officer. The obvious questions posed here are strip searches, restroom and locker room situations. How should the prison handle these daily situations?

Yes, Americans are fair-minded, but Americans demand common sense.

When the average American citizen is presented with ALL the facts about this bill and its subsequent ramifications—and not the facade now being offered by its supporters—they will undoubtedly oppose its passage.

September 14, 2007.

Hon. JOHN KLINE, *Ranking Minority Member,*
Subcommittee on Health, Employment, Labor, and Pensions, Education and Labor Committee, U.S. House of Representatives, Longworth House Office Building, Washington, DC.

Re: *H.R. 2015, Employment Non-Discrimination Act of 2007*

Dear Representative Kline and Subcommittee Members: On behalf of Concerned Women for America, I would like to request your assistance to ensure that the attached letter is included in the printed hearing record for the hearing held on Wednesday, September 5, 2007, by the Health, Employment, Labor and Pensions Subcommittee on H.R. 2015, the Employment Non-Discrimination Act of 2007.

Sincerely,

WENDY WRIGHT, *President,*
Concerned Women for America.

September 14, 2007.

Hon. JOHN KLINE, *Ranking Minority Member,*
Subcommittee on Health, Employment, Labor, and Pensions, Education and Labor Committee, U.S. House of Representatives, Longworth House Office Building, Washington, DC.

Re: *H.R. 2015, Employment Non-Discrimination Act of 2007*

Dear Representative Kline and Subcommittee Members: On behalf of Concerned Women for America (CWA) and our over 500,000 members nationwide, I am writing to oppose H.R. 2015, the Employment Non-Discrimination Act (ENDA).

ENDA will force employers and employees with moral or religious beliefs regarding homosexuality or bisexuality to disavow these convictions, a violation of the right to conscience. Such efforts are a misguided infringement upon our constitutional rights to religious freedom. This legislation will be used as a tool to punish businesses that have moral standards.

It will also overturn the historical basis of protected class status by adding "sexual orientation" and "gender identity" to civil rights law. Unlike the currently protected classes of race, age and gender in employment, "sexual orientation" is behavioral. ENDA affords special protection to a group that is not disadvantaged. Homosexuals as a group have higher income, education and wield considerable political influence.

Marriage as an institution will be undermined if ENDA is enacted by pronouncing traditional sexual morality a form of discrimination in America. This legislation may inevitably lead to employers being required to offer marriage-like benefits to homosexual employees.

Proponents of ENDA falsely claim that the bill contains a religious exemption. But this exemption is entirely illusory. At best, churches, and essentially pastors, could be exempt from the provisions of ENDA, but that's not guaranteed. All other faith-based organizations, even those which are tax exempt, would be discriminated against under this bill. Groups such as Christian schools, Christian camps, faith-based soup kitchens and Bible book stores would be forced to adopt a view of human sexuality which directly conflicts with fundamental tenets of their faith.

If H.R. 2015 is passed by Congress and signed into law, the U.S. government will, in effect, become an adversary to moral sexuality and religious conviction. Please do not punish Americans who believe that it is important to apply their moral convictions in the workplace.

Sincerely,

WENDY WRIGHT, *President,*
Concerned Women for America.

THE TRADITIONAL VALUES COALITION,
Washington, DC, September 14, 2007.

Hon. ROBERT E. ANDREWS, *Chairman,*
Hon. JOHN KLINE, *Ranking Member,*
Subcommittee on Health, Employment Labor and Pensions, Committee on Education and Labor, Ford House Office Building, Washington, DC.

DEAR REPRESENTATIVES ANDREWS & KLINE: Traditional Values Coalition requests that this letter and the attached documents: (1) The TVC Special Report on H.R. 2015, the Employment Non-Discrimination Act (ENDA) and (2) 30 Sexual Orientations be placed into the record for the hearing held on Wednesday, September 5, 2007, by the Health, Employment, Labor and Pensions Subcommittee on H.R. 2015, the Employment Non-Discrimination Act of 2007.

Traditional Values Coalition opposes passage of any version of ENDA.

We have many problems with the bill. We are outlining two of them here. One of our major concerns involves the vague term called "gender identity." Our other concerns are outlined in greater detail in the attached report.

Congress is attempting to pass a law to protect "gender identity" but the proponents of the legislation are doing their best to keep members of this soon-to-be protected federal minority out of sight. Why?

During the hearing on ENDA every pro-ENDA panelist carefully avoided mentioning the fact that protecting "gender identity" in the law will force businesses and non-profits to cater to the whims of cross-dressers, transsexuals, drag queens, and she-males.

Chief sponsor of ENDA, homosexual activist legislator Barney Frank (D-MA), for example, referred to emotionally troubled individuals with a different gender identity than their birth sex as "these people," and pleaded for federally-protected status for them. Yet, "these people" were never permitted to sit on the panel nor to discuss why they think businesses should bow to their wishes on restroom and shower policies.

Apparently, Rep. Frank believes that "these people" should remain invisible until ENDA is passed. His attitude towards these troubled individuals was demeaning and shocking to us.

ENDA will provide federally-protected status for "sexual orientation," which is defined in the bill as heterosexuality, bisexuality and homosexuality; and "gender identity," which is the sense of how a person "feels" about his or her birth sex. Individuals with a Gender Identity Disorder (GID) think they're really the opposite sex. GID is still considered by the American Psychiatric Association to be a treatable mental condition. Transgender activists, however, claim that having a different gender identity than their birth sex is perfectly normal and deserves federal protection.

The bill limits "sexual orientation" to heterosexuality, bisexuality, and homosexuality, while the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) lists 30 bizarre sexual orientations, including pedophilia and bestiality. These are sexual attractions or orientations toward children and animals.

And, on the issue of "gender identity," one doesn't have to be a psychiatrist or psychologist to clearly understand that if a person rejects his birth sex, he is experiencing disordered thinking. Members of Congress should understand this. Disordered thinking is treatable. It should not be granted minority status under federal law.

Dr. Paul McHugh, for example, became the psychiatrist-in-chief at Johns Hopkins University in 1975 and put an end to the practice of providing sex-change operations for patients. Writing in his essay, Surgical Sex for First Things in 2004, McHugh observed: "We have wasted scientific and technical resources and damaged our professional credibility by collaborating with madness rather than trying to study, cure, and ultimately prevent it [GID]."

Dr. McHugh believes that psychiatrists are collaborating with a mental illness by performing sex change operations on individuals. The problem is one of the mind, not the body. A person who has a gender identity disorder needs therapy—not surgery.

Rep. Barney Frank and other proponents of ENDA should be open and honest with the American people about exactly who and what ENDA will "protect" in federal law.

In future discussions about ENDA, Rep. Frank should invite several male-to-female, female-to-male or she-males to testify as to how this legislation will benefit them.

If Americans see what these poor gender confused individuals look like—and what impact they will have on business practices, they'd be outraged. Imagine being

forced to hire or retain a person who goes through half of a so-called sex change operation? Should a business really have to deal with she-male demands? Or, to hire or retain a person who just "thinks" he's the opposite sex, but doesn't "transition" into another sex. The legal problems for employers will be insurmountable.

Another major concern is over the phony religious exemption in the legislation.

ENDA ostensibly provides a "religious exemption" for denominations or organizations operated by denominations—but not other non-profit Christian or other religious organizations. The bill says in Section 6, "Exemption for Religious Organizations" that a "religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" is exempt from ENDA.

This is a phony religious exemption. A Christian school, for example, would probably not be exempt under ENDA because its primary purpose is education, not the teaching or spreading of religious doctrine. A Christian day care center would not be exempt from ENDA; nor any Christian-owned for-profit business such as a Bible or book publisher.

TVC calls upon Congress to reject any version of ENDA legislation offered that will make "sexual orientation" or "gender identity" into federally-protected minorities. The phony religious exemption is only designed to silence people of faith. We can see through this ruse. Our opposition to ENDA—in any form—is absolute.

Sincerely,

REV. LOUIS P. SHELDON, *Chairman,*
ANDREA LAFFERTY, *Executive Director,*
Traditional Values Coalition.

MEMORANDUM

TO: Representative John Kline
Committee on Education and Labor
United States House of Representatives

FROM: Brian W. Raum
Austin R. Nimocks

RE: H.R. 2015 – Employment Non-Discrimination Act

DATE: September 14, 2007

Introduction

The proposed Employment Non-Discrimination Act (*hereinafter* "ENDA") would, if passed, add "sexual orientation" and "gender identity" as protected categories under various aspects of federal law. The bill defines "sexual orientation" as "heterosexuality, homosexuality, bisexuality." "Gender identity" is defined as "with or without regard to the individual's designated sex at birth" or, in other words, how someone chooses to define their own sex. ENDA relies on disproven scientific theory, and runs counter to American business, cultural, and religious interests. ENDA should be rejected.

Not Supported by Science or Mainstream America

ENDA is a substantive departure from the scientific and cultural mainstream. ENDA does not reflect the attitude of the American business community. Out of hundreds of thousands of employers in America, only 571 have a gender expression or identity nondiscrimination policy, including only 230 major corporations. *See* Human Rights Campaign, Workplace page (available at http://www.hrc.org/issues/workplace/search_employers.asp; viewed Sept. 14, 2007); Gender Public Advocacy Coalition, National News (available at http://www.gpac.org/workplace/corps.html; viewed Sept. 14, 2007).

The few gender identity or expression policies in place have not existed long enough to allow a thorough analysis of how they will be applied. But there have already been lawsuits by transsexuals claiming the right to use restrooms reserved for members of the opposite sex. In fact, only seven years ago the Minnesota Court of Appeals ruled that a man must be permitted to use a women's restroom. *Goins v. West Group*, 619 N.W.2d 424, 429 (Minn. App. 2000). Fortunately, the Minnesota Supreme Court reversed the decision (635 N.W. 2d 717, 723 (Minn. 2001)), but the Court of Appeals opinion shows how some courts will construe provisions like the ones proposed in ENDA.

"Sexual orientation" policies are likewise out of the mainstream because only 3,170 of the hundreds of thousands of employers in America have a sexual orientation nondiscrimination policy. *See* Human Rights Campaign, Workplace page. More importantly, there is no valid basis for legislation making "sexual orientation" a protected category, unlike other traits such as skin color and sex. Rather, in the free marketplace of ideas, businesses will respond to employee pressure to adopt policies where great needs for those policies exist.

There is no scientific evidence that people are born with a specific "sexual orientation." The researchers who erroneously believed they found a "gay gene" have subsequently acknowledged that they were unsuccessful in identifying such a gene, and that homosexual desire is related at least in part to childhood environment.[1] Simply put, homosexual behavior is just that—a behavioral trait, not a biological one; a choice, not an immutable characteristic.

Moreover, there is valid evidence that persons change their "sexual orientation" over the course of a lifetime, both spontaneously and deliberately. A recent study by Columbia University published in the American Journal of Sociology concluded that the existence of any relationship between genes and hormones on "sexual orientation" is "inconclusive at best." *See* Peter S. Bearman & Hannah Bruckner, Opposite-Sex Twins and Adolescent Same-Sex Attraction, 107 AMERICAN JOURNAL OF SOCIOLOGY 1179, 1180 (2002).

Furthermore, a myriad of publications like the JOURNAL OF SEX RESEARCH, DEVELOPMENTAL PSYCHOLOGY, and JOURNAL OF CLINICAL PSYCHOLOGY (just to name a few) have all published studies concluding that homosexual behavior does not result from an immutable biological trait, but from behavioral or psychological phases.[2]

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[1] For extensive information on this point, go to http://www.narth.com.

[2] *See* Richard C. Friedman and Jennifer I. Downey, SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE 39 (2002); Letitia Anne Peplau & Linda D. Garnets, A New Paradigm for Understanding Women's Sexuality and Sexual Orientation 56 JOURNAL OF SOCIAL ISSUES 329, 332 (2000); Rosemary C. Veniegas & Terri D. Conley, Biological Research on Women's Sexual Orientations: Evaluating the Scientific Evidence 56 JOURNAL OF SOCIAL ISSUES 267, 277 (2000); J. Michael Bailey et al., 2000. Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample, Journal of Personality and Social Psychology, 78(3): 524-536, 533; Scott L. Hershberger, 2001. "Biological Factors in the Development of Sexual Orientation," in Lesbian, Gay, and Bisexual Identities and Youth: Psychological Perspectives 27-51, 40 (Anthony R. D'Augelli & Charlotte J. Pattersons, eds.) (New York: Oxford University Press); J.M. Bailey, et al., Heritable Factors Influence Sexual Orientation in Women 50 ARCHIVES OF GENERAL PSYCHIATRY 217 (1993); J.M. Bailey & R.C. Pillard, A Genetic Study of Male Sexual Orientation 48 ARCHIVES OF GENERAL PSYCHIATRY 1089 (1991); Janet R. Jakobsen & Ann Pelligrini, LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE 96 (Boston: Beacon Press 2004); Joseph P. Stokes, et al, Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men, 43 JOURNAL OF SEX RESEARCH 304, 305 (1997); Roy F. Baumeister, Gender Differences in Erotic Plasticity: The Female Sex Drive as Socially Flexible and Responsive 126 PSYCHOLOGICAL BULLETIN 347 (2000); Letitia Anne Peplau & Linda D. Garnets, A New Paradigm for Understanding Women's Sexuality and Sexual Orientation 56 JOURNAL OF SOCIAL ISSUES 329 (2000); Lisa M. Diamond & Ritch C. Savin-Williams, Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women 56 JOURNAL OF SOCIAL ISSUES 297 (2000); Karen L. Bridges & James M. Croteau, Once-Married Lesbians: Facilitating Changing Life Patterns 73 Journal of Counseling and Development 134, 135 (Nov./Dec. 1994) (describing C. Charbonneau and P.S. Lander, Redefining Sexuality: Women Becoming Lesbian in Mid-Life in LESBIANS AT MID-LIFE 35 (B. Sang, et al. editors, 1991)); Lisa M. Diamond, Development of Sexual

The University of Chicago conducted the most extensive random study of sexuality in America to date. *See* Lauman, *et al.*, *The Social Organization of Sexuality* (1994). In the chapter on homosexuality, the researchers referred to "assumptions that are patently false: that homosexuality is a uniform attribute across individuals, that it is stable over time, and that it can be easily measured." *Ibid*, p. 283. Even the psychiatrist who was primarily responsible for removing homosexuality from the list of mental illnesses, Dr. Robert Spitzer, has concluded that persons with same-sex desire can change to opposite-sex desire. Robert L. Spitzer, M.D., "Can Some Gay Men and Lesbians Change Their Sexual Orientation?" *Archives of Sexual Behavior* 32:5, 412 (October 2003).

Given the fact that "sexual orientation" is not an immutable and/or uniform attribute, cannot be easily measured, and cannot be discerned by physical characteristics, entities subject to ENDA will have no way to objectively assess an employee's "sexual orientation." (Organizations that want to properly follow current law, and avoid sexual harassment claims, already do not permit sexuality to be part of the workplace culture.) Yet, ENDA now runs contrary to other aspects of federal law by directly injecting sexuality into the workplace. This kind of provision opens employers and others to unfounded charges of discrimination. In fact, employers will be constantly faced with decisions where someone who may be engaged in homosexual behavior is competing with another employee. Under ENDA, the employee who loses can claim discrimination based upon sexual orientation–and have a reasonable chance of winning. Moreover, nothing will prevent persons not engaged in homosexual behavior from making such claims in order to gain an unfair advantage, or otherwise abuse their relationship with their employer. Given the absence of scientific proof distinguishing "homosexuals" from "heterosexuals," no organization could reasonably refute or defend any allegation of discrimination or unfair treatment.

The proposed provision extending protected status based upon gender identity or expression eliminates employment at will—an essential doctrine of employment. According to GenderPac, "At some point in their lives, most people experience some form of discrimination or bias as a result of gender stereotyping." GenderLaw Guide to the Federal Courts and 50 States, p. 2 of 90 (available at http://www.gpac.org/workplace/GenderLAW.pdf; viewed Sept. 14, 2007). In discussing the various kinds of civil rights statutes, GenderPac states the following: "The broadest of these protections, extending to *gender expression and identity*, could be considered the most direct way of protecting people from discrimination and harassment based on gender stereotypes."[3] *Ibid.* (emphasis added). Thus, according to GenderPac, ENDA

Orientation Among Adolescent and Young Adult Women 34 DEVELOPMENT PSYCHOLOGY 1085 (1998); Susan Rosenbluth, Is Sexual Orientation a Matter of Choice? 21 PSYCHOLOGY OF WOMEN QUARTERLY 595, 605-607 (1997); Sari H. Dworkin, Treating the Bisexual Client 57 JOURNAL OF CLINICAL PSYCHOLOGY 671 (2001); Lisa M. Diamond, Was It a Phase? Young Women's Relinquishment of Lesbian/Bisexual Identities Over a 5-Year Period 84 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 352 (2003); Robert L. Spitzer, Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation 32 ARCHIVES OF SEXUAL BEHAVIOR 403 (2003); Warren Throckmorton, Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays 33 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 242 (2002).

[3]GenderPac says that "Gender Stereotyping can be considered the root cause of discrimination based on gender expression, identity, or characteristics, and – in an expanded reading – discrimination based on sex and sexual orientation." *Ibid*, p. 3 of 90.

includes the broadest provisions available for addressing "gender stereotyping," and may encompass discrimination against "most people." If "most people" can claim gender identity or expression discrimination if they are terminated from employment, lose out on a promotion, fail to obtain a job, etc., "employment at will" will have lost all meaning.

Improper Treatment of Religious Entities

ENDA will significantly hinder religious organizations and their ability to operate by drawing a fictional line between faith tenants that are important or "significant," and beliefs that are supposedly insignificant. This fictional distinction ignores the fact that ALL tenets of faith by religious organizations, which they are constitutionally entitled to hold, are both important and inextricably intertwined. Moreover, by definition, a "tenet" is significant as "a principle, belief, or doctrine generally held to be true; *especially* : one held in common by members of an organization, movement, or profession."[4] Yet, ENDA seeks to somehow create varying levels of significance amongst faith tenets, or perhaps even create the oxymoronic notion of a "mildly significant" tenet. Worse yet, under ENDA, the government, not religious leaders, is the ultimate arbiter of the legitimacy or validity of various religious tenets.

This type of governmental parsing of various religions, and their respective beliefs, is exactly the type of governmental intrusion into religion feared by the founders of our nation. Such is why the Establishment Clause was created, to avoid religious accountability to the government, and government checks upon religion—the exact type of intertwining feared by Thomas Jefferson in 1802 when he first uttered the words "wall of separation between church and state."[5] Almost two centuries later, this same concern was echoed by our Supreme Court in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Amos, 483 U.S. at 336. Moreover, "[i]t is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *National Labor Relations Bd. v. Catholic Bishop*, 440 U.S. 490, 502 (1979).

It is commonly understood that the behavior of its members and followers, in various contexts, comprises the central tenets of any religious faith. From Christians who avoid the practice of homosexual behavior, to the wearing of a kippah by Jews, to Muslims who fast during Ramadan, every organized religion and/or faith has tenets that are concerned with the conduct and behavior of its members. These tenets are well established and known to both its

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[4] See http://www.merriam-webster.com/dictionary/tenets.
[5] See Jefferson's letter here – http://www.loc.gov/loc/lcib/9806/danpre.html.

members and the public at large. Yet, ENDA would require religious organizations to "declare" as "significant" that which is commonly known and understood in order to gather unto themselves the legal protections to which they are already entitled. Moreover, ENDA is unclear as to whether religious organizations would be required to somehow prove, beyond their clear religious doctrine, their opposition to homosexual behavior.

It is presumed that any organization, including those of a religious nature, has a vital interest in ensuring that those who carry out its mission are in agreement with that mission and, by words or deed, do not undermine that message. For example, each member of this legislative body possesses an undeniable interest in hiring staff members who share their social and/or political philosophy. For this reason, Congress does not impose restrictions upon its members, and remove their political conscience, by requiring that staff members to include those associated with, for example, the communist or libertarian parties. This is because each member of this body understands the importance of cohesive and fluid thought and ideals within each office in order to maximize its effectiveness. Yet, while religious conscience and speech is afforded the same level of paramount constitutional protection as that of political conscience and speech, it strains comprehension to determine why a political body would honestly seek to create legal litmus tests for religious organizations, while avoiding the same for itself. Such a distinction clearly runs afoul of our country's concept of religious freedom.

Section 8(a)(5) of ENDA is notably egregious because it invades the inviolability of religious beliefs concerning the sanctity of marriage. This section unconstitutionally prohibits any religious organization from using marriage as a requirement for any possible employment position. This is an impermissible effort to advance same-sex "marriage" as an element of federal law, contrary to the federal Defense of Marriage Act, and contrary to the 49 states which do not permit same-sex "marriage." In a state, like Virginia, where same-sex "marriage" is not permitted, a religious organization could not mandate, as an employment qualification, that their marriage counselor be married. Alternatively, a church in Ohio would be prohibited from requiring that the leader of its married couples Sunday school class also be married. In other words, although the law of their state clearly supports such, under ENDA, no religious organization would be permitted to hinge employment of certain positions upon an individual's marital status—something that is both necessary and crucial to various aspects of religious organizations and their ministries.

For numerous reasons, ENDA is harmful to the American business and religious communities. Federal law should not equate sexual behavior with immutable characteristics. Moreover, this body should not impose upon this country's religious organizations laws which clearly violate the Constitution and invade the province of Free Exercise and Free Speech.

ENDA must be rejected.

TO: **HON. ROBERT ANDREWS, CHAIRMAN**
HON. JOHN KLINE, RANKING MEMBER
HOUSE EDUCATION AND LABOR SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C.

FROM: **COLBY M. MAY, ESQ.**
DIRECTOR & SENIOR COUNSEL, WASHINGTON OFFICE
JACQUELINE MICHELLE SCHAFFER, J.D.
AMERICAN CENTER FOR LAW & JUSTICE, INC.

DATE: **SEPTEMBER 17, 2007**

COMMENTS OF THE ACLJ ON THE
EMPLOYMENT NON-DISCRIMINATION ACT OF 2007

The American Center for Law and Justice (ACLJ) hereby respectfully provides the following comments on the Employment Non-Discrimination Act of 2007 (H.R. 2015), or ENDA, being considered by the House Education and Labor Subcommittee on Health, Employment, Labor, and Pensions.

Overview:

In its current form, H.R. 2015—The Employment Non-Discrimination Act of 2007, or ENDA—suffers from significant constitutional infirmities that must be eliminated. In order for this piece of legislation to withstand scrutiny under *Lemon*'s entanglement prong, ENDA must contain a blanket exemption for religious organizations. As currently drafted, Section 6 of ENDA fosters unconstitutional government entanglement with religion by requiring the government to assess the primary purposes of religious organizations. ENDA also fosters government entanglement by requiring the government to assess the primary duties of individuals employed by religious organizations whose primary purposes the government has already deemed are not sufficiently religious to trigger the exemption. To resolve these blatant constitutional defects, ENDA should contain a blanket religious organizations exemption that mirrors the religious institutions exception found in Section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (2007). Additionally, Section 8(a)(5) must be stricken from the bill as it operates to prohibit religious organizations from having a

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policy of firing or refusing to hire an individual who engages in extra-marital sexual conduct. Employers must be permitted to enact and enforce codes of ethics which govern behavioral expectations, including those based on marital status. In light of the First Amendment and the church autonomy doctrine, the government simply may not govern the affairs of religious organizations as it seeks to do through H.R. 2015. See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

I. Section 6 of H.R. 2015 violates the Establishment Clause by fostering excessive government entanglement with religion.

It is a matter of settled law that the government may not interpose itself in the affairs of religious organizations. In 1872, the Supreme Court held that courts may not review a religious body's determinations on points of faith, discipline, and doctrine. *Watson v. Jones*, 80 U.S. 679 (1872). Almost one hundred years later, the Supreme Court reiterated this point by explaining that government action runs afoul of the Establishment Clause when it fosters "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). Just one year prior to *Lemon*, the Court held that any government involvement with religion that requires official or continuous surveillance leads to the kind of government entanglement with religion prohibited by the Establishment Clause. *Walz v. Tax Comm'r of New York*, 397 U.S. 664, 675 (1970).

The Supreme Court's entanglement jurisprudence is well exemplified in the equal access cases of the last thirty years. For instance, in *Widmar v. Vincent*, the Court noted that a public university's use policy which strictly excluded religious speech and worship actually fostered government entanglement with religion by requiring the school, a government actor, to "determine which words and activities fall within 'religious worship and religious teaching.'" 454 U.S. 263, 272 n.11 (1981). The Court further explained that such a policy would require continuous surveillance of religious groups, *id.*—a violation of the principle established in *Walz*. In *Board of Education v. Mergens*, the Court relied on *Widmar* to find that a school more effectively avoids the risk of government entanglement by implementing an open use policy rather than one that excludes religious uses and thus requires an assessment of whether certain uses are indeed religious or not. 496 U.S. 226 (1990). It should be noted that while the practical effect of such policies was important to the Court's entanglement analysis in these cases, the Court made its ultimate assessment of each policy's constitutionality by considering first and foremost what the policy, as written, required of the government actor, not necessarily what the government actor did in response to the policy.

The Court has clearly demonstrated that policies requiring government review of religious doctrine, government monitoring of religious organizations, or government assessment of a program's religious nature cannot withstand a First Amendment challenge. Government action simply cannot foster excessive entanglement between the government and religion. As currently drafted, however, Section 6 of ENDA does exactly this.

Section 6(a) of ENDA narrowly provides that the "Act shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or teaching or spreading

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of religious doctrine or belief." The government's enforcement power under ENDA rests entirely on whether an organization has "as its primary purpose religious ritual or worship[, etc.]" Like a use policy that excludes religious worship, ENDA not only permits but impermissibly *requires* the government to assess the religious nature of an organization in order to determine whether the primary purposes of a religious organization render it exempt from ENDA.

The constitutional defects intrinsic to ENDA's unnecessarily narrow exemption are compounded in Section 6(b). This provision provides that "[f]or any religious corporation, association, educational institution, or society that is not wholly exempt under [Section 6(a)], this Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship." Interestingly, this particular provision contemplates that the government has already engaged in the impermissible government entanglement with religion permitted in Section 6(a) by determining that the primary purposes of a religious organization are not sufficient to invoke ENDA's religious organizations exception. A paid position with that non-exempt religious organization may be exempted from ENDA compliance, but only if the government determines that the primary duties of that particular position are sufficiently religious to invoke the exception. Once again, the government is required to delve into and determine the religious nature of a course of employment. It is unclear how a bill which so patently fosters government involvement with religious affairs would ever survive First Amendment scrutiny.

Section 6(c) also suffers from constitutional defects. By its terms, this provision contradicts itself, invites government review of religious determinations and should therefore be stricken from the Act as unconstitutional. Section 6(c) permits a religious organization to require its employees to conform to the specific religious tenets that it deems significant. The provision purportedly shields from judicial review the determinations of religious organizations as to what beliefs are significant and thus require employee conformance. Oddly enough, however, the provision simultaneously renders such determinations "admissible [] for the proceedings under this Act." Regardless of its apparent nod to non-entanglement, Section 6(c) nevertheless unconstitutionally permits courts to review the religious determinations, or "declarations," of religious organizations. Particularly in light of the provisions contained in subsections (a) and (b), one can only assume that such religious determinations are admissible for the purposes of reviewing the overall religious nature of a religious organization's purposes or an employee's duties.

II. H.R. 2015's severability clause will render the bill unconstitutional under the Free Exercise Clause if a court deems Section 6 unconstitutional under the Establishment Clause.

As currently drafted, Section 6 of ENDA also contains significant Free Exercise implications. If Congress passes ENDA in its current form, it is likely that religious organizations will raise constitutional challenges to its enforcement under the foregoing

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entanglement analysis. As Section 6 clearly fosters impermissible government entanglement with religion, a faithful application of the Supreme Court's Establishment Clause jurisprudence will undoubtedly find the entire provision unconstitutional. However, the bill's severability clause, found in Section 16 of the Act, permits the Court to strike from the Act the provision containing the unconstitutional religious organizations exception, leaving the rest of the Act fully enforceable. As such, every employer, whether sectarian or non-sectarian, within the scope of this Act as defined by Sections 2 and 7 would be prohibited from engaging in employment practices that discriminate on the basis of sexual orientation or gender identity. Accordingly, the consequent application of the Act would infringe upon religious organizations' First Amendment free exercise right to hire employees whose religious views, particularly regarding sexual orientation, comport with their own. To stand in harmony with the Religion Clauses of the First Amendment, this Act must completely exempt religious organizations from ENDA compliance.

The most effective way to cure the First Amendment infirmities found in Section 6 is simply to eliminate it and fill its void with a provision that removes religious organizations from the scope of the Act, much like Congress did for Title VII of the 1964 Civil Rights Act. Borrowing the language of Title VII's religious entities exception, 42 U.S.C. 2000e-1(a), Section 6 of ENDA might read as follows: "This Act shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, association, educational institution, or society of its advances." As such, ENDA would not permit or require any government assessment of a religious organization's religious purposes and determinations or an employee's religious duties.

It should be noted that Title VII's religious entities exception has been consistently upheld under the First Amendment. In *Corporation of the Presiding Bishop v. Amos*, the Supreme Court stated the following:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. It is well established, too, that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

483 U.S. 327, 334 (1987) (internal quotations omitted). The Court further explained that under *Lemon*, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. Accordingly, an exception that exempts all religious organizations from ENDA compliance is free from constitutional defects. Not only is this exception permissible, but it is absolutely necessary to cure Section 6 of ENDA of its constitutional infirmities.

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III. H.R. 2015 should contain a conscientious objector exception.

While the proposed blanket exemption for religious organizations remedies Section 6's entanglement problems, it does not remedy ENDA's unconstitutional infringement upon the Free Exercise rights of employers in non-sectarian organizations who hold religious and moral convictions against employing homosexual, bisexual or transgender individuals. ENDA thus treats identical religious convictions differently. The drafters of the bill should include a provision which exempts employers not otherwise exempt under the bill if they have conscientious objections. As stated in *United States v. Seeger*, an individual may qualify for such status if he or she possesses "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." 380 U.S. 163, 176 (1965). The Court further posited that permitting a conscientious objection under this test "avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition [] is grounded in their religious tenets." *Id.* In the same way, a conscientious objector or right of conscience exception to ENDA would avoid the incompleteness entailed in protecting the conscience rights of some employers but not others. Additionally, it should be noted that ten states currently enforce right of conscience laws in the health care arena.[1]

While there is no conscientious objection exception to Title VII compliance, it must be emphasized that sexual orientation and gender identity—unlike race, sex, religion and other traditional classes of protection—are neither suspect classes nor groups entitled to heightened scrutiny. As such, there is no "compelling" or "substantial" government interest in overriding individual conscience. Furthermore, individuals may legitimately object to what they consider to be anomalistic sexual practices. While race and gender are morally neutral categories, sexual preference/orientation is not.

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1 United States Protection of Conscience Laws, http://www.consciencelaws.org/Conscience-Laws-USA/Conscience-Laws-USA-03.html (last visited Sept. 14, 2007).

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IV. Section 8(a)(5) infringes upon the Free Exercise and conscience rights of employers and challenges the marriage laws of 49 States.

Finally, Section 8(a)(5) must be stricken from the text of the bill. As applied, this provision would effectively prohibit employers in 49 States from maintaining policies that discourage extra-marital sexual conduct, whether heterosexual or homosexual. This provision prevents employers in the 49 States that prohibit same-sex marriage from conditioning negative employment action against a homosexual on whether that individual is married or eligible to be married. In practice, Section 8(a)(5) prohibits an employer from instituting a policy that discourages any form of extra-marital sex: An employer who fires a homosexual employee for engaging in homosexual sex in a State that does not allow same-sex marriage has conditioned the decision to fire that individual on his or her marital status. It necessarily follows that if an employer may not enforce a policy that proscribes the extra-marital sex of homosexuals, then that employer may not enforce a policy that proscribes the extra-marital sex of heterosexuals unless that policy singles out heterosexual misconduct for punishment. Under Section 8(a)(5), a policy that discourages heterosexual extra-marital conduct would be permissible only if it proscribed heterosexual conduct while permitting homosexual conduct. Ironically, Section 8(a)(5) forces employers seeking to maintain a level of morality amongst its employees to condone and even endorse homosexual conduct. Furthermore, while religious organizations whose primary purposes invoke the exemption may not have to comply with this provision, religious organizations whose primary purposes do not invoke the exemption would.

In addition to these patent moral defects, it must be noted that Section 8(a)(5) effectively challenges the marriage laws of 49 States that have independently chosen to prohibit same-sex marriage. Accordingly, Section 8(a)(5) should be stricken from the bill and replaced with language that allows all employers within the scope of the Act to maintain a code of conduct and ethics that governs behavioral expectations, including those based on marital status.

V. Conclusion

In light of the foregoing, it is clear that the constitutional infirmities contained in the current draft of H.R. 2015 must be addressed. In order to withstand constitutional scrutiny, ENDA must contain a blanket religious organizations exemption. Additionally, employers must be given the right to make conscientious objections to compliance with the bill. Finally, Section 8(a)(5) should be stricken from the bill and replaced with language that permits employers to enact codes of ethics governing behavioral expectations, including those based on marital status.

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September 4, 2007

Hon. John Kline
Subcommittee on Health, Employment, Labor and Pensions
Education and Labor Committee
United States House of Representatives
1429 Longworth HOB
Washington, DC 20515-2302

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

Testimony of Center for Law & Religious Freedom of the Christian Legal Society (CLS) and Professor Thomas Berg

Dear Congressman Kline and Subcommittee Members:

We write to oppose passage of H.R. 2015, the Employment Non-Discrimination Act of 2007 ("ENDA" or "the bill") in its present form. Laws that prohibit discrimination in employment on the basis of sexual orientation must be accompanied by meaningful exemptions to protect employers, especially religious organizations, whose religious conscience and tenets teach that homosexual conduct is immoral. Without substantial exemptions, the effect of the bill will be to pressure and marginalize organizations and religious adherents who hold this view, not to promote the diversity that ENDA's proponents claim to affirm. For the reasons detailed below, this bill's exemptions, which have been greatly narrowed from previous versions of ENDA, are inadequate to protect religious conscience.

The Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom ("the Center"), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will and because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

Thomas Berg is St. Ives Professor of Law at the University of St. Thomas School of Law in Minneapolis. He is a leading scholar of religious liberty, the author of more than thirty law review articles on the subject and the author or co-author of four books including the popular law school casebook *Religion and the Constitution*. He serves on, among other religious liberty committees, the advisory committee for CLS's Center for Law and Religious Freedom. He has represented or advised numerous groups and individuals seeking to preserve their religious freedom against governmental restriction, including Native Americans, Orthodox Jews, evangelical Christians, Brazilian animist-Christian believers, and Muslims.

Background: Moral Standards, Disagreement, and Antidiscrimination Law

The morality of homosexual conduct currently ranks among the most divisive issues in American society. A great many Americans continue to believe, based on longstanding and widespread religious and moral teachings, that homosexual activity runs contrary to the purposes of human sexuality. Many others now condemn this attitude as bigoted, claiming that there is no moral difference between same-sex and opposite-sex activity. Our focus here is not on the moral debate itself, but on how such deeply-felt disagreements should be handled by a government, such as that of the United States, committed to respecting liberty of conscience for all.

If the government by law imposes one of these competing moral visions on those who conscientiously reject it, the law will make those people suffer and will greatly aggravate the conflict between the competing views. Considerations such as this have led more and more to the decriminalization of private, consensual homosexual conduct.

But by the same token, laws that prohibit private discrimination based on homosexual conduct pose a severe risk of imposing on organizations and individuals with deeply held religious/moral views that such conduct is sinful. It is true that antidiscrimination laws can help ensure that gays and lesbians are not severely hampered in their ability to find work and participate in the economic system. Proponents of ENDA thus claim that the bill promotes the goal of "embracing diversity" in the workplace.[1] However, antidiscrimination laws in fact undermine diversity and tolerance

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[1] *See* Human Rights Campaign, Statements of Support for the Employment Non-Discrimination Act (statements of Steve Keyes, Nationwide Co.), available at http://www.hrc.org/Template.cfm?Section=Press_Room&CONTENTID=36496&TEMPLATE=/ContentManagement/ContentDisplay.cfm.

if they are not accompanied by meaningful exemptions for religious organizations and other employers with religiously grounded moral objections to homosexual conduct. Without strong exemptions, religious organizations will be forced, as a condition of seeking workers to carry out their faith-based missions, to accept those whose conduct contravenes the moral principles of the faith and whose conduct may be apparent to outsiders or other employees. It hardly exemplifies diversity or tolerance to use the law to force nearly all religious employers to accept such employees or exit the labor marketplace. In the words of the Supreme Court, protecting expressive associations from antidiscrimination laws "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas." *Boy Scouts v. Dale*, 530 U.S. 640, 647-48 (2000) (upholding right of Boy Scouts to dismiss openly gay scoutmaster notwithstanding antidiscrimination law).[2]

Religious employers have a vital interest in ensuring that those who carry out their missions do not, by their conduct, send messages inconsistent with the organization's religiously grounded views. Those messages can be sent in a variety of ways, to a variety of audiences—not just to the outside world, but to other employees or (at a religious school) to students—and the organization must have leeway to judge, without state pressure, whether an employee's conduct will interfere with his or her ability to advance the organization's mission. See also *Dale*, 530 U.S. at 655-56 (refusing to second guess Boy Scouts' determination that presence of openly gay scoutmaster would compromise their message). Congress and the Supreme Court have repeatedly recognized the interest of a religious organization in employing only those people who believe in and live by its doctrines of faith. Several exemptions from the religious-nondiscrimination rules of Title VII protect this interest for all jobs in the

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[2] If the bill were limited to employment distinctions based purely on sexual orientation, as opposed to extramarital sexual conduct, it would impose far less on religious conscience. Many organizations, including CLS, believe that all acts of sexual conduct outside traditional marriage are sinful, including heterosexual fornication and adultery as well as homosexual conduct, and withhold offices and membership from those who unrepentantly continue either category of conduct. Thus, as the Seventh Circuit has held, CLS "requires its members and officers to adhere to and conduct themselves in accordance with a belief system regarding standards of sexual *conduct,* but its membership requirements do not exclude members on the basis of sexual *orientation.*" *See Christian Legal Society v. Walker*, 453 F.3d 853, 860 (7th Cir. 2006) (emphases in original). But ENDA plainly is not so limited; it would forbid any organization to apply a general policy against extramarital conduct to homosexual conduct, if the organization is in a state "in which a person cannot marry a person of the same sex"—that is, in every state but Massachusetts. H.R. 2015, § 8(a)(5).

organization.[3] This very interest is at stake when a religious employer requires that its employees believe in and live by those doctrines of faith that concern sexual conduct. As one court has put it, Congress "intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991). Thus, the hospitable attitude to religious exemptions for hiring decisions based on religious faith must also apply to hiring decisions based on religiously grounded moral doctrines. For the following reasons, the exemptions in the current ENDA are inadequate.

Analysis

1. The Bill's Exemptions for Religious Organizations Are Inadequate.

Previous versions of ENDA, extending over more than a decade, have included broad exemptions for religious employers. Until this year's proposal, the bills always provided that the Act "shall not apply to a religious organization."[4]

The current bill's exemption, however, is significantly narrower and more complicated. It states, in section 6:

> (a) *In General* – This Act shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief.
>
> (b) *Certain Employees* – For any religious corporation, association, educational institution, or society that is not wholly exempt under subsection (a), this Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of

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[3] *See* 42 U.S.C. § 2000e-1 (protecting religion-based hiring by religious organizations for all activities); *id.* § 2000e-2(e)(2) (protecting religion-based hiring by religious educational institutions for all activities); *id.* § 2000e-2(e)(1) (protecting organization where religion is bona fide occupational qualification for position).

[4] *See, e.g.*, S. 1705, § 9 (introduced Oct. 2, 2003); H.R. 3285, § 9 (introduced Oct. 8, 2003); H.R. 2692, § 9 (introduced July 31, 2001); S. 869, § 9 (introduced June 10, 1997); H.R. 4636, § 6(a) (introduced June 23, 1994).

> persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship.
>
> (c) *Conformity to Religious Tenets* – Under this Act, a religious corporation, association, educational institution, or society may require that applicants for, and employees in, similar positions conform to those religious tenets that such corporation, association, institution, or society declares significant. Under this Act, such a declaration by a religious corporation, association, educational institution or society stating which of its religious tenets are significant shall not be subject to judicial or administrative review. Any such declaration made for purposes of this Act shall be admissible only for proceedings under this Act.

This narrows and complicates the exemption in several ways.

First, under § 6(a) the categorical exemption for an organization no longer applies to all religious organizations, but only to those that, in the opinion of a court, "ha[ve] as [their] primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief."

Second, as to all other religious organizations, the exemption in § 6(b) covers only those positions whose "primary duties"—again, as seen by a secular court—consist of religious teaching, religious governance, or religious ritual or worship, or the supervision of those activities.

The weakness in both exemptions is that they limit protection of the freedom of religious organizations to certain activities singled out as religious, and even further to situations where a court deems those activities "primary" to the organization or the particular job. The § 6(a) exemption might very well be limited to churches and theological seminaries, and the § 6(b) exemption might well be limited to clergy or ministers in other religious organizations. At best, the scope of both is unclear and subject to narrow interpretations by courts unsympathetic to or unfamiliar with the organization's mission. A few examples, with analysis, will illustrate the problems.

If enacted into law, ENDA might well impose liability on a Christian social-service organization that provided shelter and other resources to homeless persons and families and that required employees to observe standards against homosexual (along with other extramarital) conduct. Even if the shelter included Christian counseling and teaching in its programs, one could easily imagine a court concluding that the shelter falls outside of the § 6(a) exemption because its primary purpose is to aid the homeless, not to

engage in worship or teach "religious doctrine or belief." Such a ruling is especially possible because under § 6(a), religious teaching must be the organization's "primary purpose," not, it appears, one of two or three primary purposes.

Given that the shelter would likely fall outside the § 6(a) exemption, a similar danger exists under § 6(b) that a court would rule that most of its employees' "primary duties consist" in aiding the homeless, with the teaching or spreading of religious doctrine or belief only secondary or incidental. But even if an employee is not specifically assigned to lead worship or teach doctrine, this is no way exhausts a shelter's interest in ensuring that its workers follow standards of conduct consistent with the beliefs that inspire the shelter's work. Employees may counsel beneficiaries in a host of circumstances, informal as well as formal, and serve as role models to them and to fellow employees.

ENDA's exemption provisions impose unrealistically narrow definitions of what is "religious." Millions of Americans, individually and in organizations, view serving the needy as a part of their fundamental religious duty to love their neighbor. Such work is no less religious because it does not fall within the categories of "primarily worship" or "primarily teaching doctrine." Indeed, religious faiths are often challenged by the broader society to do more to help those in need. As such, it is simply perverse to say, as this bill does, that to the extent an organization engages in such activities it loses its fundamental religious-freedom right to define its moral standards.

To take another example, ENDA might easily impose liability on a Christian liberal arts college that disciplined a philosophy professor for violating a no-extramarital-conduct policy by engaging in homosexual activity. Even if the college integrated Christian teachings throughout the courses in its curriculum, a court might well conclude under § 6(a) that the college's one primary purpose is to teach various liberal arts subjects, not to teach "religious doctrine or belief." Courts in past cases have separated educational purposes from religious purposes, and elevated the former over the latter, in precisely this way.[5] But as the Supreme Court has said, "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment"; it is enough that the organizations "engage[s] in expressive activity that could be impaired" by having to hire certain employees. *Dale*, 530 U.S. at 655.

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[5] *See, e.g., Baltimore Lutheran High School Assn. v. Employment Security Admin.*, 490 A.2d 701 (Md. 1985) (holding that Lutheran school was not "operated primarily for religious purposes," under unemployment-tax exemption, even though it had mandatory chapel services and sought to integrate Christian teaching into all courses).

Likewise, under § 6(b) a court might well rule that the professor's "primary duties" are to teach philosophy, with the teaching or spreading of religious doctrine or belief only secondary or incidental. But even if the professor is not asked to teach Christian doctrine directly in the classroom, such teaching does not exhaust the school's interest in ensuring that faculty members follow standards of conduct consistent with the school's beliefs. Faculty members inevitably exercise moral suasion on students, counseling them and serving as role models—especially, though not only, for students majoring in the faculty member's subject, whether that is science or theology. The §§ 6(a) and 6(b) exemptions, narrowed as they are to activities with the primary purpose of teaching religious doctrine, appear to leave little or no room to protect these vital interests.

The Supreme Court, the Congress and lower federal courts have all recognized that religious freedom is inadequately protected by exemptions that define religious activity in narrow terms. Congress therefore expanded the Title VII exemption of religious organizations to allow them to choose employees based on religious faith in all their activities, not just those a court would deem "religious." 42 U.S.C. § 2000e-1. The Supreme Court unanimously approved the broadened exemption, pointing out that

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987). Justice Brennan, concurring, likewise noted how the prospect of secular court review "chill[s]" a religious organization's religious activity, leading it "to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well." *Id.* at 343-44. Moreover, Brennan said, second-guessing by a court of which positions are religious produces "considerable ongoing government involvement in religious affairs." *Id.* at 343. "It is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). To avoid both of these constitutional evils—chilling of religious activity and governmental entanglement in religious determinations—Congress "intended the explicit exemptions to Title VII to enable religious organizations to create and maintain

communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'" *Little*, 929 F.2d at 951. Thus in *Little*, the court held that Title VII's exemption for religion-based employment decisions protected a Catholic school's right to discharge a teacher for remarrying in violation of Catholic canon law, even though the teacher "was not given responsibility for teaching religion." *Id.* at 945.

The narrowed, uncertain exemptions in the current ENDA bill invite the precise evils that Congress has previously sought to avoid. Liability under ENDA would prevent religious organizations that believe homosexuality is sinful from maintaining communities of workers faithful to that doctrine. And as the examples discussed above show, the exemptions in §§ 6(a) and 6(b) deny protection not only to religious activities that fall outside the enumerated categories (such as worship or teaching doctrine), but also even to the enumerated activities if they do not constitute the "primary purpose" of the organization or the "primary dut[y]" of the particular position. Determining what is "primary" is an open-ended criterion that would (1) entangle the courts by requiring them to delve deeply into the organization's religious understanding of how religious faith and its other functions relate, and (2) chill religious activity by allowing courts to downplay or overlook how religious purposes accompany or provide the foundation for a so-called "nonreligious function" such as education or service to the homeless.

These deficiencies are in no way cured by the third exemption provision, § 6(c), which is currently so unclear as to be useless. The provision allows a religious organization to require applicants for and employees in "similar positions . . . to conform to those religious tenets that [the organization] declares significant." Unfortunately, it is hard to see to what the term "similar positions" could refer other than the positions described immediately beforehand in § 6(b): that is, positions that, in the view of a secular court, have as their "primary duties" religious teaching, governance, or ritual/worship. For the reasons already given, that exemption is far too narrow to protect a religious organization's vital interests in ensuring its employees reflect its religiously grounded moral standards. No other plausible, coherent reference for the term "similar positions" is apparent from the bill's text. An exemption that merely restates another inadequate exemption is inadequate too.[6]

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[6] We have struggled to come up with interpretations that do not make §6(c) simply redundant. "Similar" could plausibly be read to refer to positions that do not primarily involve religious teaching, governance, or ritual/worship, but are somehow like those positions that do. But without defining in what way the other positions must be similar, the provision gives no coherent guidance and would most likely be narrowed out of existence in interpretation. We also have hypothesized that "similar" could be read to refer to a scenario in which a religious

Whatever ambiguity there might be about the precise scope of this bill's exemption, there can be no doubt that ENDA's supporters intentionally narrowed it from those in previous bills. The narrowing almost certainly reflects the recent change in control of Congress and the supporters' judgment that they now have a chance to pass a bill with a narrower exemption. ENDA's supporters, of course, have the right to seek whatever provision they want, but the dramatic change further suggests that this exemption does not reflect a principled commitment to religious freedom -- that it would be interpreted narrowly and would be inadequate to protect that freedom.

2. The Bill Would Harm Religious Organizations in Other Contexts.

This bill could also significantly harm religious organizations' conscientious decisions in areas far beyond employment. Similar conflicts between antidiscrimination laws and religiously grounded moral standards arise in contexts such as adoption, housing, and employee benefits. Catholic Charities recently had to stop providing adoptions for special-needs children in Massachusetts because of its refusal to facilitate adoptions by same-sex couples, even though Catholic Charities did nothing to stop such couples from adopting through any of numerous other agencies.[7] Small landlords have been sued and sometimes held liable for refusing to provide apartments to unmarried cohabiting couples, even though there was no evidence that the couples had the slightest difficulty finding alternative housing. *See, e.g., Smith v. Fair Employment & Housing Comm.*, 12 Cal. 4th 1143, 913 P.2d 909, 51 Cal. Rptr. 2d 700 (1996) (imposing liability on landlord); *Thomas v. Anchorage Equal Rights Comm.*, 165 F.3d 692 (9th Cir. 1999) (ruling for landlord), vacated on ripeness grounds, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). In each of these cases, prohibiting a particular organization or individual from acting on religiously grounded moral standards—without any showing that gay or unmarried couples lack alternative means of adopting, getting housing, or otherwise participating in the relevant activity—can only have the meaning and effect of marginalizing and suppressing those religiously grounded views.

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employer asks employees in jobs that are similar to one another to conform to a religious tenet such as refraining from homosexual conduct. But this reading is far less plausible on its face, and again without some definition of similarity we cannot understand how courts could fairly hold employers to some such standard of consistency across jobs before allowing the exemption.

[7] *See, e.g.*, John Garvey, *State putting church out of adoption business*, Boston Globe, Mar. 14, 2006, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/03/14/state_putting_church_out_of_adoption_business/.

Currently, the availability of exemptions for religious conscience in these varied circumstances depends heavily on whether courts determine that there is a "firm national policy" against the kind of discrimination in question. The phrase first appeared in *Bob Jones University v. United States*, 461 U.S. 574 (1983), where the Supreme Court found such a firm national policy against government support for racial discrimination in education and therefore found a compelling interest supporting the denial of tax exemptions to racially discriminatory schools. *Id.* at 593, 603-04. By contrast, in *Thomas*, *supra*, a Ninth Circuit panel held that no compelling interest existed in forcing a small landlord to rent to an unmarried cohabiting couple, because "there is no similar 'firm national policy' against marital-status discrimination." 165 F.3d at 715.[8] In reaching this conclusion, the panel relied on, among other things, the absence of provisions against marital-status discrimination in federal law and the presence of marriage-based distinctions in federal and state law.

There can be little doubt that if ENDA is enacted, proponents of gay rights laws will point to it as conclusive evidence of a firm national policy against sexual-orientation discrimination and thus seek to bootstrap its effect to deny exemptions for religious conscience in numerous other contexts. Any argument that ENDA covers only employment decisions therefore ignores reality. If ENDA in some form were to pass, broad exemptions in it, like those in religious nondiscrimination statutes (see pp. 2-3, 5-6 above), could communicate the importance of respecting religious conscience in other contexts involving homosexual conduct. But ENDA with narrow exemptions might very well lead courts to approve impositions on religious conscience in a host of contexts, in the name of a "firm national policy" against sexual-orientation discrimination.

3. The Bill Would Harm Small Businesses with Religious Motivations.

Finally, ENDA would undermine the freedom of small commercial employers to exercise their faith-based moral judgments about homosexual conduct. Such a business owner may believe that given his direct personal association with the business and his direct daily interaction with employees, the business constitutes part of his identity and expression and therefore the employees' conduct should coincide with his basic moral values. The bill gives insufficient protection to such conscientious judgments: its exemption for business with fewer than 15 employees fails to protect many other small businesses with more employees but whose owner nevertheless closely associates with the business and her employees. Any protection of the religious claims of small

[8] Although the *Thomas* panel opinion was vacated and does not serve as precedent, it illustrates the kind of analysis courts tend to use in assessing whether to recognize an exemption.

proprietorships currently must come through a statutory exemption, because the courts have been unwilling to recognize constitutional protection. *See, e.g., EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *State by McClure v. Sports & Health Club*, 370 N.W.2d 844 (Minn. 1985). The current bill's exemption is inadequate.

Conclusion

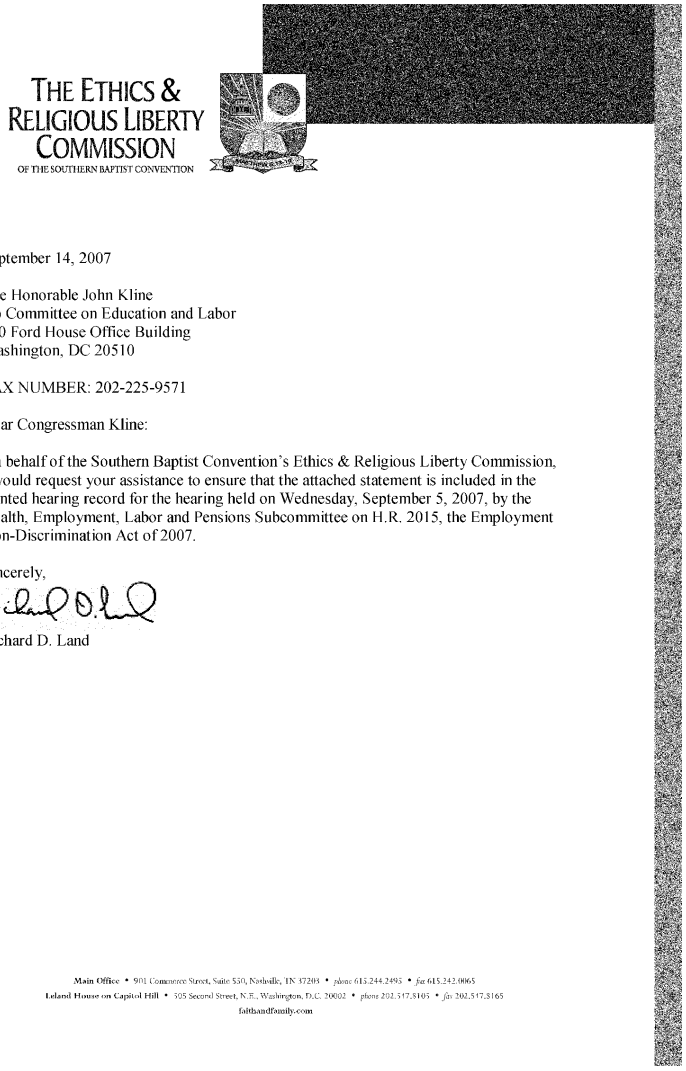
The exemption in H.R. 2015—shrunk in scope from that in every other previous ENDA bill—is inadequate to protect employers, especially religious organizations, with conscientious objections to homosexual conduct. Thus a significant effect of the bill would be not to promote diversity in society over the divisive issue of homosexual conduct, but instead to impose, by government coercion, one moral position on those who disagree with it as a matter of deep religious conscience. "[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Dale*, 530 U.S. at 660.

We appreciate the Subcommittee Members' careful deliberation over this important issue. If you have any questions regarding our position on this matter or the opinions stated in this testimony, please do not hesitate to contact the undersigned.

Very truly yours,

Prof. Thomas Berg
University of St. Thomas School of Law

Steven H. Aden, Esq.
Senior Counsel
Center for Law & Religious Freedom of the
Christian Legal Society



September 14, 2007

The Honorable John Kline
c/o Committee on Education and Labor
230 Ford House Office Building
Washington, DC 20510

FAX NUMBER: 202-225-9571

Dear Congressman Kline:

On behalf of the Southern Baptist Convention's Ethics & Religious Liberty Commission, I would request your assistance to ensure that the attached statement is included in the printed hearing record for the hearing held on Wednesday, September 5, 2007, by the Health, Employment, Labor and Pensions Subcommittee on H.R. 2015, the Employment Non-Discrimination Act of 2007.

Sincerely,

Richard D. Land

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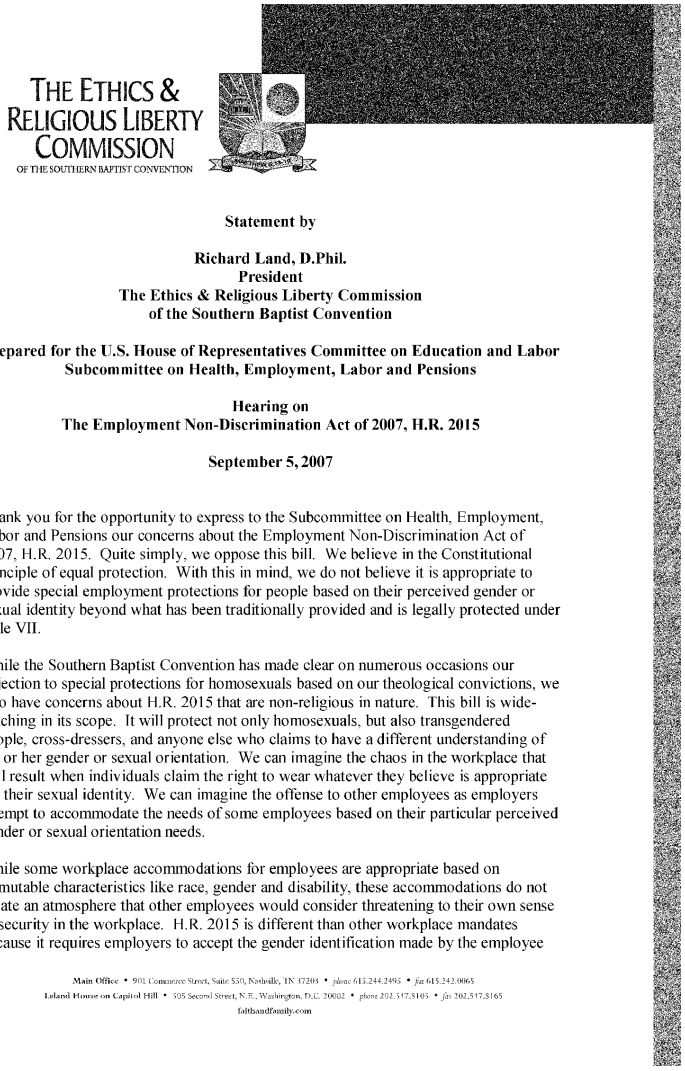

Statement by

Richard Land, D.Phil.
President
The Ethics & Religious Liberty Commission
of the Southern Baptist Convention

Prepared for the U.S. House of Representatives Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions

Hearing on
The Employment Non-Discrimination Act of 2007, H.R. 2015

September 5, 2007

Thank you for the opportunity to express to the Subcommittee on Health, Employment, Labor and Pensions our concerns about the Employment Non-Discrimination Act of 2007, H.R. 2015. Quite simply, we oppose this bill. We believe in the Constitutional principle of equal protection. With this in mind, we do not believe it is appropriate to provide special employment protections for people based on their perceived gender or sexual identity beyond what has been traditionally provided and is legally protected under Title VII.

While the Southern Baptist Convention has made clear on numerous occasions our objection to special protections for homosexuals based on our theological convictions, we also have concerns about H.R. 2015 that are non-religious in nature. This bill is wide-reaching in its scope. It will protect not only homosexuals, but also transgendered people, cross-dressers, and anyone else who claims to have a different understanding of his or her gender or sexual orientation. We can imagine the chaos in the workplace that will result when individuals claim the right to wear whatever they believe is appropriate for their sexual identity. We can imagine the offense to other employees as employers attempt to accommodate the needs of some employees based on their particular perceived gender or sexual orientation needs.

While some workplace accommodations for employees are appropriate based on immutable characteristics like race, gender and disability, these accommodations do not create an atmosphere that other employees would consider threatening to their own sense of security in the workplace. H.R. 2015 is different than other workplace mandates because it requires employers to accept the gender identification made by the employee

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regardless of actual physical evidence to the contrary. For example, a person who is anatomically male can claim to be female in gender identity and therefore demand access to space previously reserved for women, such as the women's bathroom. Some female employees may feel threatened if forced to share the bathroom facilities with a man.

Further, the bill seems to suggest that an employer will be able to classify all employees as either male or female in gender. Yet, many authorities also speak of transgender people who perceive themselves as both male and female, or neither. How will the employer address this? What recourse does the employer have when an employee gives notice that neither male nor female gender assignments are acceptable and claims the right to workplace accommodations the employee considers appropriate? In addition, many in the scientific community are still developing theories of gender identity. While the issue may be settled for us, the vast majority of the rest of the evangelical community, and many others, some secular authorities seem far less certain about current definitions about gender. It is possible that this bill could take on much broader applications as the secular science evolves on the whole question of gender and sexual orientation. Thus, we are deeply concerned about the unintended consequences that could result from this bill. In the hands of a judge with a new definition of gender, this bill could be applied in ways that the bill's sponsors have not even imagined. We notice that the bill does not even limit gender identity to male and female. Is this because those who wrote it are already uncertain about appropriate or comprehensive gender attributions?

We appreciate the attempt of the bill to exempt religious institutions from its requirements. However, we are dismayed that the legislation attempts to distinguish between various activities of religious organizations, exempting some of their activities from its hiring protections but not all of them. Religious organizations engage in a wide range of activities in order to fulfill their calling from God. While some people may not consider some of their activities to be central to their mission or sufficiently religious in nature, the organizations may believe much differently. A religious organization may perceive *all* that it does to serve people as a direct outgrowth and expression of their service to God. As such, they may believe such activities as child care, private school education, or job training services are efforts of the organization to serve God by serving the community. It is unacceptable for the government to have the power to dictate to those organizations which of their activities are sufficiently "religious" and, therefore, exempt and which are not. Further, it should not fall to the organization to declare ahead of time which are or are not. This places an undue burden on those organizations, putting them in the position of liability for failure to adequately address the requirements of the bill or to act in a timely manner. In spite of the sponsors' best efforts, any attempt to exempt religious institutions from this legislation is insufficient since the underlying bill is so fatally flawed.

We consider this bill to be an inappropriate government intrusion on businesses and the religious community. We oppose it and ask that the Committee take our concerns under consideration and reject H.R. 2015. We are available to answer any questions you may have regarding our response to this bill.

Thank you for allowing Family Research Council to submit comments on the hearing held on Wednesday, September 5, 2007, by the Health, Employment, Labor and Pensions Subcommittee on H.R. 2015, the "Employment Non-Discrimination Act of 2007." H.R. 2015 is misleadingly referred to as a logical extension of Title VII of the Civil Rights Act. While the Civil Rights Act was enacted primarily to protect the rights of racial minorities, ENDA is aimed at providing heightened protections for a particular sexual behavior-homosexuality. H.R. 2015 is a radical transformation of workplace discrimination law. It would grant special consideration on the basis of "sexual orientation" or "gender identity" that would not be extended to other employees in the workplace.

ENDA is a "one size fits all" solution to alleged discrimination that erases all marriage-based distinctions. It grants special rights to homosexuals while ignoring those of employers. The federal government should not force private businesses to abandon their moral principles.

The Family Research Council opposes this legislation on the following grounds:

- **Such legislation affords special protection to a group that is not disadvantaged.** There is no evidence for the oft-repeated assertion by proponents of ENDA that homosexuals, who enjoy higher disposable income levels than married persons, suffer systematic job discrimination and have been excluded from full participation in the political process.
- **The issue is not job discrimination:** It is whether private businesses will be forced by law to accommodate homosexual activists' attempts to legitimize homosexual behavior. ENDA will require business owners to hire people they believe to be involved in sexual behavior that they consider to be immoral precisely because they are openly involved in such behavior.
- **The first "religious exemption" clause is very narrow and offers no clear protection to church-related businesses:** The legislation exempts any religious corporation, etc., "which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief." Religious schools or charitable organizations, religious bookstores, or any business affiliated with a church or denomination fall outside this narrow definition, and could presumably be required to hire homosexuals.
- **The second "religious exemption" clause fails to offer protection for all hiring by church-related organizations or businesses.** The clause specifies that only those "whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order," etc., are exempt from ENDA. In other words, a teacher of religion at a church-related school would be exempt, but, e.g., a biology teacher would not. Thus, most of the teachers and staff at a religious school would be covered by ENDA, which means that the church would be forced to hire homosexuals for such positions-despite the fact that their lifestyle would be in direct opposition to the religious beliefs of the organization or company.

FAMILY RESEARCH COUNCIL
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- **It is unlikely that the "religious exemption" included in the bill would survive court challenge:** The exemption is likely to be construed narrowly, denying exemption to organizations that have a religious point of view but have no formal connection to a church. Institutions that could be targeted include religious summer camps, the Boy Scouts, Christian bookstores, religious publishing houses, religious television and radio stations, and any business with fifteen or more employees.
- **ENDA would mandate the employment of homosexuals in inappropriate occupations.** ENDA disregards the fact that sexual conduct may in fact be relevant to employment. Under such legislation religiously-affiliated employers in the area of education and childcare would be denied the right to refuse to hire homosexuals, even if they consider such persons to be inappropriate role models for children and young people.
- **ENDA violates employers' and employees' Constitutional freedoms of religion, speech and association.** The proposed legislation would prohibit employers from taking their most deeply held beliefs into account when making hiring, management, and promotion decisions. This would pose an unprecedented intrusion by the federal government into people's lives.
- **ENDA would approvingly bring private behavior considered immoral by many into the public square.** The argument "What goes on in the bedroom is nobody else's concern" is specious. From time immemorial human societies have used legal and cultural means to encourage the traditional family. This is because of the realization that non-marital sexual activity in all its forms has detrimental effects upon individuals and society as a whole. By declaring that all sexual preferences are equally valid, ENDA would change national policy supporting marriage and family.

Again, thank you for allowing this opportunity to submit our written comments.

Tom McClusky

Vice President of Government Affairs
Family Research Council

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TESTIMONY OF

Attorney Mathew D. Staver
Founder and Chairman of Liberty Counsel
Dean and Professor of Law at Liberty University School of Law
Before House Education and Labor Subcommittee on
Health, Employment, Labor, and Pensions
September 14, 2007

Mr. Chairman and members of the committee, my name is Mathew Staver.[1] I am the Founder and Chairman of Liberty Counsel[2] and Dean and Professor of Law at Liberty University School of Law.[3]

I would like to address the 2007 version of H.R. 2015, the Employment Non-Discrimination Act ("ENDA"), specifically, Section 6 entitled "Exemption for Religious Organizations," and Section 8 entitled "Construction." Section 6 is a narrow exemption that leaves several employers subject to the provision of ENDA that should be exempted. Section 8's language of construction is troubling in that it would force acceptance and exposure to those in "gender transition" in the workforce, and it does not protect discrimination on the basis of marriage other than in the employee benefit realm. Overall, these two sections raise significant Free Exercise and Free Speech concerns.

I. SECTION 6 IS NOT A TRUE EXEMPTION FOR RELIGIOUS ORGANIZATIONS

[1] A detailed curriculum vitae is available upon request. In reference to the relevant issue before this Committee, my specialty is constitutional litigation. I have earned B.A., M.A. and J.D. degrees, an honorary LL.D. degree, am an AV rated attorney and Board certified by the Florida Bar in Appellate Practice. I have written ten books, most of which deal with constitutional law, including a recent 572 page book devoted exclusively to constitutional law. I have written numerous briefs before the United States Supreme Court and presented oral argument before the High Court twice as lead counsel.

[2] Liberty Counsel is a nonprofit litigation, education and policy organization founded in 1989. Liberty Counsel has offices in Florida, Virginia, and Washington, D.C., and has hundreds of affiliate attorneys in all 50 states. Liberty Counsel specializes in constitutional law.

[3] Liberty University School of Law was founded in 2004 and received provisional accreditation by the American Bar Association on February 13, 2006.

Under Sections 6(a) and (b), ENDA employs a "primary purpose" test for employers or "primary duties" test for employees to determine whether the exemption applies. These terms will, of course, be judicially construed as they are not defined in the bill. Under the plain language of the bill, only groups such as churches and religious orders will fit the exemption provision. Most nonprofit, and certainly commercial, organizations will have a much harder argument that the primary purpose of the organization is "religious ritual or worship or the teaching or spreading of religious doctrine or belief." ENDA's current exemption scheme, as drafted, lends itself to a strict construction, which would lead to a finding that such groups are not exempt from ENDA. In addition to this, ENDA does not in any way exempt any Christian owned and Christian run businesses. Those employers would still be subject to ENDA despite their sincerely held religious beliefs to the contrary.

II. SECTION 8'S CONSTRUCTION PROVISION DAMAGES MORALITY, MARRIAGE AND THE FREE EXERCISE AND FREE SPEECH RIGHTS OF EMPLOYERS.

A. Employee Restrooms

Sections 8(a)(3) and 8(a)(4) of ENDA contain provisions that are problematic from two perspectives. First, the addition of those employees in "gender transition" or that have a "gender identity" creates problems for employers. ENDA deals with shared facilities for employees and mandates that employers give access to shared facilities, such as restrooms and other similar facilities for those who are of the same sex, but have an opposite gender identity (i.e. a male identifying as female), or of those who have notified their employer of an ongoing gender transition (i.e. a male transitioning to a female). Those employees would be allowed to share restrooms and other similar facilities with

members of the opposite sex. The only exception to the shared facilities requirement is when the facility is such that "being seen fully unclothed is unavoidable." Facilities such as shared showers would not have to be shared if the shower is such that being seen fully unclothed is unavoidable. However, shared shower facilities with stalls where being seen fully unclothed is avoidable would not be exempted from the requirement of allowing access to those facilities by opposite sex individuals who have a different "gender identity" or are undergoing "gender transition." This section is problematic for employers who have a sincerely held religious belief of upholding morality in the workplace. Allowing individuals access to facilities of the opposite sex certainly implicates moral and religious beliefs.

Additionally, this provision of ENDA requires the employer to acknowledge and recognize the concept that sex can be changed or that it is a fluid concept. Those "identifying" as a different gender than what they were born as and those undergoing "gender transition" would have to be recognized by employers for the gender they claim to be or they claim to be transitioning to. This forced recognition raises serious Free Exercise and Free Speech implications for religious employers who believe that sex is determined at birth and cannot be changed. As Liberty Counsel has argued before, "A woman who had a hysterectomy and mastectomy is a woman. A woman who thinks she is a man is a woman. Therefore, a woman who has had a hysterectomy and mastectomy and thinks she is a man remains a woman."[4] Sex is not a fluid concept. It is determined at birth and cannot be changed. ENDA requires forced acceptance of a very radical notion that gender is merely a product of personal expression completely unrelated to a

[4] Appellant's Initial Brief on Appeal, *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. 2d Dist. Ct. App. 2003).

person's biology of physiology. ENDA represents the abolition of gender, which is the primary end goal of the same-sex agenda.

ENDA's provision of "dress and grooming standards" under Section 8(a)(4) also raises the same concerns as the shared facilities relative to the forced recognition by employers of the fact that sex is a fluid concept and can be changed. Section 8(a)(4) requires that an employer allow an individual who has previously been through "gender transition" or has notified their employer that they are in "gender transition" to dress as the gender to which the employee has transitioned or is transitioning. This section also forces employers to recognize that sex can be changed and thus raises serious Free Exercise and Free Speech concerns.

The "dress and grooming standards" section also is very broad and would force employers to hire individuals that may be contrary to the employer's image it wishes to portray. For instance, airlines would be force to hire "gender transitioning" individuals as flight attendants or women's clothing retailers would be force to hire men who believe they are women to sell their goods.[5] An argument could be made that such individuals could not perform their job duties, but ENDA's acknowledgment that gender does not matter would prohibit this kind of argument. If gender is irrelevant, then a "transition" from one sex to another would not prohibit someone from accomplishing their job duties.

B. Marriage and Employee Benefits

These two sections of ENDA, when read together mean that, in states where same-sex couples are not allowed to marry, employers do not have to give benefits

[5] A host of other examples could be imagined. The Rockettes would be forced to hire a man who is "transitioning" to female for their shows assuming he is otherwise qualified for the position. A football cheerleader squad would be forced to hire a man who thinks he is a woman for their squad assuming he is otherwise qualified.

National
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Christian
Communicators
Impacting
the World

September 14, 2007

The Honorable John Kline
C/O Committee on Education & Labor
230 Ford House Office Building
Washington, DC 20510

Dear Mr. Kline,

I send the greetings of our President/CEO Dr. Frank Wright. Please find attached a statement written by our Sr. Vice President/General Counsel, Mr. Craig Parshall on the present ENDA legislation. The National Religious Broadcasters (NRB) has serious concerns about this legislation and would kindly request your earnest review and action on this matter.

Sincerely,

Bob Powers
Director of Government Relations
(202) 607-0065
bpowers@nrb.org

Statement of
National Religious Broadcasters
Regarding the Nondiscrimination Act of 2007 (ENDA)

September 14, 2007

National Religious Broadcasters ("NRB") is the nation's pre-eminent association representing the interests of Christian broadcasters and communicators. The largest percentage of our 1400 plus members are television and radio stations and networks, and those participating in religious broadcast-related activities.

We have grave concerns about the applicability of the Employment Non-Discrimination Act of 2007 ("ENDA") to Christian broadcasters, and its potential conflict with existing protections afforded our members under Federal Communications Commission ("FCC") regulations.

In its current form, ENDA provides a complicated and not entirely clear stepping-stone hierarchy for religious employers. First, any "religious corporation, association, educational institution, or society," (without further qualification regarding the purposes of that entity) may establish "significant" "religious tenets" which can be imposed on any or all employees. Sec. 6 (c). However, we further note in this paper the inherent inconsistency of that provision. See: n. 5, below. As such, sec. 6 (c) may well prove to be illusory.

Second, under Sec. 6 (b), any "religious corporation, association, educational institution, or society" not entirely exempt under Sec. 6 (a), (a category in which many religious broadcasters may find themselves) can receive a partial exemption that would <u>only</u> apply to employment positions where the "primary duties" of that job position require "teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order" or supervising those that spread religious doctrine or to positions involving "religious ritual or worship." Thus, in this grouping, religious broadcasters would find themselves in roughly the same position as existed prior to the action of the FCC in 2002 which then expanded their employment rights. [1]

Prior to the 2002 EEO Order of the FCC, the rights that religious broadcasters had to impose faith-based criteria in employment were restricted to those jobs that were necessary to espouse religious teachings. [2] Thus, under Section 6 (b) of ENDA, administrative, management, secretarial and even broadcast programming positions would likely not be entitled to a religious exemption from ENDA.

Since the EEO Order of the FCC in 2002, religious broadcasters have been regulated only relating to matters of "race, color, national origin or gender …" but not religious belief. Religious broadcasters "may establish religious belief as a job qualification for *all employees*." 47 C.F.R. § 73.2080. (emphasis added). ENDA, however, would change that.

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[1] That is when the FCC passed the current regulation in *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd. 24018 (2002) ("EEO Order").

[2] As the Court stated in *Lutheran Church – Missouri Synod v. FCC*, 141 F. 3d 344, 347 (D.C. Cir. 1998): "FCC policy exempts religious broadcasters from the ban on religious discrimination, but only when hiring employees who are reasonably connected to the espousal of religious philosophy over the air. *King's Garden, Inc.*, 38 F.C.C.2d 339 (1972), aff'd sub nom. *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). After questioning the Church about the duties attached to various positions, the Commission found it unnecessary for receptionists, secretaries, engineers, and business managers to have knowledge of Lutheran doctrine."

The third religious category created by ENDA in Sec. 6 (a), which grants a total exemption, applies only to a "religious corporation, association, educational institution, or society," if such a group "has as its *primary purpose* religious ritual or worship or the teaching or spreading of religious doctrine or belief." [3] This "primary purpose" language is fraught with problems. Secular courts often misunderstand the mission and strategies of religious organizations. The more a religious broadcaster airs programming that deals with current events, news or information, the more a court may be inclined to ignore the subtle but important Christian world-view that motives such programming and could be tempted to simply label that station as one that does not have the "primary purpose" of religious teaching. Some Christian radio stations have a predominance of their programming day made up of Gospel-oriented music: does that constitute "religious ritual or worship?" ENDA does not answer that.

Also, the broadest religious exemption in ENDA, which is contained in Section 6 (a), is still much weaker than the existing protections for religious broadcasters afforded by the FCC. Sec. 6 (a) applies only to an organization if it satisfies two conditions: first, it must be a "religious corporation, association, educational institution or society …" The FCC exemption, on the other hand, applies to a "religious broadcaster" as defined as one that is a FCC licensee which is "closely affiliated with a church, synagogue, *or other religious entity.*" The later language, including the reference to "other religious entity" is broad in scope. ENDA's Sec. 6 (a) by contrast, is not.

This crucial difference in treatment between ENDA's scope of religious organizations protected and those protected by the FCC rule is illustrated by a case in the Court of Appeals. In *EEOC v. Kamehameha School/Bishop Est*ate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993), the 9th Circuit Court of Appeals applied a legal standard consistent with the language of ENDA. The result: a private protestant religious school was denied Title VII religious exemption in employment even though it had the following religious characteristics, where the court noted:

> " … the religious characteristics of the Schools consist of minimal, largely comparative religious studies, scheduled prayers and services, quotation of Bible verses in a school publication, and the employment of nominally Protestant teachers for secular subjects. References to Bible verses, comparative religious education, and even prayers and services are common at private schools and cannot suffice to exempt such schools from … [general discrimination prohibitions]."

The Court in the 9th Circuit case reasoned that where a religious organization was merely "affiliated with a religious organization" (i.e. the FCC standard) it would be disqualified from exemption unless it satisfied the other requirement that its "purposes" be primarily religious (i.e. the ENDA standard). Thus, ENDA employs a standard that, if the 9th Circuit approach is followed, a multitude of Christian ministries will be found not to be entitled to exemptions. This second requirement under ENDA's Sec. 6 (a) for full religious exemption that the religious organization must be proven to have a "primary purpose" of spreading a religious message, or participating in religious ritual or worship, then, is a critically dangerous requirement. By contrast, current FCC regulations contain no such requirement.

On the whole, then, ENDA is likely to create a conflict with FCC employment exemption protections for Christian broadcasters, and, if ENDA is construed by courts to prevail, then religious broadcasters will lose considerable freedom to impose faith-based criteria in their employment decisions. [4]

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[3] This language, at first blush, would seem to line up with I.R.S. code section 501 (c)(3), which exempts religious corporations organized for religious purposes; under that construction, a religious broadcaster incorporated as a 501 (c)(3) would qualify under ENDA for full exemption. However, the tests for tax exemption have a different focus than those that proscribe discrimination. Thus, a court could construe ENDA's sec. 6 (a) exemption as applying to less than the entire field of 501 (c) (3) religious groups.

[4] An argument could be advanced in subsequent litigation to the effect that Congress intends ENDA to prevail over FCC agency regulations, in that ENDA's own express purposes (Sec. 2) clause provides that ENDA is "a

This paper was designed to narrowly focus on what NRB sees as the most obvious and troublesome implications of ENDA regarding Christian broadcasters. That is not to say, however, that we do not also have additional concerns as well.[5]

In conclusion: NRB believes that ENDA, as currently drafted, creates an intractable infringement on the rights of Christian broadcasters.[6]

Respectfully submitted,

Craig L. Parshall, Esq.
Senior Vice-President and General Counsel
National Religious Broadcasters

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comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity." (emphasis added).

[5] For instance, there is an inherent contradiction in the provisions of ENDA as concerns the religious autonomy of faith-based organizations. In Sec. 6 (c), the Act purports to grant a right for every "religious corporation, association, educational institution, or society" to require that all employees to adhere to any "religious tenets" that it deems to be "significant." Yet, Sec. 4, read in tandem with Sec. 3 (9), bans employment discrimination based on homosexuality or bisexuality. But what if a religious employer views homosexuality or bisexuality to be sin and therefore a disqualification from ministry employment, and also considers that "religious tenet" to be "significant?" Can it enforce that "tenet" under Sec. 6(c) and undermine Sec. 4? Or would Sec. 4 trump Sec. 6(c)? The text of ENDA provides no clear answer to that, though it would appear that Sec. 4's general anti-discrimination provisions would probably prevail.

[6] The situation would be different, however, if ENDA provided a clear "carve-out" for religious broadcasters, where it is made clear that *nothing in the Act shall diminish, or be construed to conflict with, those employment discrimination exemption rights currently provided by the Federal Communications Commission to religious broadcasters, whereby religious broadcasters are free to establish religious belief or religious affiliation as a job qualification in all areas except as to race, color, national origin or gender.*

conditioned on marriage to same-sex couples, but that employers may not otherwise discriminate against same-sex couples because they are unmarried. Put simply, an employer under ENDA can reserve marital employee benefits for opposite sex married couples. However, an employer cannot take an employment action against a same-sex person because that person is unmarried. It is difficult to imagine a scenario where an employer would not hire or would discharge an employee because they are unmarried because they are in a same-sex relationship. Certainly religious employers would refuse to hire or discharge a person who is in a same-sex relationship. To the extent that those employers are not wholly exempt or the employee is not exempted under Section 6 of ENDA, the employer could not discriminate on the basis of marriage if the person is in a same-sex relationship and is in a state that does not allow same sex marriage.

III. DISCRIMINATION AGAINST PEOPLE OF FAITH

Despite the overall problems with creating special rights for same sex individuals and those in "gender transition" or with a different "gender identity," the two sections analyzed in this memo raise significant Free Exercise and Free Speech concerns. ENDA's provisions do nothing to address these concerns raised by the effect of ENDA on employers. Moreover, ENDA would establish the controversial, and dangerous notion, that gender is merely based on personal expression and is unrelated to biology and physiology. Finally, the exemption found in Section 6 only includes an organization which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief; leaving many nonprofit and commercial businesses at risk of not being covered under the umbrella of the exemption. In effect, by not incorporating a true exemption, ENDA acts to further discrimination rather than eliminate it.

What Is A 'Sexual Orientation'?

*Page numbers are from "Paraphilias," **Diagnostic and Statistical Manual of Mental Disorders**, Fourth Edition, Text Revision (Washington: American Psychiatric Association, 2000), pp. 566-582*

1. **Apotemnophilia** - sexual arousal associated with the stump(s) of an amputee
2. **Asphyxophilia** - sexual gratification derived from activities that involve oxygen deprivation through hanging, strangulation, or other means
3. **Autogynephilia** - the sexual arousal of a man by his own perception of himself as a woman or dressed as a woman (p. 574)
4. **Bisexual** - the capacity to feel erotic attraction toward, or to engage in sexual interaction with, both males and females
5. **Coprophilia** - sexual arousal associated with feces (p. 576)
6. **Exhibitionism** - the act of exposing one's genitals to an unwilling observer to obtain sexual gratification (p. 569)
7. **Fetishism/Sexual Fetishism** - obtaining sexual excitement primarily or exclusively from an inanimate object or a particular part of the body (p. 570)
8. **Frotteurism** - approaching an unknown woman from the rear and pressing or rubbing the penis against her buttocks (p. 570)
9. **Heterosexuality** - the universal norm of sexuality with those of the opposite sex
10. **Homosexual/Gay/Lesbian** - people who form sexual relationships primarily or exclusively with members of their own gender
11. **Gender Identity Disorder** - a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, or the other sex, "along with" persistent discomfort about one's assigned sex or a sense of the inappropriateness in the gender role of that sex (p. 576)
12. **Gerontosexuality** - distinct preference for sexual relationships primarily or exclusively with an elderly partner
13. **Incest** - sex with a sibling or parent
14. **Kleptophilia** - obtaining sexual excitement from stealing

15. **Klismaphilia** - erotic pleasure derived from enemas (p. 576)
16. **Necrophilia -** sexual arousal and/or activity with a corpse (p. 576)
17. **Partialism** - A fetish in which a person is sexually attracted to a specific body part exclusive of the person (p. 576)
18. **Pedophilia** - Sexual activity with a prepubescent child (generally age 13 years or younger). The individual with pedophilia must be age 16 years or older and at least 5 years older than the child. For individuals in late adolescence with pedophilia, no precise age difference is specified, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account; the adult may be sexually attracted to opposite sex, same sex, or prefer either (p. 571)
19. **Prostitution** - the act or practice of offering sexual stimulation or intercourse for money
20. **Sexual Masochism** - obtaining sexual gratification by being subjected to pain or humiliation (p. 573)
21. **Sexual Sadism** - the intentional infliction of pain or humiliation on another person in order to achieve sexual excitement (p. 574)
22. **Telephone Scatalogia** - sexual arousal associated with making or receiving obscene phone calls (p. 576)
23. **Toucherism -** characterized by a strong desire to touch the breast or genitals of an unknown woman without her consent; often occurs in conjunction with other paraphilia
24. **Transgenderism** - an umbrella term referring to and/or covering transvestitism, drag queen/king, and transsexualism
25. **Transsexual** - a person whose gender identity is different from his or her anatomical gender
26. **Transvestite** - a person who is sexually stimulated or gratified by wearing the clothes of the other gender
27. **Transvestic Fetishism** - intense sexually arousing fantasies, sexual urges, or behaviors involving cross-dressing (p. 575)
28. **Urophilia** - sexual arousal associated with urine (p. 576)
29. **Voyeurism** - obtaining sexual arousal by observing people without their consent when they are undressed or engaged in sexual activity (p. 575)
30. **Zoophilia/Bestiality -** engaging in sexual activity with animals (p. 576)

Gender Identity Disorders

Homosexual and transgender activists claim that "gender identity" can be different from a person's biological sex and is inborn. In other words, a man who

thinks he's a woman, should be free to change his sex; a woman who thinks she's a man should be free to change her sex and be free of alleged "discrimination" in the workplace.

TVC's report, "A Gender Identity Disorder Goes Mainstream" explains how radical transgender activists are working to overthrow the idea that a person's biological sex is who they are – not what they think they are. Men are not women; women are not men. To think otherwise is to display evidence of a mental disorder and gender confusion. These conditions are treatable. They should not be normalized as "gender variant" behaviors.

TVC's report, "Sexual Orientation: Fixed Or Changeable" discusses the idea of sexual orientation being on a continuum that can change over time.

The *DSM* still lists transvestism and gender dysphoria (confusion over one's status as male or female) as mental problems to be dealt with by a psychiatrist.

TVC Special Report

H.R. 2015, the Employment Non-Discrimination Act (ENDA)

ENDA will force employers with 15 or more employees to implement the homosexual/transgender radical agenda in businesses across the nation.

Fall 2007 — Once again, homosexual legislator Barney Frank (D-MA) has introduced the H.R. 2015, the Employment Non-Discrimination Act (ENDA) to create federally-protected minority status for homosexuals and transgenders in housing and employment.

The legislation includes "gender identity" for the first time. The term "gender identity" is code for drag queens, transvestites, and transsexuals. The umbrella term "transgender" is used to describe these individuals.

In August, 2004, the homosexual community came out in favor of adding transgender language to ENDA for the 2005 version. This is now established policy among homosexual activists.

According to former HRC Executive Director Cheryl Jacques, *"Passing ENDA without gender identity and expression is like passing a copyright law that covers books and television shows but doesn't cover digital music or videos."* (HRC web site, August 13, 2004)

If ENDA is passed with "gender identity" language in it, it is likely that employers will be forced to allow individuals with Gender Identity Disorders to wear opposite sex clothing to work or use opposite rest rooms or shower facilities.

ENDA defines "sexual orientation" as homosexuality, bisexuality and heterosexuality, but also adds "gender identity" as a protected class. This is code for someone who thinks he's the opposite sex or likes to wear opposite sex clothing. It also includes she-males, individuals who undergo only half of a sex-change operation. They are male from the waist down and female from the waist up.

By making "gender identity" a federally-protected class under the law, this normalizes what are mental illnesses, known as a Gender Identity Disorder and/or Transvestic Fetishism. *It elevates what a person "thinks" he is over what he actually is.* The federal government should not be legalizing the confused thinking of individuals who believe they are trapped in opposite sex bodies. This mental disorder is a treatable condition, not a fixed identity that must be accorded federally-protected class status.

Dr. Paul McHugh, for example, became the psychiatrist-in-chief at Johns Hopkins University in 1975 and put an end to the practice of providing sex-change operations for patients. Writing in his essay, Surgical Sex for *First Things* in 2004, McHugh observed: "We have wasted scientific and technical resources and damaged our professional

credibility by collaborating with madness rather than trying to study, cure, and ultimately prevent it [GID]."

Dr. McHugh believes that psychiatrists are collaborating with a mental illness by approving sex change operations on individuals. The problem is one of the mind, not the body. A person who has a gender identity disorder needs therapy, not surgery.

Lawyer Notes Problems With 'Gender Identity' In ENDA

On September 5, 2007, the U.S. House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions held a hearing on H.R. 2015 (ENDA).

During the hearing, labor attorney Lawrence Z. Lorber testified about the serious problems associated with adding "gender identity" to ENDA.

He noted, for example:

> There is a major new issue raised in this section which the Committee may wish to focus on. For the first time, a new protected category, Gender Identity, has been introduced into the legislation. The term is defined in section 3 (a) (6) as "the gender related identity, appearance, or mannerisms or other gender-related characteristics of an individual, without regard to the individual's designated sex at birth." While gender identity may be viewed as a manifestation of an individual's sexual orientation as defined in section 3 (a)(9), gender-identity, as defined in the bill does not seem to relate to any discernable innate characteristic or sexual orientation. Rather, as used in section 4 (a) it appears to relate to actions or representations of an individual perhaps related to sexual orientation or perhaps not. Thus, it stands as an independent protected classification not grounded in any discernable characteristic or status which is the basis for all of the non-discrimination legislation. I would suggest that the Committee examine in more detail how an employer might deal with this issue and insure that it does not violate the law. While, for example, section 8 (a)(4) permits employers to establish neutral reasonable dress or grooming standards, might not the requirement to accommodate an individual's gender identity, which may or may not have relationship to the individual's sexual orientation or gender transition, undermine the protection of section 8 (a)(4)?
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> ***
>
> **Section 4(e)**
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> I would note as well that section 4 (e) of the legislation which prohibits association discrimination also includes *gender identity*. Section 4 (e) is modeled after the ADA, 42 USC 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.
>
> ***
>
> **Section 8(a)(3)**
>
> Section 8(a)(3) requires an employer to provide adequate shower or dressing facilities to employees undergoing transgender transition. The committee should address whether this section creates the requirement for the provision of additional facilities or the requirement that use of certain facilities be timed to insure employee comfort for all employees. In addition, section 8(a)(3) as drafted requires that facilities not only accommodate employees who have undergone or

> are undergoing gender transition, but to accommodate the employees self-perceived gender identity. This would seem to present an extremely difficult standard for employers to meet and in fact would seem to require an employee to register his or her gender identity with the employer at the time of employment which seems to be highly intrusive to both employer and employee.

Mr. Lorber is concerned that the federal government will be creating a legal and employment policy nightmare for business owners because "gender identity" is "ephemeral" and not grounded in any "discernible characteristics" or "traits."

"Gender identity" is what a person thinks about himself. It's subject to change and is not an immutable characteristic like skin color or race.

Three News Stories Illustrate Problems With Protecting 'Gender Identity'

Mr. Lorber's concerns about putting "gender identity" in ENDA is illustrated by the following three real life examples from the news:

A so-called 'transgender' teenager in Texas won the right to wear girl's clothing to school. Rodney Evans, who calls himself Rochelle, is a 15-year-old at Eastern Hills High School in Fort Worth, Texas. Evans fought for the right to wear make-up, fake breasts and women's jeans to school. In a *Dallas News* (May 19, 2007) interview, Evans told the reporter: "*There was never a day when I was Rochelle for the whole day.* I love makeup. I started wearing makeup because it helped to complete me more. It made me feel more like a girl. With the help of makeup, you can create your own kind of life."

The article quotes Simon Aronoff, deputy director of the National Center for Transgender Equality in Washington, DC: "Transgender teens are demanding acceptance in all facets of society including school." (Aronoff is a young woman who thinks she's a man. She came out to her parents as a lesbian as a teenager, but is now taking male hormones and sports a goatee.)

How will businesses deal with Rodney Evans when he enters the work force? He claims that there was "never a day when I was Rochelle for the whole day." If Evans can determine his "gender identity" from day to day, how will his behavior impact employment policies if ENDA passes?

Will Evans be a woman on Mondays, Wednesdays and Fridays at work and a man on Tuesdays and Thursdays? What restrooms will Evans use if he doesn't undergo a sex change operation? What shower facilities? Will businesses have to provide separate facilities for him? If Evans applies to a school to become the women's gym coach, will the school have to hire him?

A second story out of Duke University also illustrates the problems of providing federal protection for the ephemeral term "gender identity."

In August, 2007, the Duke University *Chronicle* reported that a young gender-confused male student at Duke University (who thinks he's a woman) was given permission to use the women's restroom at a dorm on campus. The man has not yet had a so-called "sex

change" operation. (Even if he did have the operation, he would still be genetically a male, not a female.)

Lee Chauncey, a father of one of the female students said he was outraged by Duke's willingness to permit this man to use a woman's restroom. He contacted Duke University officials and the national media over this situation.

Chauncey told a local ABC affiliate that he didn't think it was appropriate to have a man living like a woman and using women's "shower and bathroom facilities."

This incident at Duke University is a microcosm of the social chaos that will result if ENDA is passed. ENDA, by providing federally-protected status for "gender identity," will be creating not only a third sex, but will be normalizing a whole range of bizarre sexual orientations.

A third story out of Seattle also shows the serious problems that will be created by ENDA. Transgender women invade men's restrooms at Seattle mall.

On August 31, 2007 at a Seattle mall, two women who are taking male hormones were kicked out of a men's restroom. They were attending a Gender Odyssey Conference at the Washington State Convention and Trade Center and were staging a "pee-in" at the 4th floor bathrooms. This was clearly a set-up.

Washington state passed a "sexual orientation" and "gender identity" protection law last year. These gender confused women are filing a lawsuit against the mall to test the law.

According to Sean (who only wanted her last name used), "Peeing is basic. Anyone who feels a need to use a bathroom should be able to do so without something [sic] rapping on the stall while your pants are down around your ankle." Sean and her friend Simon want to use whatever restrooms they choose.

If ENDA passes, businesses will be forced to permit "transitioning" men and women to use opposite sex restrooms.

ENDA Defines 'Sexual Orientation'

Under ENDA, "sexual orientation" is defined as "homosexuality, bisexuality, or heterosexuality" in Section 3: Definitions. This makes homosexual and bisexual behaviors on an equal par with heterosexuality, which has been the norm throughout human history. Behaviors like homosexuality, bisexuality, and cross-dressing are expressions of gender identity confusion and should not be equated with heterosexuality as being "normal."

However, in Section 4, Employment Discrimination Prohibited, **ENDA says that an employer cannot discriminate against an employee "because of such individual's actual or perceived sexual orientation or gender identity**."

The inclusion of "perceived" in the definition of sexual orientation in ENDA is a recipe for legal disaster for businesses. There is no condition of sexual abnormality

that may not be perceived to fall within one of these categories, including all those excluded by the ADA [Americans with Disabilities Act]: transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, and sexual behavior disorders. Without containing an explicit exclusion, persons with these conditions will have a certain degree of protection under ENDA.

In fact, the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) lists at least 30 sexual orientations, which includes incest, pedophilia, and coprophilia (sexual pleasure from feces). Individuals who engage in these activities can claim protection under ENDA under Section 4.

"Gender identity" is defined in Section 3 as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics or an individual, with or without regard to the individual's designated sex at birth." This vaguely-worded definition can mean someone who:

- **cross-dresses**
- **is undergoing a sex change operation**
- **thinks he or she is the opposite sex without a sex change operation**
- **lives as a she-male. These are sexually-confused individuals who undergo only a partial sex change operation. Usually males, they are female from the waist up and male from the waist down.**

If an employee decides he wishes to wear a dress to work because this is his sexual orientation, he can expect to be protected by ENDA. It will prove to be a nightmare for employers and normal employees who will be forced to remain silent as their cross-dressing co-workers press for the right to wear dresses to work.

ENDA And Restrooms/Shower Facilities

Section 8 of ENDA lays out rules for how an employer must treat a person who has a different "gender identity" than his or her biological sex. The concept of "gender identity" is misleading. Transgender activists think that they're normal. What homosexual, transgender activists and Congressional sponsors of this bill are not saying is that "gender identity" is actually a Gender Identity Disorder, which is still considered a mental condition by the American Psychiatric Association. Transgender activists who have helped craft this latest version of ENDA, assert that having a sex change operation is a perfectly legitimate way of dealing with individuals who are supposedly trapped in the wrong body.

In veiled language, Section 8 (3) describes how employers will be permitted to establish policies on shower rooms and restrooms and "gender identity" individuals. It states that employers must "provide reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established by the employer at the time of

employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later."

A plain reading of this section means that an employer must make restroom and shower facilities available to a transgender individual that is consistent with what sex *he* thinks he is -- even if he's not yet had a sex change operation. In short, if a man thinks he's a woman, he must be given access to women's restrooms and shower facilities – *or the business must construct separate restrooms and shower facilities for a person who thinks he's the opposite sex or is going through a so-called sex change operation.*

Either way, ENDA will be a legal and construction nightmare for businesses that will be forced to provide "adequate facilities" to these seriously confused individuals.

Section 8 (4) deals with "Dress and Grooming Standards." The section states that the employer must permit "any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment," to "adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning."

In plain English, this means that an employer must permit a so-called transgender employee to wear clothing that reflects his chosen sex, not his biological sex. A man choosing to wear women's clothing is protected under ENDA.

Since "gender identity" is a state of mind in ENDA, a person who thinks he's the opposite sex but doesn't want to have a sex change operation, would undoubtedly be protected by ENDA by claiming the "actual or perceived" section of the bill. This would permit a man to use a woman's restroom or shower because he "thinks" he's a woman.

Under ENDA, someone like Rodney Evans will be free to pick whatever restroom he wishes to use under the "gender identity" protection section.

And what will employers do with she-males? Will they be permitted to use either men's or women's restrooms and showers? After all, they're both male and female and can claim protection under the gender identity section of ENDA.

This is not a flight of fantasy. This is already happening on college campuses around the nation. The Duke University and Seattle mall cases are the most recent.

In October, 2002, for example, a student group calling itself, "The Restroom Revolution," at the University of Massachusetts, began demanding that the university establish unisex restrooms for so-called "transgendered" students. **This is what businesses will face if ENDA is passed.**

In June, 2001 a Latino AIDS Agency sued its former landlord for discrimination because the landlord was forcing a transgendered male to use the men's restroom instead of the women's restroom. The ACLU is defending the "right" of this man to use a woman's restroom because he thinks he's a woman. ENDA will result in endless litigation over restroom facilities.

In 2005, a man who calls himself a "male-bodied woman" and uses the name Pauline Park, won a lawsuit against the city of New York over the use of restrooms. Park's

lawsuit permits any individual to use whatever restroom he wishes, depending on his "gender identity."

Phony Religious Exemption In ENDA

ENDA is legislation ostensibly designed to forbid "discrimination" against a person's "sexual orientation" or "gender identity." The bill covers any employer who is engaged in interstate commerce or has 15 or more employees.

ENDA provides a supposed "religious exemption" for religious denominations or organizations operated by religious denominations – but not other non-profit Christian or other religious organizations. **The bill says in Section 6, "Exemption for Religious Organizations" that a "religious corporation, association, educational institution, or society which has as its *primary* purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" is exempt from ENDA.**

This is a phony religious exemption. **A Christian school, for example, would probably not be exempt under ENDA because its *primary purpose* is education, not the teaching or spreading of religious doctrine. A Christian day care center would not be exempt from ENDA; nor any Christian-owned for-profit business such as a Bible or book publisher.**

The key word in Section 6 of ENDA is "primary." If a judge decides that the primary purpose of a Christian organization is not to spread religious belief, then the entity would be forced to adhere to provisions under ENDA!

It is also very likely that once ENDA is passed, lawsuits and liberal judges will sweep away any such weak exemptions in the bill.

ENDA will pit religious employees against activist homosexuals in the workplace. The employer will be caught in the middle, trying to balance free speech, freedom of religion issues with the requirements of ENDA.

The employer will have to choose between suppressing the ability of employees to express their religious viewpoints, for which they have relatively little protection in the workplace (religious speech is far less protected then religious observances), and risking costly claims from homosexuals under ENDA's broad language. Most likely, the employer will impose a rule on the workplace that, in effect, allows no criticism of homosexual or bisexual lifestyles, even among peers.

If ENDA passes, Christian bookstores, TV and radio stations would also be forced by ENDA to violate their religious beliefs by hiring individuals whose behavior is considered to be sinful and sexually perverted. They would very likely be forced by this law to hire or retain cross-dressers and individuals who engage in behaviors considered to be sins by Christians and other religious faiths.

ENDA forbids any employer from failing to hire or to fire any individual because of his "actual or perceived sexual orientation or gender identity" (Section 4). It will also forbid an employer from taking any action against an employee because of the sexual orientation of a person he may associate with outside of work. (Section 4[e].)

ENDA Will Encourage Lawsuits

States, universities and local communities that have already passed "sexual orientation" laws are already beginning to feel the severe economic impact of these laws.

- In July 2007, Fresno State University was fined $5.8 million by a jury for its alleged discrimination against a lesbian volleyball coach, Lindy Vivas. She claimed she was the victim of sexual orientation discrimination because she was a feminist activist and lesbian.
- In April 2007, a homosexual couple filed a lawsuit against the Rochester Athletic Club for refusing to grant them a family membership. The couple claimed that the club was violating the state's Minnesota Human Rights Act and "sexual orientation" discrimination law.
- In July 2007, a jury in Los Angeles awarded a lesbian firefighter $6.2 million in a sexual orientation/harassment case. Lesbian Brenda Lee claimed she was harassed because she's a black lesbian.
- In April 2006, a homosexual group, Colorado Legal Initiatives Project filed a lawsuit on behalf of homosexual Richard James Miller against his company, AIMCO. The lawsuit claimed he was the victim of sexual orientation discrimination. Denver has a sexual orientation policy.

These are just a few of the cases that have been fueled by "sexual orientation" ordinances passed by states and cities.

Once ENDA is passed, it will unleash a veritable flood of such cases in businesses, colleges, non-profit organizations and churches. The cost of litigation will potentially destroy many businesses – especially smaller businesses – without the resources to fight against well-funded homosexual legal groups.

ENDA will add to the economic burden of employers.

To defend a company against an individual filing a discrimination charge, the following fees might apply:

Agency dismissal stage: $5,000-$25,000**;**

If claimant files suit, and company wins summary judgment: $50,000-$100,000**;**

To prevail at trial: $150,000-$250,000

Simply defending one's company from a frivolous lawsuit could bankrupt smaller businesses. Employers may eventually win these suits but suffer huge financial losses and bad publicity. This legislation will certainly help homosexual lawyers fill their coffers, but it will result in financial ruin for business owners.

Here are important points to consider about **ENDA's impact on businesses**:

- The cost of defending—and winning one discrimination case can be enough to break a small company. Most small companies do not have insurance that covers discrimination claims.
- The Law of Unintended Consequences dictates that even laws intentionally limited in scope become expanded by the courts, with consequences never intended by Congress.
- ENDA is not a simple inclusion of sexual orientation into federal discrimination law.
- ENDA is broader than any federal discrimination law ever passed, both in its definition of discrimination and its protection of different categories of persons.
- Employers will have difficulty defending themselves against ENDA claims because the protected class is not based on a known characteristic, may be based on a behavior one can opt into and out of, and is subject to interpretation.
- Employers will be caught in the crossfire between homosexual activist staffers and employees with deeply held religious, moral, or traditional beliefs against homosexual behavior.
- Employers will have great difficulty in enforcing existing anti-harassment rules once homosexuality becomes a protected category.
- Employers will be unable to identify and prevent hostile work environments due to sexual orientation, without invading the privacy of employees.

ENDA Is Based On A Faulty Premise

One underlying assumption of ENDA is that the 'sexual orientation' considered in this bill is 'fixed,' 'normal,' and 'healthy' in the context of American life and human action. It isn't. Homosexual sex acts have dangerous consequences, including AIDS, bowel diseases, STDs, etc. ENDA, however, attempts to impose a federal gag order on the crucial question about whether or not homosexual activity is voluntary and whether or not homosexuality has scandalous social consequences.

ENDA is based upon the faulty premise that homosexuality is normal and that individuals are "born gay." And, now they're saying that individuals are born bisexual or trapped in the body of the wrong sex. This "born gay" premise has recently been exposed to be a fraud by none other than homosexual researchers themselves who have admitted there is no scientific proof that a homosexual "gene" or "brain" exist.

Psychologists with the National Association for Research and Therapy of Homosexuality (NARTH) have recently published "The Innate-Immutable Argument Finds No Basis in Science," which quotes homosexual researchers and philosophers on the "born gay" theory.

In this article, NARTH quotes homosexual researcher Dean Hamer, "There is not a single master gene that makes people gay. . . . I don't think we will ever be able to predict who will be gay." Homosexual researcher Simon LeVay who studied hypothalmic differences between heterosexual and homosexual brains noted: "I didn't show that gay men are born

that way, the most common mistake people make in interpreting my work. Nor did I locate a gay center in the brain."

NARTH also quotes lesbian activist and philosopher Camile Paglia who had the most blunt words about homosexuality: "Homosexuality is not 'normal.' On the contrary, it is a challenge to the norm . . . Nature exists whether academics like it or not. And in nature, procreation is the single relentless rule. That is the norm. Our sexual bodies were designed for reproduction . . . No one is born gay. The idea is ridiculous. … homosexuality is an adaptation, not an inborn trait."

Homosexuality is a behavior and a lifestyle choice. It is not genetically-based nor is it a healthy way to live. AIDS and sexually-transmitted diseases running rampant among this population are clear evidence that this lifestyle choice is not one to be protected nor encouraged by our culture. *The federal government has no right to force America's businesses, labor unions, and non-profits to support a poor, unsafe lifestyle choice.*

Individuals who consider themselves "transgendered" have a mental condition known as Gender Identity Disorder (GID), also called Gender Dysphoria. These individuals are in need of psychiatric, psychological or spiritual counseling so they will stop rejecting their birth sex. A mental condition cannot be effectively treated by surgery nor should it be.

To put a "gender identity" protection into federal law is to affirm that these individuals are normal and must be protected and accommodated by businesses and non-profit organizations. A serious mental condition must not be accorded specially-protected minority status under the law – nor should American businesses be forced to bend to the wishes of individuals with a treatable mental condition.

TVC's report, "A Gender Identity Disorder Goes Mainstream" describes the radical transgender agenda and its goal of overturning all concepts of male and female in our culture. Dr. Paul McHugh's essay, "Surgical Sex" describes the failure of surgery to deal with what is a mental problem.

Conclusion

If ENDA is signed into law, the homosexual/transgender movement will have won a major victory. They will have accomplished a long-term goal of having "sexual orientation" and "gender identity" given federally-protected minority status under the law.

Once this happens, efforts to oppose the homosexual agenda will be considered a violation of federal law.

More serious consequences will ensue. Christians and other religious faiths will be forced to violate their firmly-held religious beliefs to bend to the will of homosexual and transgender activists. Freedom of religion will be suppressed by ruthless homosexual/transgender activists.

Freedom of speech will be targeted as well. Once homosexuals and gender confused individuals have minority status under federal law, criticism of their behaviors will be considered discriminatory and will be punished. The efforts to pass "hate crime" legislation will increase. So-called "Hate speech" will be considered outside the protection of the First Amendment. Homosexuals are arguing that "hate speech," (anything critical of homosexuality) provokes "hate crimes" and thus can be banned.

What homosexuals are actually targeting is "truth speech" from those who understand the dangers of homosexual sex and the impact that this behavior will have on children and the future of families in America. Transgender activists are, likewise, smearing those who tell the truth about their mental condition as being "transphobic."

Congress, in the words of Dr. Paul McHugh, is collaborating with madness by considering passage of ENDA.

Neither homosexual behaviors nor the mental condition of gender confused individuals should have federally-protected minority status. ENDA and all other bills pushed by homosexual-transgender activists should be voted down in Congress or vetoed by President Bush.

Additional Reading:

The Agenda: The Homosexual Plan To Change America by Rev. Louis P. Sheldon

A Gender Identity Disorder Goes Mainstream

What Is A Sexual Orientation?

Summary Of 'Peeing In Peace"

Intersex Report

Homosexuality 101

TVC Legislative Analysis of HR2232

TVC Special Report S. 1105

Surgical Sex by Dr. Paul McHugh

The Overhauling Of Straight America

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[Whereupon, at 12:58 p.m., the subcommittee was adjourned.]